

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

Date: 1 August 2023

Public Authority: Forestry Commission England
Address: 620 Bristol Business Park
Coldharbour Lane
Bristol
BS16 1EJ

Decision (including any steps ordered)

1. The complainant has requested information about the killing of badgers. The above public authority ("the public authority") relied on regulation 12(4)(a) of the EIR as it did not hold the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, the public authority does not hold any information within the scope of the request.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 22 March 2023, the complainant wrote to the public authority and requested information in the following terms:

"The following request for information relates to badgers killed in the exercise of the permission to undertake the management of badgers on land managed by the Forestry Commission in England subject to any licence issued by Natural England to kill or take badgers under the Protection of Badgers Act 1992 for the purpose of preventing the spread of disease.

1. Please disclose the number of badgers killed on Forestry Commission land.
 2. Please disclose the number of badgers killed on freehold Forestry Commission land.
 3. Please disclose the number of badgers killed on leasehold Forestry Commission land.”
5. The public authority responded on 18 April 2023. It noted that the information related to the culling of badgers on its land. It further noted that, in a recent decision,¹ the Commissioner had accepted that it did not hold any information about allowing access to its land for the purposes of culling and consequently, as no culling had taken place, it was already confirmed that no information would be held prior to the date of that decision notice – and no further searches were required for this period of time. It stated that it had made enquiries to establish whether any relevant information had come into its possession since the date of that decision and it was satisfied that none had. Therefore it relied on regulation 12(4)(a) of the EIR as it did not hold the information that had been sought. It upheld this stance following an internal review

Reasons for decision

Would the requested information be environmental?

6. The Commissioner is satisfied that this request relates to the culling of badgers – which is a measure likely to have an impact on the elements of the environment. Therefore the information (if it were held) would be environmental and thus the request was correctly dealt with under the EIR – though this makes it no more, or less, likely that information is held.

Is further information held?

7. It is evident, from the grounds of complaint, that the complainant is unhappy with the Commissioner’s decision in decision notice IC-142455-C5F4. It is her right to disagree with that decision but, if that is the case, she was entitled to appeal the decision to the Tribunal – which she did not do.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022278/ic-142455-c5f4.pdf>

8. It is also evident from the grounds of complaint that, whilst the two requests are worded differently and, superficially, seek different information, the fresh request is now being used as a vehicle to re-visit, re-argue and re-litigate the previous decision. The use of such methods is not an appropriate use of the legislation and risks bringing it into disrepute. Had this request not covered a slightly different time period, the Commissioner may well have refused the complaint entirely as an abuse of process.
9. The public authority confirmed in the previous decision that it had searched its records as of September 2022, but found no information that would fall within scope. It was therefore limiting its present response to only information created between that date and the date of the request (22 March 2023).
10. Strictly speaking, decision notice IC-142455-C5F4 could only consider the information that was held at the point the previous request was made (8 August 2021) – but it is apparent that the public authority had, when responding to that investigation, considered whether it held any further information that had been created between the date of the request and the date the Commissioner's investigation was responded to. The Commissioner therefore considers it would have been unreasonable to have expected the public authority to have repeated searches that had already established that no information was held.
11. The public authority has explained that it had consulted its single point of contact who had confirmed that no information was held. That individual would have been aware if relevant information was held.
12. The complainant has provided detailed and well-researched arguments in support of her case that the public authority holds further information. Unfortunately almost all these arguments suffer from the same defect: namely that they have almost all been considered by the Commissioner in decision notice IC-142455-C5F4, but were found to be unpersuasive.
13. In that decision, the Commissioner addressed what he felt were inadequate searches carried out by the public authority when it first dealt with the request. However, fresh searches were then carried out which satisfied the Commissioner that no information was held. Therefore, to the extent that earlier searches may have been poor, that failing has already been addressed and does not indicate that further information is now held.
14. Nor is the Commissioner persuaded that any inconsistencies in the responses the complainant has received from other public authorities (some of which were, admittedly, received after the decision notice was

issued) indicate that it is more likely than not that the information is held.

15. One argument is worth giving fresh consideration to: the complainant argued that the present request related to badgers being killed and not to access for culling – therefore any searches carried out in relation to the previous request would not have identified all relevant information held.
16. Whilst this argument is superficially attractive, on closer inspection it is simply a reformulation of the complainant's central argument – that the public authority allows culling on its land and is attempting to conceal that fact.
17. As decision notice IC-142455-C5F4 made clear, the search terms the public authority used to determine whether it had allowed access for culling were "killed", "culled" or "firearms". It is not clear to the Commissioner why such search terms would not have located all information relevant to the present request. It is equally unclear why adding an additional search term such as "badger" – which the complainant suggested – would be likely to identify new information. The most likely outcome of such an expansion would be to have simply identified a vast amount of irrelevant information (the public authority is likely to have a huge amount of information on badgers – from information about sightings to information about habitats – much of which would lie outside the scope of the request).
18. The complainant has not put forward any argument as to why new information was likely to have come into the public authority's possession since September 2022. This is clearly an issue she cares passionately about and has researched intensely. However, whilst he has identified some procedural failings, no evidence has been presented to persuade the Commissioner that the public authority is intentionally concealing information.
19. Given the intense public scrutiny of culling activity, the Commissioner considers that the public authority would be aware of any activity that had taken place on its land and that this would have been brought to the attention of the single point of contact – that is of course the purpose of their role. Given that this individual has stated that no information is held, the Commissioner is bound to conclude that, on the balance of probabilities, the public authority holds no information within the scope of the request.

Right of appeal

20. 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

21. 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.
22. 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
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SK9 5AF