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

Decision notice

Date: 17 August 2017

Public Authority: Natural England
Address: 4th Floor, Foss House
Kings Pool
1 – 2 Peasholme Green
York
Y01 7PX

Decision (including any steps ordered)

1. The complainant has made a series of requests to Natural England for information concerning the badger culls in West Gloucestershire, West Somerset and Dorset. Natural England responded by providing what it considered was the relevant information it held which was captured by the requests. The complainant has challenged Natural England's position and has asked the Commissioner to consider whether there is additional material or data that should have been provided. The Commissioner has decided that on the balance of probabilities Natural England does not hold any further information. She does not therefore require Natural England to take any steps as a result of this notice.

Request and response

2. On 22 January 2016 the complainant made 13 principal requests to Natural England for information relating to the badger culls in West Gloucestershire, West Somerset and Dorset. The complete wording of the requests is reproduced in the annex appended to this notice.

3. Natural England responded on 17 March 2016 and carried out an internal review into the way it had dealt with the requests on 13 June 2016. For some of the requests (1(a)-(c), 2(a)-(c), 3(a), 4(a), 10(a), 11, 12(a)-(b)), Natural England provided the information or clarification it considered relevant. For the other requests (3(b), 4(b), 5(a)-(d), 6-9, 10(b), 13(a)-(c)), Natural England advised that it did not hold the requested information.

Scope of the case

4. The complainant contacted the Commissioner to complain about the way some of her requests for information had been handled.

5. For the purpose of the complaint, the requests fall into one of two categories:

   A. The complainant is satisfied that Natural England has complied with the request.

      Requests 1(a)-(b), 2(a)-(c), 4(a), 10(a), 11, 12(a)-(b)

   B. The complainant disputes Natural England's claim that either it does not hold the requested information or does not hold further information.

      Requests 3(a)-(b), 4(b), 5(a)-(d), 6-9, 10(b), 13(a)-(c)

6. The Commissioner's investigation has therefore focused on the requests listed under B above.

Reasons for decision

Background

7. Badgers are known to be carriers of bovine tuberculosis and scientific evidence indicates that badgers contribute to bovine tuberculosis in cattle. As part of a wider strategy for controlling bovine tuberculosis, the then Secretary of State for the Department for the Environment, Food and Rural Affairs (Defra) announced in December 2011 that trial culls of badgers would be conducted in two areas of 150 sq. km in West Gloucestershire and West Somerset for four seasons. The purpose of the pilots was to confirm how effective (in terms of badger removal), humane and safe it would be to use controlled shooting as a method of removing badgers.

8. Natural England is the statutory body responsible for the oversight of the culls and the licensing of the organisations (the Control Companies) responsible for the conduct of the culls. Natural England issued the first culling licence, for West Gloucestershire, in September 2012 and the second licence, for West Somerset, in October 2012. In August 2015, it was announced that a culling exercise would also be rolled out in Dorset.

Is further information held?

9. Natural England considers that it has identified and provided the relevant records for the purposes of the requests. The complainant disputes this position.

10. The Commissioner is of the view that the information requested constitutes environmental information and therefore the EIR rather than FOIA is the appropriate access-regime. The EIR is solely concerned with recorded information that is held by a public authority at the time an information request is made. What this means is that the legislation does not require a public authority to provide opinions or explanation, generate answers to questions, or create or obtain information it never held, or no longer holds, even where this would be helpful.

11. As her guidance 'Determining whether information'[1] explains, when the Commissioner receives a complaint that a public authority has not provided any or all of the requested information, it is seldom possible to prove with absolute certainty that there is not either any information or anything further to add. The Commissioner will therefore apply the normal civil standard of proof in determining the case, ie she will decide on the balance of probabilities whether the required information is held. To exercise this test, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out and, or any other explanations offered that demonstrate why the information is not held.

12. For all but one of the requests under consideration, the information can broadly be seen as relating to operational details connected to the culling exercises. The exception is request 13, which asks for any evidence that indicated the Protection of Badgers Act 1992 (as amended) had been breached. For ease of reference, the decision notice looks first at the arguments and analysis pertaining to the first group of requests before going on to consider request 13 separately.

[1] https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

13. The complainant has offered a number of different arguments to explain why she considers that Natural England either must hold or is able to extract further information covered by the requests. An overview of each of the principal arguments is provided below:

    a) Natural England uses sophisticated mapping technology, or otherwise has access to mapping information, which could be employed to provide some or all of what the complainant considers is the outstanding information.

    b) Natural England should have independently reviewed data relating to the culling sites.

    c) Where the requested information is not held in one record or database, Natural England could use the information referred to in a) and b), in conjunction with other sources of accessible data to piece together what has been requested.

