



Neutral Citation Number:

**IN THE FIRST-TIER TRIBUNAL**  
**& 0059**

**Appeal No: EA/2015/0026**

**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50559004**

**Dated: 16 December 2014, and**

**The Information Commissioner's Decision Notice No: FER0543199**

**Dated: 3 February 2015**

**Appellant: Natural England**

**Respondent: The Information Commissioner**

**2nd Respondent: The Badger Trust**

**3rd Respondent: John Leston**

**Heard at Heard on the papers: Field House**

**Date of Hearing: 14 and 15 May, deliberation 23 June**

**Before**

**Chris Hughes**

**Judge**

**and**

**Narendra Makanji and Jean Nelson**

**Tribunal Members**

**Date of Decision: 14 August 2015**

**Attendances:**

For the Appellant: Rory Dunlop  
For the Respondent: Robin Hopkins  
For the 2<sup>nd</sup> Respondent: Mr Desai  
For the 3<sup>rd</sup> Respondent: In person

**Subject matter:**

Environmental Information Regulations 2004

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notices dated 16 December 2014 and 3 February 2015.

**IN THE FIRST-TIER TRIBUNAL**  
**& 0059 & 0059**

**Appeal No: EA/2015/0026**

**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**SUBSTITUTED DECISION NOTICE**

**Dated:** 14 August 2015

**Public authority:** Natural England

Address of Public authority: Foundry House, 3 Millsands, Riverside Exchange,  
Sheffield, S3 8NH

**Name of Complainant:** Natural England v ICO and The Badger Trust and Mr. John  
Leston

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeals and substitutes the following decision notice in place of the decision notices dated 16 December 2014 and 3 February 2015.

Dated this 14th day of August 2015

Judge Hughes

[Signed on original]

## **REASONS FOR DECISION**

### **Introduction**

1. These appeals relate to requests for information held by the Appellant in these proceedings “Natural England” relating to the financing of the culling of badgers in West Somerset and West Gloucestershire as part of an investigation of the effectiveness of such culling to control tuberculosis in cattle by controlling a vector of the disease.
2. In December 2011 the Secretary of State responsible for the Department for the Environment, Food and Rural Affairs announced that trial culls would be conducted in two areas of 150 sq km for four seasons. 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. DEFRA issued guidance to Natural England on how it should discharge its responsibilities with respect to the granting of licences to the Control Companies. One of the requirements was that the Control Companies should be able to demonstrate sufficient funding for the conduct of the culls:

*“Applicants must have arrangements in place to deposit sufficient funds in a reputable bank to cover the total cost of a four-year cull, plus a contingency sum of 25%”*

3. The culls started in late summer 2013. The numbers of badgers culled in both areas was below the projected level and extensions of time were granted to allow further culling. The Independent Expert Panel, appointed by the Secretary of State to support the appropriate conduct of the culls and the collection of robust data to support analysis of the effectiveness of the cull programme reported on 5 March 2014 on the first year of the culls (bundle pages 607-665). It set out the position in the introductory letter to the Secretary of State:-

*“Reduction of badger populations by shooting was considered, by government, as one of a number of measures to control the prevalence of bovine tuberculosis in cattle. However, because of the protected status of badgers, little or no experience of shooting unrestrained badgers was available. A pilot cull was seen as an appropriate*

*way to test assumptions on the effectiveness, humaneness and safety of this type of shooting.*

*The pilot culls were complex and it was essential that they were conducted with scientific and statistical rigour to ensure that they generated reliable and robust results. Our original terms of reference were refined in 2013 to reflect the primary roles of the IEP in (a) guiding the development of scientifically and statistically sound protocols and (b) assessing the robustness of the data collection and their analyses. The IEP was not involved in either the implementation or the day to day monitoring of the pilots during the six-week period set aside for culling.*

