Department for Environment Food and Rural Affairs v The Information Commissioner & The Badger Trust

[2014] UKUT 0526 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. GI/79/2014

Appellant:	Department for Environment Food and Rural Affairs
First Respondent:	The Information Commissioner
Second Respondent:	The Badger Trust

DECISION OF THE UPPER TRIBUNAL

MR JUSTICE CHARLES
N J WARREN
A WHETNALL

JUDGES & MEMBER OF THE UPPER TRIBUNAL

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ADMINISTRATIVE APPEALS CHAMBER

Case No. GI/79/2014

Before **UPPER TRIBUNAL JUDGES & MEMBER**

MR JUSTICE CHARLES
N J WARREN
A WHETNALL

For the Appellant:	Ben Lask instructed by TSol
For the First Respondent	Robin Hopkins instructed by the ICO
Fro the Second Respondent	Raj Desai instructed by Bindmans LLP

Decision:

REASONS FOR DECISION

DECISION

1. **It is in the public interest to disclose the disputed information in this case on the basis that the two individuals named therein are not identified.**

2. **There is to be a directions hearing at which (a) if they are not agreed the terms of the order on disclosure are to be determined, and (b) it is to be considered whether in the light of this decision the exceptions claimed are to be determined in these proceedings and if they are what further directions should be given as to further evidence, written argument and generally. The parties can apply to vacate that hearing.**

REASONS

Introduction

1. This is an appeal under Section 57 Freedom of Information Act 2000 (FOIA) against a decision notice issued by the Information Commissioner (ICO) on 13 June 2013. In that notice the ICO directed the Department for Environment, Food and Rural Affairs (DEFRA) to disclose, under the Environmental Information Regulations 2004 (EIR) four risk and issue logs (RILs) relating to meetings in 2010 of a project board established by DEFRA (the Project Board) which had been requested by the Badger Trust.

2. For reasons which we refer to later, the appeal was transferred from the First-tier Tribunal to the Upper Tribunal. This means that although normally appeals

to the Upper Tribunal in this jurisdiction are limited to points of law, in this case we are not so constrained.

3. We held a hearing on 30 and 31 July 2014 at which Mr Lask appeared for DEFRA; Mr Hopkins for the ICO; and Mr Desai for the Badger Trust.

Closed material

4. Pursuant to directions given by the Chamber President all of the evidence has been open and the only closed material has been the four RILs (or "the disputed information"). Obviously, it would have defeated the object of the proceedings for them to be disclosed to the Badger Trust.

5. We also felt it necessary to hear part of the oral submissions from DEFRA and the ICO in closed session. This was to permit those parties to support the submissions they made in open session by specific reference to the content of the disputed information. As we explained at the time the central reason for this was to enable DEFRA and the ICO to address us on whether, and for us to test whether, disclosure of the actual content of the disputed information in this case would be likely to damage the public interest in the manner asserted.

6. This was a case, of course, in which the ICO and the excluded party were both arguing for the same result and so the closed session involved an adversarial process rather than one in which the representatives of the ICO sought to point out issues which might support a conclusion that was contrary to his decision on the public interest.

7. At the end of the closed session we agreed with both Counsel who attended what should be included in an account to the Badger Trust of what had been said. That account included arguments that had emerged or been developed in the closed session but did not contain anything that we think could have come, or was asserted to have come, as a surprise to the Badger Trust.

The short answer

8. In our view an examination of the contents of the disputed information leads inexorably to the conclusion that the four RILs that constitute the disputed information do not match their billing in the DEFRA evidence to the effect that they are documents that reflect and disclose the content of robust, candid, and innovative discussion and thinking. Nor would their disclosure now or as at about September 2012 give rise to a significant risk of damage to the public interest either directly or indirectly by affecting equivalent discussions and risk assessments in similar situations.

9. Their description by DEFRA indicated that they would add to the published information we have seen in that they would give an indication of risks identified and assessed by DEFRA in the course of the badger control project. To an extent they do this but they contain nothing that an intelligent reader would not expect to see and they have been drafted in anodyne terms.