14. In short, the complainant believes it would be within the capabilities of Natural England to provide accurate information in response to each of the requests in question.

15. The Commissioner accepts that these points, considered separately and in combination, strongly lend weight to the impression that Natural England would be in a position to provide the accurate information requested. Accordingly, as part of her investigation of the complaint the Commissioner has put each of these arguments to Natural England. Natural England has revisited the requests in light of these but has decided that its original position was correct.

16. Natural England prefaced its response to the Commissioner by explaining that many of the requests grew out of the release of Badger Control Plans (BCPs). It further clarified the use of the BCPs as follows:

> *The BCPs are submitted by the Control Companies, but Natural England did not use the figures recorded on the BCPs worksheets to make the final assessment of the applications. The BCP lists all the participants and the participating land areas. These are usually fairly accurate but in the cases of West Somerset and West Gloucestershire, the land areas were based on farmer estimates and participant enrolment maps. To ensure accuracy, all land was subsequently assessed by Natural England into eligible/non eligible land and also digitised into mapping software to increase the accuracy of the sign-up figures.*
>
> *The BCPs were subsequently updated by Natural England to reflect the mapping data, as they are documents that belong to the Control Companies. So Natural England doesn't rely on the*

worksheet values to make any assessments. Therefore the figures on the BCPs may never have been accurate at the time of the submission and should not be considered as definitive.

17. Natural England has advised the complainant that in respect of a number of the requests, but particularly those asking for participant data, it did not hold information which was necessarily more reliable or accurate than the information provided in the BCPs.

18. Natural England has confirmed that it does use mapping software (ESRI ArcGis). It has further explained that there a number of other repositories of information relevant to the badger cull exercise and its responsibilities regarding the conduct of the culls. These include:

- A Primary Check spreadsheet – the primary source for the number of participants in West Gloucestershire and West Somerset.
- TB Management Agreements (TBMA)s – a legal agreement signed by participants in the Badger Control Policy. The agreement is between the participant, Natural England and the Secretary of State under section 7 of the NERC Act.
- A mailing list – in carrying out further searches Natural England identified that it had assisted the Control Companies in sending biosecurity awareness letters in 2012. This informed non-participant cattle owners of the potential increased risk of a higher coincidence of TB breakdowns to non-participants within the 2k buffer area who have cattle.
- Biosecurity monitoring forms.
- The Annual Herd Location data produced by the Animal and Plant Health Agency, to which Natural England has access.
- Approximate boundary plans drawn by the Control Companies.

19. For Natural England, it is critical to understand that none of these sources of information will contain the comprehensive data sought by the complainant. The reasons for this are two-fold. Firstly, in some instances the information is 'historical', in that it was only produced some time before the requests and often during the submission process. Secondly, the way in which the information was collected, and the function for its use, was never designed to answer requests of the level of specificity asked for by the complainant. In some cases it was accepted that would be an element of inaccuracy built in to the data. This would apply, for example, not only to the boundary drawings supplied by the Control Companies but also to the addresses used when sending the biosecurity awareness letters in 2012. Natural England does

carry out some basic checks of the information supplied by the Control Companies. If any errors are picked up from the checks then the information is either corrected internally or the Control Companies are asked to correct it. According to Natural England, however, this mechanism does not mean it is in a position to provide the accurate information described in the requests.

20. Natural England has also confirmed that the use of its mapping software would not permit it to produce accurate participation data:

> *You asked us to explore if we could drill down into the layer of the mapping system to 'create' the information. It may be possible to gain ownership information on non-participating land via other datasets which Natural England has access to for other purposes eg APHA's Annual Herd Location referenced above. However, these datasets are predominantly concerned with who has an interest in the land eg tenants/occupiers/cattle/owners, rather than land ownership. Therefore, even if we collated/interrogated/manipulated these datasets, we would not be able to provide a complete or accurate number of non-participating landowners. In fact we wouldn't know how incomplete the dataset would be.*

21. The Commissioner has decided that Natural England does not hold the information specifically requested by the complainant. Although appreciative of the cogency of the complainant's arguments, the Commissioner is satisfied that Natural England has taken proportionate steps to explore the resources available to it which could potentially be used to produce the requested information. Furthermore, she considers that Natural England has demonstrated to a sufficient degree why these resources are not adequate for the purposes of complying with the requests.

22. As stated, where there is a dispute about the extent of the information held by a public authority, the Commissioner will apply the normal civil standard of proof in making a determination, ie she will decide on the balance of probabilities where the information is held. On the basis of this test, and having weighed up the evidence put before her, the Commissioner has found that on balance Natural England was correct to say that it does not hold the requested information.