*Our report, enclosed, sets out our findings. The Panel confirmed that the protocols used to assess the pilot culls were scientifically and statistically sound, as were the data collection and analyses carried out by AHVLA. We concluded, from the data provided, that controlled shooting alone (or in combination with cage trapping) did not deliver the level of culling set by government. Shooting accuracy varied amongst Contractors and resulted in a number of badgers taking longer than 5 min to die, others being hit but not retrieved, and some possibly being missed altogether. In the context of the pilot culls, we consider that the total number of these events should be less than five per cent of the badgers at which shots were taken. We are confident that this was not achieved. The Panel is, however, confident that controlled shooting can be carried out safely, even in the context of protester activity, if Best Practice Guidance is followed. The implications of the results of the pilot cull on any future roll-out are addressed in Section 6 of our report.*

4. On 3 April 2014 the Secretary of State published the report and confirmed that the badger culls were to continue. On 11 April 2014 the solicitors for the Badger Trust wrote a detailed pre-action protocol letter to DEFRA concerning the decision. It was also sent to Natural England (bundle pages 56-64). The purpose was to challenge the decision to continue with the culls. The first of the proposed grounds of challenge was “compliance with requirements in relation to financial bond” and extended over more than three pages. It concluded with four questions; the third of which was:-  
  
*“Please confirm whether the review mandated by section 3.2.5 of the Badger Control Deed of Agreement has been conducted by NE in relation to each licence holder. If*

*so, please confirm the previous and new total sum deposited, and the cost estimates for future culling now provided in line with the licence conditions”*

5. The letter required an answer by 22 April. The Treasury Solicitor replied on 24 April on behalf of the Secretary of State:-

*“...This and your other questions as to the total sum deposited last year and costs estimates for the future are matters for Natural England as the Licensing Authority. However, in the absence of any identified potential ground of challenge in this regard, it is not clear why this information is relevant to any potential challenge or why it is sought by your client.”*

6. Natural England replied on the same day clarifying their role and with respect to questions about funding stated:-

*“There are provisions in Clause 3.2.5 (to which you refer) for the licence holder to provide natural England with information each year about costs hitherto incurred, estimates of future costs and details of how much is in the fund. We anticipate that such information will be provided by the Licence Holders shortly. When it is, Natural England will consider it.”*

7. On 2 May the solicitors, in furtherance of the judicial review wrote again to DEFRA and Natural England and in a schedule sought various information including the financial information. An application for judicial review against DEFRA was lodged on 14 May and the solicitors wrote to Natural England on 29 May asking about arrangements for the 2013 cull and for the financial information. In a detailed reply of 1 July (bundle pages 89-93) Natural England responded to the request. It was considered under the Environmental Information Regulations (EIR) and withheld relying on Regulation 12(5)(d) – confidentiality of proceedings of Natural England. The reasoning drew on a decision of the First Respondent in these proceedings (“the Commissioner”) in regard to a request for information from Natural England concerning the financial affairs of the Control Companies made by Mr Leston which the Commissioner considered and rejected under decision notice FER0479985 on 8 July 2013:-

*36 The Commissioner considers it important to highlight that the information is financial information and consists of bank statements and funding letters as well as a cost calculator. He is of the view that this information is unlikely to add anything to*

*any debate on the issue as it will not provide the public with any greater insight into the badger control policy but will put sensitive financial information into the public domain which could harm the commercial interests of the companies and, at the time of the request, may have negatively affected the licencing process.*

8. The solicitors responded on 14 July 2014 (bundle pages 94-98) arguing that the information in that case had been a broad request for extensive information, this request was for simple high level figures, it disputed that disclosure of the information would lead to *“undue pressure being brought to bare on the badger control companies”*.
9. Natural England replied on 30 July noting that the requests information had arisen in a pre-action letter relating to a judicial review which had not pursued that issue:-  
*“.. the current proceedings are entirely about your client expectations as to the monitoring of the culls in year two being undertaken by an independent expert panel pending any decision on roll-out. The challenge is not about the funding associated with the culls”*
10. The review carried out by Natural England confirmed the position that Natural England had adopted.
11. Mr Leston’s request to information, originally made on 24 July 2013 was:-  
*“Please disclose the total financial amounts you have required to be raised and/or held by the two companies in Gloucestershire and Somerset combined as a condition of issuing their licences ”*
12. This information was ultimately refused relying on Regulations 12(5)(d) and 12(5)(e).