Background

10. Bovine TB was once a disease isolated to small pockets of the country; in 1979 only 0.01% of British cattle tested as infected. It has now spread extensively northwards and eastwards from infected pockets in the south west of England and Wales. In the last ten years 314,000 otherwise healthy cattle have been slaughtered in Great Britain in attempts to control the disease. In 2013, over 6 million tests for bovine TB were performed in England leading to the slaughter of over 26,000 cattle. The cost to the taxpayer of dealing with the disease is nearly £100 million a year with additional costs to farmers estimated in tens of millions of pounds.

11. It is common ground that some TB infection in cows is transmitted by badgers but experiments involving the culling of badgers were abandoned in 2008. In May 2010, the government decided "as part of a package of measures, to develop affordable options for a carefully managed and science led policy of badger control in areas with high and persistent levels of bovine TB". DEFRA is responsible for this programme of work.

12. Badger culling is controversial. It is fair to place the Badger Trust and the National Farmers Union (NFU) on opposite sides of the controversy. The Badger Trust, however, is not at the extreme end of those opposing a cull. The Trust does not condone non-lawful or intimidating methods of campaigning. Others are not so scrupulous. In September 2012, DEFRA found it necessary to apply for, and the High Court found it necessary to grant, injunctions to prevent harassment of public servants whose work brought them into contact with the policy. Later, the NFU found it necessary to take similar action on behalf of individual farmers and their employees.

13. For effectively the same reasons the Chamber President made an order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (with a penal notice attached to it) granting witnesses defined in a confidential schedule to the order anonymity throughout these proceedings. The names and positions of those witnesses were disclosed to identified individuals at the Badger Trust who gave confidentiality undertakings. The existence of the enforcement powers of the Upper Tribunal in respect of such an order (as opposed to those of the First-tier Tribunal) was the reason why this appeal was transferred to the Upper Tribunal.

14. It is convenient to add here that one element of DEFRA's appeal is no longer contested. This ground was not raised with the ICO and relates to entries in the column headed "risk owner" on the RILs template naming two individuals. The common ground arose because in our view sensibly the Badger Trust accepted that their opposition to redaction or anonymisation of the identity of these persons was based on effectively the same grounds as their opposition to the anonymity orders made in respect of the witnesses and they were not going to persuade us by a re-run of those arguments. We will return to this ground at the end of this decision.

The witnesses

15. Statements were made on behalf of the Badger Trust and DEFRA. The statements made on behalf of DEFRA were:

    (a) a statement by Witness A, a senior civil servant and head of the Bovine TB programme at DEFRA for about 14 months,

    (b) a statement by Witness B, a senior official of the NFU who served on the Project Board,

    (c) a statement by Mr David Blackall, a senior civil servant from the Cabinet Office whose evidence was directed to the general use of RILs in Government, and the possible damaging effects of disclosure of the disputed information in this case.

    At the request of the parties we agreed that we would hear limited and directed oral evidence from Witnesses A and B. The Badger Trust and the ICO did not wish to question Mr Blackall. The day before the hearing we were informed that Witness A had suffered a close family bereavement and would not be able to attend and two witnesses were offered to, and did, take his place. They were:

    (d) Witness C, a DEFRA civil servant who adopted and spoke to Witness A's statement with the exception of paragraphs 2-23 and 56-61 inclusive, and

    (e) Mr Nigel Gibbens, the UK's Chief Veterinary Officer since 2008 who had been a member of the Project Board, although he was not able to attend all of its meetings and had had no specific responsibilities as a board member. He adopted and spoke to paragraphs 2-23 and 56-61 inclusive of Witness A's statement.

    We shall refer to this written and oral evidence compendiously as the DEFRA evidence.

The Project Board

16. The Project Board was supported by a "badger control project team" and reported to an overarching "DEFRA bovine TB programme board". It was part of a project to "inform and oversee the delivery of policy on badger culling including the practicalities of implementation and cost effectiveness." Importantly, such controversial issues as badger vaccination and cattle controls were generally outside its scope. The Project Board's role was to agree the project plans and documentation; monitor progress; assist in problem solving; identify and manage risks and issues; and to resolve issues brought to it. Most of the Project Board members worked within DEFRA. At least four did not. One of these was an independent expert brought in to challenge the Project Board's thinking. The other three worked for Natural England, the Animal Health and Veterinary Laboratories Agency and the NFU.

