

## **Summary of Judgment**

### **requiring Natural England to disclose information on the badger culls**

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1658/EA-2014-0094\(+3\)\\_09-11-2015.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1658/EA-2014-0094(+3)_09-11-2015.pdf)

**This summary has been produced because the judgment in this case included many statements recognising the democratic legitimacy of protest against the badger culls, the predominantly non-violent nature of anti-cull protests, and the public interest in gaining detailed knowledge of the culls.**

Natural England's appeal against the Information Commissioner's earlier ruling that it should disclose information on the badger culls was rejected after a three-day tribunal hearing in September 2015. Four requests for various details of the culls were made in 2013; NE persistently refused to disclose this information. The 'requesters' complained to the Information Commissioner, who ordered Natural England ('NE') to release the information. Instead NE appealed to the Tribunal.

Judgment from the appeal hearing was given on 9 November 2015. The Tribunal rejected NE's appeal and ordered release of the withheld information. The Tribunal stated that *"There is a significant amount of public interest and public debate over the policy to permit badger culling, including considerable opposition from many quarters."* It quoted from an earlier judgment (another appeal lost by Defra) which described the culls as *"controversial"*.

Shortly before the appeal hearing, NE released some of the requested information, leaving the following information still in issue:

- (1) the number of landowners in West Somerset ('WS') and West Gloucestershire ('WG') who permitted culling on their land;
- (2) the total area of each buffer or ring area around the West Somerset and West Gloucestershire cull areas;
- (3) the length of the cull area perimeters, and the nature of the surrounding buffer areas; this information appeared in the Badger Control Plans for each cull area.

There is a general rule that it is in the public interest for environmental information to be released, except in certain cases ('exemptions'). NE refused to disclose the requested information on the basis of two of the legal exemptions:

(1) release of the information would “*adversely affect . . . public safety*”. NE’s legal team argued that releasing the information would lead to “*drastic and terrifying results*”, and “*could endanger people’s safety for no good reason*”; and

(2) release of the information would “*adversely affect . . . protection of the environment*”.

Both exemptions can only be relied upon where the public interest in maintaining the exemptions outweighs the public interest in disclosing the information: ‘the public interest test’.

NE called several witnesses in support of its appeal. Two of the witnesses were given anonymity:

(1) Witness A “*is the manager of the bTB licensing team within NE.*” She “*has day to day responsibility for the licensing regime that implements government policy on bTB and badger control.*” In another case, it was noted that she was appointed in 2011, at the same time that the government introduced its culling policy. Witness A claimed that “*the level of intimidation and harassment has already been unprecedented*” and releasing the requested information would make this worse.

(2) Witness B, an NFU employee, made similar claims giving various examples of protester activity. In Witness B’s evidence, it was stated that “*There are 55,000 members of the NFU. Only a proportion of farmers are members of the NFU. Most farmers in the cull areas support the cull but there are a substantial number of farmers who are against it.*”

(3) James Griffiths, a farmer in the WG area participating in the cull, also gave evidence complaining of protester activity. It was noted that he was the only farmer in his area to speak out publicly in favour of the cull and about intimidation.

Countering the NE witnesses, Anna Dale, one of the requesters of the withheld information, and a police liaison representative for those opposed to the badger cull, gave evidence. Ms Dale said she (and the public) needed the information in order to assess the risk to non-participating farmers (within and beyond the Control Area) from badger perturbation, the adequacy of buffers and barriers and other measures to mitigate the spread of bTB to areas outside the cull zones, the extent of local support and whether culling was taking place on cattle farms or in areas without cattle, the adequacy of monitoring, and other matters of

public interest and concern. She and the police liaison representative said that the NE witnesses' reports of criminality were much exaggerated.

Rejecting NE's argument that there had been substantial criminal activity which threatened public safety, the Tribunal accepted that the anti-cull movement involved *"very largely lawful forms of protest that are permitted in a democratic and open society; the mainstream anti-cull movement like the pro-cull movement deplore illegal activity and any harassment or intimidation of farmers."* Although *"there has been some unacceptable behaviour . . . this involves a small number of activists . . . Although there were some arrests in 2013 there have been very few since and almost no prosecutions throughout the cull; there is evidence of damage to and removal of traps but these relate to a very small percentage of traps being set by contractors and such incidents have been reducing; since the injunction there has been one conviction and that did not involve acts of violence."*

The Tribunal did not accept that the withheld information would allow protesters to improve their mapping of the cull areas nor that this would increase criminal activity. Moreover *"Most of the incidents described seem to us to be perfectly lawful protester activity, such as marching or demonstrating to gain public support for their cause; or identifying participants who can be lobbied and using largely lawful methods to try to persuade them to cease involvement in the culls through social media, phone calls, writing polite letters to retailers of farm produce etc."*