#### The complaint to the Information Commissioner

13. The Badger Trust and Mr Leston both complained to the Commissioner. In his decision notices the Commissioner accepted that the proceedings of Natural England were confidential and that the information was commercial confidential information; however he did not find that there was any significant harm caused by disclosure and therefore concluded that neither exception was engaged. In the circumstances he directed the disclosure of the information. Natural England appealed against these decisions.



The appeal to the Tribunal

14. Natural England appealed against his findings to the tribunal. It disputed that it was necessary to demonstrate harm for the exemptions to be engaged but argued that in any event the confidentiality of proceedings exemption was fully engaged since disclosure of the information would undermine its ability to effectively regulate the Control Companies because they would be reluctant to provide information in an open way. The breach of the duty of confidence owed by Natural England to the Control Companies by the release of the information would prejudice good working relationships. Natural England criticised the Commissioner for making a decision with respect to commercial confidentiality without approaching Natural England for further information. In its notices of appeal it set out factual matters which it considered demonstrated the harm that would flow from disclosure.
15. The Respondents resisted the appeal. The Commissioner relying on his decision notice, The Badger Trust further denied that there were any “proceedings” of Natural England to be protected or that the information in question was commercial in nature. Mr Leston argued that “there is a public interest in knowing what the proportion of the costs are that it is expected will be paid by the private sector and whether they are in line with the projections on which the policy is based.” He emphasised that the information he sought was high level and he did not accept that the control companies could have had a reasonable expectation of the release of such information.

The questions for the Tribunal

16. The legal questions as to the interpretation of the Regulations are common to both appeals:
- (1) What is the correct construction of Regulation 12(5)(d) of EIR? Is it engaged whenever disclosure would adversely affect the confidentiality of proceedings? Or is it necessary to establish that disclosure would, on the balance of probabilities, adversely affect the proceedings themselves?
  - (2) Does the disputed information in either appeal concern the Appellant’s ‘proceedings’ within the meaning of Reg. 12(5)(d)?
  - (3) If the answer to (2) is ‘yes’, were the relevant proceedings confidential?

(4) What is the correct construction of Regulation 12(5)(e) of the EIR? Is it engaged whenever disclosure would adversely affect the confidentiality of commercial information where such confidentiality is provided by law to protect a legitimate economic interest? Or is it necessary to establish that disclosure would, on the balance of probabilities, adversely affect economic interests?

(5) Was the disputed information 'commercial' in nature?

(6) At what point in time should the public interest balance be judged?

### Evidence

17. Witness A, an official of Natural England who has responsibility for the licensing regime for the badger cull, gave evidence as to the licensing and supervision arrangements for the cull, including the provision of financial information (written statement bundle 762-773). She emphasised the scale and number of requests for information about the cull and the level of information provided including a wide range of questions including the taxpayer costs, the costs of licensing, numbers culled, details of monitoring, guidance provided to the control companies on a range of issues, the IEP report, the number of culling contractors.
18. The conditions the Control Companies need to meet in order to be authorised to continue the cull including satisfying Natural England each year that sufficient funds are available. They may be required to top up the funds in order to be able to complete the annual cull. That information is part of the information considered by Natural England in deciding whether the cull may be authorised to proceed in each year. In addition to the formal requirements to provide information, the Control Companies have, as trust has been built up, invited officials of Natural England to their operational planning meetings which enable Natural England to have an in depth knowledge of the whole complex operations, going far beyond the information that Natural England is entitled to demand.
19. Mr Dod, a Somerset farmer and a director of HNV Associates Limited, the Control Company for the West Somerset cull, gave evidence as to the disruption of the cull by protesters and the harassment of farmers and contractors involved in the cull and the damage to equipment used in the cull. This had caused HNV to try to maintain a high level of confidentiality concerning the cull and it had given assurances to its members

(the affected farmers) and contractors as to confidentiality. Over time a level of trust had developed with Natural England – HNV acknowledged the importance of an open relationship with the regulator. As part of the licensing arrangements under which it operates HNV provided financial information to Natural England. If that information were released they could no longer rely on any information provided to Natural England remaining confidential. It could not devote its energies to considering whether each and every piece of information it supplied to Natural England should remain confidential and it would no longer invite Natural England to management meetings and information would be limited to that identified in the Licence and Badger Control Deed of Agreement.