17. The Project Board met regularly. Their discussions were expected to be robust, candid, innovative and confidential. There were no detailed minutes but decisions and action points were recorded at each meeting.

18. The Project Board used a system of RILs whose purpose is described by Witness B, the employee of the NFU who was a member of the Project Board, as follows:-

> "…. to maintain an overview of the risks to the delivery of the project; identify new risks to delivery; discuss current mitigation measures and identify additional measures as necessary; and to discuss current and possible future contingency plans should the risk(s) materialise."

That purpose of the RILs and the meetings to which they related is obviously a sensible one to promote good decision making. The other DEFRA witnesses gave evidence to the same effect. The RILs follow a template used by DEFRA and other Government Departments. The entries on the template tend to be in note form. Each risk and its consequences are described. The current likelihood and impact of the risk is then assessed as high, medium or low by the board members. Another column then describes action to mitigate the risk leading to another marking by the board members of residual likelihood and residual impact. For each risk a current and residual overall rating is calculated by a formula according to the Project Board's view of likelihood and impact. The template also has columns indicating the risk owner and any contingency plans.

19. The evidence of the DEFRA witnesses and Witness B, the employee of the NFU who had been on the Project Board, focused on the Project Board and the benefits of its members having robust discussions on all the relevant factors when assessing risks and the way ahead. The employee of the NFU referred to thinking out of the box and raising arguments and issues for discussion even though they may not accord with his views or those of the NFU and some of its members. We agree that robust discussions between members of the Project Board that engaged their particular expertise, experience and knowledge would promote properly informed decision making and thus the public interest.

20. The senior civil servant at the Cabinet Office, Mr Blackall, gave written evidence relating to the importance of RILs in government generally. We were pointed in the direction of the annual publication of Delivery Confidence Assessment Ratings for Major Projects supervised by the Major Project Authority. These involve a traffic light system of appraisal on the same lines as that used in RILs. The Government publishes these assessments annually, some six months after they are compiled. The annual publication, is supported by Departmental reports on specific projects, explaining the current assessment for each project with a brief explanation and note explaining the grounds for the assessment, the actions required as a result, with background on the cost, budget and implementation timetable. The programme for control of bovine tuberculosis is not on the list of major projects, and does not fall within the Major Projects Annual reports. The extent to which project ratings are made public in the Major Projects Annual reports is said to be governed by Freedom of Information Act considerations:

> "exemptions to the publication of data [are] permitted only under exceptional circumstances and in line with Freedom of Information requirements. In a small number of the most sensitive projects, these exemptions are made on grounds of national security. The majority of exemptions are made for projects that are undertaking commercial procurement exercises, where publication of data would harm our ability to secure value for money for the taxpayer." *Major Projects Annual Report, 2013-14, p18.*

21. Clearly transparency on the delivery status of major projects can be uncomfortable. In his foreword to the first 2012-13 Annual Report the Minister responsible in the Cabinet Office said:

> "Alongside [the report] departments will release information on their projects as well as the traffic light ratings produced by the Major Projects Authority.
>
> Transparency is not easy. We are taking a big step by publishing this honest appraisal of our major projects. A tradition of Whitehall secrecy is being overturned. And while previous Governments buried problems under the carpet, we are striving to be more open.
>
> Major projects affect all of us. The Government's portfolio alone has a total lifetime cost stretching over £350 billion. These aren't just projects: they are integral to the Government's ambitious reform agenda.
>
> By their very nature these works are high risk and innovative. They often break new ground and dwarf anything the private sector does in both scale and complexity. They will not always run to plan. Public scrutiny, however uncomfortable, will bring about improvement. Ending the lamentable record of failure to deliver these projects is our priority."