The Tribunal described the NE evidence on public safety as *"speculative . . . some farmers have been subjected to protests, and . . . the conduct of some protesters has crossed the line of unlawful conduct (civil or criminal). However, the limited police figures and correspondence available in evidence (and no separate figures are provided by NE) do not support widespread chaos and illegality across the WG and WS cull areas: Avon & Somerset Police made eight arrests in 2013 (two of which were de-arrested), and received 108 complaints in 2014 (including 13 by protesters), while Gloucestershire Police made 38 arrests in 2013 and 2 in 2014, with 30 recorded crimes in 2014. Very few arrests led to prosecutions."*

Therefore, the Tribunal concluded that *"the disclosure of the Withheld information would not have caused direct or actual harm to public safety or increased the risk of harm to a degree or extent that it could be said to adversely affect public safety"* – and rejected the NE appeal on this ground.

NE's second ground of appeal – that disclosure of the withheld information would endanger the environment, was also rejected: “. . . we cannot find that . . . disclosure would have led to the culls being aborted or in any way held up to the detriment of the environment.”

NE had argued that the withheld information could help protesters to urge cull participants to withdraw from the cull, thereby reducing the cull area below the required 70% access level and halting the culls, so reducing the effort to control bTB. However, the evidence before the Tribunal showed that *“no participants in the cull areas withdrew before the start of the cull in September 2013 or have withdrawn since then, despite the intimidation and harassment alleged by the NE witnesses.”*

The Tribunal was critical of NE on this point, as it was previously on ‘public safety’, adding that *“there is no certainty that if the threshold levels had been breached the cull would have been stopped, particularly because of the history of badger culling trials where even though their effectiveness has been questioned the Government has continued to pursue them.”* And *“There is also a counter argument that protecting badgers also protects the environment. Badgers are a protected species in England. The anti-cull movement believe that vaccinating badgers and other measures such as restricting cattle movements are the way to protect the environment including cattle. These views, we are informed, are supported by many scientists.”* These are sharp and pointed comments for a judicial body to make against a government policy and its implementer, Natural England.

Neither exemptions were accepted by the Tribunal so it was not strictly necessary to consider the public interest test, but they did comment as follows: *“The fact that the badger culls are a matter of significant public interest does not mean that there is a strong public interest in the disclosure of every piece of information in relation to the badger culls,”* but, there is a strong public interest *“in the creation of a sustainable environment, in transparency and accountability, and in the facilitation of public participation and public debate on matters of environmental concern”* to *“enable [the public] to challenge decisions”*. And that includes *“public protest on matters of environmental concern . . . Increased protesting in the cull areas (or better directed protesting) is perfectly legitimate in a democratic society. We must guard against impermissibly mingling criticism of unlawful activity with criticism of legitimate protest.”* In the present case, *“the vast majority of protester activity was peaceful and lawful.”*

The Tribunal referred to the words of the Information Commissioner in supporting Ms Dale and the other people requesting the withheld information: *“one of the critical objections to*

*culling in the RBCT was that it actually increased the incidents of bTB in the surrounding area of the cull zone. The Government sought to deal with that problem, whilst still implementing a cull, by recognising the need to bound the cull zones with a mixture of buffers and barriers, such as hard boundaries like motorways or water, combined with soft boundaries in areas where badgers are vaccinated or other control measures taken. This can be seen from the Impact Assessment, 30 November 2011, internal p.5. Release of BCP information which provides the length of the kinds of boundaries and buffers will enable the public to engage in an informed debate as to the success of that safeguard. Similarly, the perturbation effect will be harder to discover or analyse without the length of the perimeter of the pilot areas. It is also hard to understand why this is withheld when the area figure has been given.”*

*“The ability to monitor and assess the effectiveness of the pilot culls is a significant public interest particularly in view of the public controversy surrounding the badger culls . . . We note that NE is now performing the monitoring function without there being any IEP assessment and as a body implementing Government policy NE will not be perceived by the public to be entirely objective.”*

The Tribunal concluded: *“In summary we find that in the circumstances of this case the weight we give to the ability of protesters to be able to more effectively monitor the effectiveness of a controversial Government policy is greater than the weight we give to the combined increasing risk of harm to farmers and the stopping of the culls.”*

These are powerful statements from a Judicial Authority. Natural England has not opted to appeal to a higher level against the findings of this Tribunal. It does not formally set a legal precedent for other cases, but carries some weight precisely because NE has not appealed against it (probably after consultation with Defra and the Treasury Solicitor).