20. He further explained that it was in his view unfair that more information about them should be made available than for other small companies. It could affect their trading position, if they were seen as resource rich, prices from specialist suppliers could rise, if resource poor, they could be seen as a credit risk. In either event the commercial position of the company could be harmed.
21. In his evidence, Mr Hayden, a director of the Badger Trust, argued that the disputed information would provide information of the overall costs of the cull and therefore was of significant importance. To his witness statement he exhibited the accounts of one of the cull companies and drew inferences from those brief figures. He quoted the DEFRA policy on the cull (witness statement, bundle pages 774-816 at page 794):-

*The farming industry is also confident that it can deliver culling at a lower cost than estimated ... There are however plainly some uncertainties around the estimated costs and benefits...*

*Culling in two pilot areas will enable us to test our and the farming industry's cost assumptions for elements of the policy where there is currently uncertainty.*

*Alongside the outcome of the evaluation of culling in the pilot areas...this will also inform our decision on wider roll-out policy”*

22. He argued that since the annual company accounts came out 15 months after each cull, information from those accounts could not inform the “on-going public debate”.

Legal analysis

23. EIR implement Council Directive 2003/4/EC on public access to environmental information which in turn implements the public information pillar of the Convention on Access to Public Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). The wording is consistent through all these instruments in both English and French. Article 4 of the Aarhus Convention (English text) provides that:-

*“a request for environmental information may be refused if the disclosure would adversely affect:-*

*(a) the confidentiality of proceedings of public authorities, where such confidentiality is provided for under national law,*

*(b) ..*

*(c) ..*

*(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest....”*

24. What is protected therefore is in both cases the principal of confidentiality, in public proceedings and of commercial information, in circumstances where such confidentiality is already protected. The reasoning underlying this is simple, the Convention (and the subsequent implementation of it at EU and UK level) recognises that there are other and sometimes competing public goods to the public good which the Convention seeks to promote – the provision of environmental information, the Convention also recognises that confidentiality is valued and should be respected. The “purposive” interpretation of the Commissioner seeks to arrive at a conclusion convenient to the over-arching principle of disclosure of environmental information by disregarding the fundamental requirement to recognise other values. The legislation is clear, what is protected is the principal. For these exemptions to be engaged there is no requirement to demonstrate any harm beyond the harm of breaching the principal – the value of the principal is widely recognised in jurisprudence.

25. The consideration by Natural England of whether or not to renew the cull licences for a further year is an exercise by a statutory body of its regulatory functions. The requested information is a part of the information requirement to enable that consideration to take place. This process is clearly a “proceeding” of the public body since it is an exercise of a choice as to how it discharges its functions. The information received by Natural England was received in confidence from the Control Companies in order to inform its deliberations. Disclosure would adversely affect the confidentiality of those proceedings since what was received and held in confidence as part of the proceedings would no longer be confidential.
26. The information supplied by the Control Companies related to their assets which underpin their ability to carry on their business by entering into the contracts for the goods and services needed to carry out the culls. It is commercial information and is protected by the law of confidentiality which enables companies to protect their negotiating position in markets – a legitimate economic interest.

The balance of public interest

27. The tribunal was struck by the energy with which these “high-level figures” are being pursued and resisted. A large amount of information has been provided by Natural England enabling a clear view to be formed of all the significant issues around the cull, apart from the most significant – whether it works as an effective mechanism for the control of bovine tuberculosis. That information is the information which will be generated by the four year programme of culling; that information is the core of the public interest and probably can only be answered after the cull has finished.
28. The request from the Badger Trust is clearly a by-product of a failed attempt at judicial review of the Secretary of State’s decision to proceed with the second year of the cull. As that challenge proceeded it focussed on issues around arrangements for scientific scrutiny rather than financial issues, it did not proceed. Mr Leston’s request is a repeat of a previous attempt to obtain financial information about the Control Companies. The amount of information sought is minimal.
29. While the Badger Trust and Mr Leston advanced a range of arguments with respect to what they saw as the doubtful financial viability of the culls and the deviation from the culls as envisaged requiring public scrutiny. These arguments are profoundly flawed and take no account of the reality of the situation.