22. Mr Blackall saw a distinction between such summary level narratives, requiring each department to respond to the challenge of central review and informing taxpayers how their money is being spent, and "allowing the project to get on and deliver". He saw a range of risks in the publication of RILs, including inhibition of freedom and frankness at board level, the possibility of misguided public criticism, making commercial organizations who are sensitive to ill-founded adverse criticism wary of future participation, and a risk that management information would be diluted and drafted in softer, more general and less incisive terms with risks of this leading to poorer project and risk management. He suggested that disclosure of the RILs in this particular case would have knock on effects for the MPA's programme of project reviews, in which RILs were a key management document and in his statement said:

> "The inhibitory effects of disclosure of the RILs in this case would therefore have an adverse effect for successful project delivery in the future."

His statement also makes specific references to and in our view focuses on the need for a "safe space". For example, in connection with the need for stakeholders to give candid advice he says:

> " Critical to their engagement is the basis of belief of operating within confidential "safe space""

And he then says:

> " There is a general principle that a "safe space" for policy development should be preserved"

The Badger Control Project

23. The Project Board met several times in the summer of 2010.

24. Then on 15 September 2010 DEFRA issued a consultation paper on badger control policy.

25. The paper described the option of doing nothing to control the badger population as "unaffordable". The costs of the government carrying out programmes of vaccination or culling were also described as too high. The three remaining options were for farmers to vaccinate; farmers to cull; or a combination of the two. This last option was the one which DEFRA preferred at that time.

26. In July 2011, the Secretary of State announced that she was minded to allow culling to take place under licence and another consultation was launched as to the terms on which Natural England would issue licences for culling. That led to a policy announcement in December 2011 that culling would be allowed initially in two areas. The Badger Trust challenged her decision by way of judicial review. They were unsuccessful in the Administrative Court (July 2012) and the Court of Appeal (September 2012).

27. During this time the department was busy preparing for the implementation of the new policy. A new board was about to be convened to oversee the next stage of policy development. Much of the information in the RILs for the old board (the Project Board) was carried over to the new one.

28. DEFRA civil servants told us that the period leading up to September 2012 was a critical stage in the implementation of the policy. The preparation for the start of the cull required close working between DEFRA and Natural England and it was important to maintain the trust of the farmers who would be carrying out the actual work. We do not disagree with the officials' assessment, whilst observing that a controversial programme of work such as this one, spread over many years, will have few if any fallow periods.

29. In the event, although licences were issued in October 2012, the cull was postponed until autumn 2013. In April 2014, following a report from an expert panel, the Secretary of State announced the continuation of the two pilots but

no extension of them. The Badger Trust has applied for a judicial review of that decision.

The Role of the NFU

30. It was unusual for DEFRA to invite someone from the NFU onto a project board. They did so because they wanted to secure the knowledge and experience that farming could bring to the project; additionally, it was likely, if culling were adopted as part of the policy, that farmers would be responsible for carrying it out. The NFU member was able to make a valuable contribution to the board's discussions drawing on his knowledge of farming and of bovine TB. He shared responsibility with other board members for the RILs. In one sense he attended the board in a personal capacity. He could speak his own mind and he was not there as a spokesman for the NFU or a mouthpiece for NFU policy. This was not, however, in our view the full picture. It was his employment by and experience acquired at the NFU that had led to his appointment on the board. As he himself told us, his participation was "a delicate matter which involved me balancing various interests". Of course, from the viewpoint of the Badger Trust, NFU participation would provoke questions.

The Information Request

31. On 23 May 2012, solicitors acting for the Badger Trust sent an email to DEFRA which included the following:-

> "We will be grateful if you could provide us with all documentation in relation to the badger/bovine TB proposals between DEFRA and NFU and DEFRA and Natural England in 2010."

It is common ground that the request fell to be dealt with under the EIR.

32. In June 2012, DEFRA responded to the request withholding only the disputed information. The material disclosed included the agenda items and the action points of the board.

33. It is fair to say that in response to this and other requests, and in accordance with its general policy on transparency, DEFRA has placed a wealth of information about badger control in the public domain. Much of it we have seen. Mr Lask rightly stressed the quality and volume of this information amounting to nearly a hundred documents and just short of 800 pages of information. It is sometimes suggested that the fact that information of the kind requested is generally in the public domain is an irrelevant factor when resolving cases under FOIA or EIR. In our view, that approach is a mistaken one. We agree instead with the comments of Mitting J in Export Credits Guarantee Department v Friends of the Earth [2008] EWHC 638 (Admin) at paragraph 43.