23. The decision notice next looks at whether Natural England was equally correct to say that it did not hold the information described at request 13. The complainant considers that Natural England will be an investigating authority, in addition to the police, where evidence is provided that indicates a breach of the Protection of Badgers Act 1992 (as amended) occurred. According to the complainant, reports suggest it

is likely that such evidence has been produced and therefore it follows that Natural England should hold relevant information.

24. Natural England has confirmed that in response to the request it liaised with its bTB Team, Wildlife Licencing Team and the Species Enforcement Specialists – the three teams that Natural England has explained would be involved in any incidences concerning potential breaches of the Protection of Badgers Act 1992 (as amended). These confirmed that they do not hold any evidence captured by the request.

25. On the basis of its explanations, the Commissioner is satisfied that the direction and scope of the searches carried out by Natural England were appropriate. She has therefore accepted Natural England's position as correct.

26. In the EIR, and specifically regulation 12(4)(a), there is an exception which says that a public authority is not required to disclose information it does not hold. All the exceptions under the EIR are subject to the public interest test, including regulation 12(4)(a). However, the Commissioner considers there is no practical value in applying the test where information is not held.

Right of appeal

27. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

29. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed ……

Alun Johnson
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

Information requests – 22 January 2016

1. (a) Please disclose the accurate percentages of participating land at 28 August 2015 for the cull areas of (a) West Gloucestershire, and (b) West Somerset.

   (b) Please disclose the accurate percentages of participating land on the precise dates that culling licences were issues to the control companies in the cull areas of (a) West Gloucestershire (17 September 2012), (b) West Somerset (4 October 2012), and (c) Dorset (28 August 2015).

2. (a) Please disclose the accurate control zone areas in km² at 28 August 2015 for the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

   (b) Please disclose the accurate participating areas in km² at 28 August 2015 for the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

   (c) Please disclose the accurate total non-participating areas in km² at 28 August 2015 for the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

3. (a) Please disclose the accurate number of participating landowners on the precise dates that culling licences were issued to the control companies in the cull areas of (a) West Gloucestershire (17 September 2012), (b) West Somerset (4 October 2012), and (c) Dorset (28 August 2015).

   (b) Please disclose the accurate number of non-participating landowners on the precise dates that culling licences were issued to the control companies in the cull areas of (a) West Gloucestershire (17 September 2012), (b) West Somerset (4 October 2012), and (c) Dorset (28 August 2015).

4. (a) Please disclose the accurate number of participating land holders at 28 August 2015 for the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

   (b) Please disclose the accurate number of non-participating land holders at 28 August 2015 for the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

5. (a) Please disclose the accurate number of participating land holders with cattle at 28 August 2015 in the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

   (b) Please disclose the accurate number of participating land holders with cattle under TB2 restrictions at 28 August 2015 in the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

   (c) Please disclose the accurate numbers of participating land holders without cattle or susceptible livestock at 28 August 2015 in the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

   (d) Please disclose the accurate number of non-participating land holders with cattle at 28 August 2015 in the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

6. Please disclose the accurate total area in km² of participating land in the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

7. Please disclose the accurate number of cattle farms in the ring area within km² of the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

8. Please disclose the combined size in hectares of the land owned or tenanted by participants listed on the West Somerset Badger Control Plan of 11 October 2012 as P58 and P134.

9. Please disclose the accurate number of participants (at 3 September 2013) in the West Gloucestershire cull area with a land holding of more than 53 hectares.

10. (a) Please disclose the accurate lengths of the total perimeters in km for the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

    (b) Please disclose the accurate lengths in km of each and every boundary (for e.g. sea coast, river/estuary, lake/reservoir, a road) and buffer (for e.g. poor badger habitat, badger vaccination, urban area, buffer area with mitigation areas in place) for the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

11. Please disclose the accurate total area in km² of the ring area within 2km of the Dorset cull area at 28 August 2015.

12. (a) Please disclose the exact number of badgers vaccinated in each of the years 2013, 2014 and 2015 in the ring areas within 2km of the (a) West Gloucestershire, and (b) West Somerset cull area.

    (b) Please disclose the exact number of badgers vaccinated in the year 2015 in the ring area within 2km of the Dorset cull area.

13. (a) Please disclose whether Natural England possessed/possesses evidence or has been made aware of any evidence suggesting that the Protection of Badgers Act 1992 has been breached in or around the cull areas of (a) West Gloucestershire, (b) West Somerset, and (c) Dorset.

    (b) If Natural England possessed/possesses such evidence or has been made aware of any such evidence, please disclose details of each incident and the dates that Natural England received each piece of evidence or was made aware of each piece of evidence.

    (c) If Natural England possessed/possesses such evidence or has been made aware of any such evidence, please disclose details of Natural England's response to this evidence/awareness of this evidence and details of any action that Natural England has taken or intends to take.