30. As the Independent Expert Panel noted there is no experience of such a process and the cull is complex. In such circumstances it was always inevitable that the actual experience of the cull would not be in accordance with the projections made before it started. That there are such variations should be of no surprise to anyone. Furthermore, as was noted in argument, the Government's Chief Vet has pointed out the evaluation of these two culls will be carried out after they have been completed. That is obviously correct. They will be evaluated against a mass of data. As the Commissioner very thoughtfully pointed out in his July 2013 decision (see above) “*He is of the view that this information is unlikely to add anything to any debate on the issue as it will not provide the public with any greater insight into the badger control policy*”. It is appropriate to consider the reality underlying the public interest: that is the effectiveness of the culls, the number of badgers and cattle killed, the potential risk to public health and the financial costs of disease and its control.
31. Financial issues are a major question in bovine tuberculosis. However the financial issues are dominated by the costs to farmers and the exchequer of infection in herds, not the cost to farmers of paying for the cull. The costs of the cull whether they are significantly larger or smaller than the cost figure originally estimated before the cull started are of very little salience compared with the costs, financial, in disruption of their farming and emotional which farmers consider that they face from tuberculosis. A substantial number of farmers in the affected areas consider that a cull is the best prospect that they have for controlling the disease, given the disparity between disease costs and control costs, their support for the cull is not sensitive to variations of the cost of the cull. In the short term they see it as the “only game in town.” The people who bear the cost of the cull, farmers, are far more concerned with the big picture, the public are the same; as the Commissioner in his July 2013 decision correctly concluded. There is no public interest in the disclosure of these figures. There is no public interest in the disclosure of minimal amounts of information about a controversial policy question simply because it is controversial. The request needs to be seen in the context of the information already available, as an increment to that information and in that context how it contributes to a broader public understanding.
32. On the other side of the balance the evidence given on behalf of Natural England by the director of a Control Company and by the Natural England official was clear, coherent and consistent. The Tribunal accepted it as a fair description of how the

tensions around the cull have affected the farmers most nearly concerned. It has taken time for a good level of trust to be built up between the farmers through the Control Companies and Natural England, the regulator. A key function of a regulator such as Natural England is that it should be able to understand in depth the issues arising in the culls and so as to be best able to advise, counsel and warn the Control Companies. While the minimalist role of a regulator may be simply to monitor and consider reports on compliance with the licence conditions, effective regulation often requires a closer attention to issues. This is especially true given novelty and complexity of what is being done. It is at this point that a risk to public interest clearly arises. As a level of trust has developed, the staff of Natural England has been given significantly greater access to the information and decision-making within the Control Companies enabling them to scrutinise and understand the issues better and discharge their difficult functions better. If the information is disclosed, there is a real risk that the affected farmers in the cull area will be concerned that the information beyond what the licence conditions requires should no longer be to be provided to Natural England, since Natural England would be seen as not being able to keep a confidence. That would significantly prejudice the ability of Natural England to carry out its functions in this regard and would mean a significant loss of that accountability which is the key value of information access arrangements.

33. Mr Dodd's evidence also pointed to commercial harms to his company which would foreseeably arise from the disclosure of the information. The Tribunal was satisfied that these harms were the foreseeable consequences of the release and (probable) widespread dissemination of the information by activists. While not of the scale of harm as that resulting to the ability of Natural England to carry out its functions, it is of substance. In the light of the insubstantial benefits flowing from disclosure of the information, the Tribunal is also satisfied that this ground is made out.
34. The Tribunal is therefore satisfied that the appeal succeeds and this decision stands as the substituted decision-notice in both appeals for the reasons stated above.
35. Our decision is unanimous

Judge Hughes  
[Signed on original]  
Date: 14 August 2015