34. What is absent, in our judgment, from the extensive published information is an indication of risks identified and assessed by the Project Board within the scope of its remit.

35. DEFRA justified the withholding of the disputed information by reference to two exceptions in Regulation 12 EIR. Both exceptions are to be invoked only if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. A public authority must apply a presumption in favour of disclosure.

36. The first of these can be referred to as "the internal communications exception". It is contained in Regulation 12(4)(e) which states simply:-

> " (e) the request involves the disclosure of internal communications."

37. The second exception can be referred to as "the confidential proceedings exception". It is to be found in Regulation 12(5)(d) and may apply to the extent that disclosure would adversely affect:-

> " (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law"

38. The Badger Trust complained to the ICO who, as we have indicated, directed that DEFRA should disclose the disputed information. The ICO decided that the internal communications exception did not apply. He agreed that the confidentiality of proceedings exception applied but concluded that the balance of the public interest was in favour of disclosure.

Which Exceptions Apply?

39. At the start of the hearing, the consensus amongst the advocates was that we probably need not answer this question because on the facts of this case the factors to be taken into account in the balancing of the public interest were essentially the same whether either or both of the exceptions applied. We agree with the latter, and by the close of the hearing, we had formed a firm view on the public interest balance whichever exception applied; but doubts had arisen about the interpretation of the exceptions.

40. Mr Desai would now argue, in reliance on the decision of the European Court of Justice in Flachglas Torgau GmbH v Federal Republic of Germany that the ICO had interpreted the confidentiality of proceedings exception too broadly.

41. If so, and correspondingly, Mr Lask would argue that the ICO had interpreted the internal communications exception too narrowly if it is to achieve its suggested purpose. All were agreed that we could not decide these issues without receiving further submissions.

42. In cases under EIR and FOIA it is orthodox and logical to decide first whether a particular exception or exemption is engaged and, only then, to balance the public interests in favour and against disclosure. Our overriding objective (see Rule 2 Tribunal Procedure (Upper Tribunal) Rules 2008) commands us though to seek flexibility in the proceedings and in the particular circumstances of this

case we think it right to state now our conclusions on the public interest balance. The parties agreed that we should do so.

43. At the hearing it was agreed that we should reconvene to hear argument on which (if any) exception applied. For the reasons set out in paragraph 48 below we are now doubtful whether we should do so. Accordingly we have provided for a directions hearing to consider the way ahead.

At what Date should the Public Interest Balancing Exercise be Conducted?

44. The public interest regularly does not stand still.

45. It seems to us that there is some lack of clarity about the date at which the First-tier Tribunal assesses whether an exemption or exception applies and, if so, where the balance of the public interest lies. Early cases looked at the date of the information request; many Tribunals now seem to look at the date of the public authority's final decision on the request. This approach has been doubted in the High Court (see OGC v IC [2008] EWHC 774 (Admin), [2010] QB 98) and seems not entirely consistent with the development of the First-tier Tribunal's role of receiving new evidence and conducting what is now well-established as a full merits review

46. We have considered whether we ought to rule on this issue.

47. All the parties had prepared their evidence and submissions on the basis that we should balance the public interest as at about September 2012, the date of DEFRA's review decision. At the hearing the parties agreed that we should do this and invited us to proceed on the basis that such an assessment was determinative of that issue in this case if either or both exemptions applied. In those circumstances, and having regard to the overriding objective and our ability to give a decision as at that date, we consider that it would impose an unnecessary burden on the parties to ask them to prepare new submissions in respect of a different one and to advance arguments on whether that date is the correct one.

48. Accordingly we do not give a ruling on this issue and state only that we regard the question as an open one.

The Public Interest Balance – General introductory comments

49. In this case DEFRA raise and rely on what has come to be known in the application of the statutory schemes introduced by FOIA and EIR as issues of "safe space". Especially in the context of EIR, we prefer to refer to a public authority having "space to think in private".

50. We accept that:

    (a) commonly while many policies are being worked out there is a public interest in government having "a space to think in private",

(b) the disclosure of the robust or other discussions and of the risk assessments during that process may cause harm to efficient decision making and thus be against the public interest,

(c) in 2010 there were powerful pointers to the need to maintain such a space for the meetings of the project board, and so

(d) there was a public interest in the project board having space to think in private.

51. That said, to the extent that there may be a need for a space to think in private concerning Departmental deliberations, no-one doubts that generally speaking the need to maintain that privacy diminishes over time. There have been suggestions in First-tier Tribunals in the past that once a policy had been formulated and announced there could be no further public interest in withholding information from publication. We do not accept that (see OGC v Information Commissioner [2010] QB 98 at paragraph 101.) It all depends on the facts and circumstances of the individual case.

52. For this reason we reject the argument advanced by the Badger Trust that disclosure must be ordered of any risk which has been deleted from the RILs as no longer current.

53. Put in the context of this case, our task is not to ask whether around about September 2012 DEFRA had a current need for a "space to think privately". Rather, we must ask whether at that date the public interest in keeping the 2010 thinking private outweighed the public interest in its disclosure. It all depends on the facts and the circumstances. The state of the policy/programme and the thinking current at September 2012 are relevant factors which we have taken into account; but they are not decisive.

54. As we have indicated, taking that approach and without inviting oral submissions from the Badger Trust, we are not persuaded by the arguments advanced by DEFRA that the four RILs should not be disclosed and so it is unnecessary for us to further address in general terms the underlying rationale for, or the application of, the "safe space" argument in this decision.

55. We should also deal with a submission made by DEFRA in relation to breaches of confidence. Relying on ICO guidance, DEFRA submit that there is always a general public interest in protecting confidential information and preserving the relationship of trust between confider and confidant.

56. We do not dispute that this is a public interest factor to be taken into account but in our judgment, if it is taken in isolation this assertion gives insufficient recognition to the fact that the legislature has intervened in public authority relationships through FOIA and EIR. The legislation must be taken to intend that in a number of cases it will be in the public interest for a public authority to disclose information provided in confidence. . So there is no "breach of that

trust" when a public authority fulfils its statutory obligations under FOIA or EIR by disclosing such information and organisations and individuals who enter into confidential discussion with public authorities are, or should be, well aware of the legal limits and must be taken to recognise that, in individual cases, and depending on the circumstances, a public authority may have a legal duty to disclose information which has been described as confidential. In any event, the common law duty of confidence is subject to disclosure in the public interest. So no absolute assurance or expectation that confidentiality will be preserved can be given or expected and this is a factor to be taken into account when competing assertions as to the public interest are made and assessed.

The Public Interest against Disclosure

57. Mr Lask on behalf of DEFRA asked us in his skeleton and oral argument to address the public interest by reference to five possible adverse consequences of disclosure of the disputed information. They were:-

    (a) an increased likelihood of the risks materialising, of the identified counter measures being less effective and of the implementation of the policy being disrupted or frustrated;

    (b) the diversion of resources required to explain the RILs;

    (c) the concerns expressed by the NFU about the security of farmers, its relationship with its members and the possibility of farmers being deterred from participating in the programme;

    (d) the NFU in particular and other bodies in general might be deterred from future participation in such projects;

    (e) a long-term effect on the drafting of RILs generally which would diminish their usefulness.

58. As we have mentioned earlier under the heading "the short answer" we have concluded that there is a mismatch between the arguments advanced by DEFRA and the content of the disputed information (the four RILs). However, we have considered each of the five possible consequences so advanced and have done so as at about September 2012. We were unpersuaded by any of these arguments and did not feel it necessary to hear oral submissions on them by counsel for the ICO or the Badger Trust.

(a) Increased Likelihood of Risks Materialising of counter measures being less effective and of the implementation of the Policy being disrupted or frustrated

59. In this connection, DEFRA points in particular to the risks of legal challenge or legal complaint and of the exploitation of possible disagreements on the evidence base between DEFRA, its executive agencies and Natural England; as well as to security and other miscellaneous risks.

60. It seems to us, however, that all these risks were well-known, particularly to opponents of the policy. Having considered the four RILs, we are unable to accept that their disclosure would materially add to the risks or to the likelihood that they would materialise. This conclusion is strengthened by the anodyne manner in which the risks of legal challenge, and the possible actions to reduce those risks, are described in the documents themselves. Disclosure would not reveal legal advice or give any significant information to those minded to bring legal challenges.

61. There is nothing surprising or informative about the counter measures identified or anything else in the four RILs that founds as at about September 2012 (and so after consultation) the existence of the risks or harm asserted.

(b) Diversion of Resources in Order to Explain the RILs

62. A DEFRA witness states that "substantial resource" would be needed in order to explain the RILs and qualify their content – though no further details of this were given. Mr Lask, in argument, referred to the likelihood of opponents cherry-picking or misrepresenting the risk assessments and the consequent need for DEFRA to counter this. The need to explain the meaning of the traffic light system has already been faced in the publication of annual assessments by the Major Projects Authority, as well as in other contexts. It may be that DEFRA would find it prudent, when releasing the RILs, to include a statement of a page or so explaining their origin and purpose in that particular context. It seems to us, however, that cherry-picking and slanted coverage from opponents are a fact of life for many public authorities. In our view, any increase in expenditure, time or resources by DEFRA under this heading would have been negligible in about September 2012.

(c) The concerns expressed by the NFU about the security of farmers, its relationship with its members and the possibility of farmers being deterred from participating in the programme.

63. The NFU employee who was a member of the board naturally and rightly expressed concerns for the personal safety of his members and their employees. As we have indicated the NFU later felt it necessary to take injunction proceedings in the High Court to protect some of its members from harassment. We take those concerns just as seriously but we are not satisfied, having looked at the four RILs, that their disclosure would add to the risk of the personal security of such persons.

64. Similarly, we agree that it was important, if the policy was to go through, that NFU members were not deterred from participating in the culling programme. The NFU witness suggested that the four RILs might have been used from September 2012 onwards to undermine farmers' confidence in the policy and that disclosure might affect relationships between the NFU and its members. Perhaps predictably the oral evidence of this witness focused on potential damage to NFU members and to their relationship with the NFU rather than on damage to Departmental decision making.

65. By September 2012, the fact of participation by an employee of the NFU on the Project Board was in the public domain as was the NFU's response to the consultation in 2011 that preceded the policy announcement in December 2011.

66. In those circumstances, even if the four RILs disclosed views of the NFU that were contrary to those of some of its members or the NFU's response to the consultation we do not accept that disclosure of them in about September 2012 would have had any or anything other than a trivial adverse effect on the relationship between the NFU and its members.

67. There is nothing in the four RILs that identifies particular farmers or which gives rise to any real risk to the security of farmers or which adds to the risk that farmers would be deterred from participating in the proposed programme or change their minds about it. Again, this asserted risk of harm was not supported by reference to particular parts of the RILs.

68. We add that there is nothing inherently wrong in a farmer, as a result of information received, changing his or her mind about the policy or being critical of DEFRA and the NFU; but again, in our judgment disclosure of the four RILs in or after September 2012 would either have no impact or only a trivial impact on this.

69. There is nothing in the four RILs that identifies particular farmers or which gives rise to any real risk to the security of farmers.

(d) The NFU in particular and other bodies in general might be deterred from future participation in such projects

(e) A long-term effect on the drafting of RILs generally which would diminish their usefulness.

70. We take these together because they engage the arguments advanced on the public interest in maintaining confidentiality to promote robust discussions and the inhibitory effect of disclosure on other decision making processes

71. They were advanced as an aspect of the "safe space" argument and, as we understood it, as free standing arguments.

72. In our judgment, all of the factors in support of that argument were effectively spent by September 2012 in respect to 2010 thinking including those advanced that disclosure would inhibit future robust discussions and risk assessments. As to that we think the timetable we have set out speaks for itself. In particular, there had been consultation and the unsuccessful challenge by way of judicial review (in which DEFRA were under a duty to give a full account of all information relevant to the grounds of challenge) and so the "die was cast" in that the policy was to be implemented. But we have rejected grounds (a), (b) and (c) and we have not been persuaded that there is any real likelihood of harm to the public interest if information concerning a risk assessment in 2010 by the Project Board was disclosed in (or after) September 2012.

73. We have not forgotten that decision making continues in respect of the culling of badgers and that some issues and risks that were relevant in 2010 remain relevant but, in our judgment, this does not point to the public interest being served by continuing the confidentiality of the discussions which are the subject of this request.

74. It is presumably for similar reasons that, even for major projects, the Cabinet Office and the Major Projects Authority now publish overall risk ratings for major projects some six months after they have been settled, together with a supporting explanatory narrative from departments.

75. We are not persuaded that persons of the calibre required to add value to decision making of the type involved in this case by having robust discussions would be inhibited by the prospect of disclosure when the public interest balance came down in favour of it. Mr Gibbens, for example, indicated that he would behave in accordance with the Civil Service Code and so as we understood him would do his duty and take part in robust discussions on boards like the Project Board. There was specific NFU evidence to the contrary directly from the NFU representative and indirectly through Witness A who reported a conversation with an NFU director. Witness B was unable to give any further details of the reported conversation.

76. In our view, the NFU must have agreed that one of its senior employees could join the Project Board because this would promote or at least was not precluded by their objects and aims. They and other organisations engage with, or must be assumed to have engaged with, public authorities in the full knowledge that Parliament has passed the FOIA and the Secretary of State has made the EIR. Participants in such boards cannot expect to be able to bend the rules. It is of course important that public authorities should be able to bring outsiders onto boards such as this one; but since there will often be a corresponding private interest for the outsider in being involved from the start and an honest desire to be of public service will also be a motivator, we do not accept that the NFU or any other equivalent body will be deterred in future from joining such boards or projects by disclosure of the disputed information in about September 2012 or now

77. Further, as we have already mentioned (see paragraph 9 above) the disputed information is drafted in anodyne terms. Time was spent in closed session in considering how it could have been drafted in more anodyne terms. We acknowledge that it was demonstrated that this was possible but the changes suggested did not support the arguments that disclosure of these RILs in September 2012 or now would be likely to:

    (a) discourage either appropriately robust discussion of risks in respect of other equivalent Departmental or public authority decision making, or

    (b) lead to anodyne recording (or even more anodyne recording) of equivalent discussions in other risk logs or their equivalent which would reduce their usefulness.

78. Accordingly, DEFRA has failed to satisfy us that on the assumption that there were robust discussions at the Project Board that the disclosure of the disputed information in about September 2012 or now would give rise to a risk that such important discussion or how they would be recorded would be inhibited in present or future project boards relating to the culling of badgers or on other boards set up to carry out a properly conducted assessment of relevant risks.

Factors in Favour of Disclosure

79. There is always value in openness and transparency, especially on issues within the scope of EIR.

80. We accept and it was not disputed that there is a public interest in disclosure to both opponents and supporters of the policy relating to the culling of badgers of the approach taken by the decision maker and thus of the risks identified and assessed in the decision making process. The controversy relating to the policy, is an additional factor in support of this public interest to the extent that a policy that gives rise to very divergent views implies a need to carry out a proper analysis of the rival contentions, the evidence and arguments they are based on and the risks they give rise to.

81. Here, for the reasons we have given, the public interest arguments against disclosure are unpersuasive at around September 2012 whereas in our view those in favour of disclosure have not lost any of their force.

82. Indeed, as we have mentioned in our view the position reached in September 2012 triggers and supports the view that by then the dominant public interest was that favouring disclosure to the public of material relevant to informing them of the analysis of the arguments and risks that was carried out by the Project Board within its remit. This has the potential for informing discussion both as to the adequacy of that analysis and issues raised in it.

83. Both may be ongoing issues in a dynamic situation relating to a policy decision now made some time ago and which has set or is the starting point for a chain of events. This continued relevance supports disclosure now rather than continued non disclosure because the demonstration of either a proper and robust analysis and or of a flawed one behind that policy decision will inform and promote sound decision making now and in the future.

Conclusion

84. For these reasons we conclude that the ICO balanced the public interests correctly and, subject to redactions of personal data for the reasons set out below, the disputed information should be disclosed.

The additional argument

85. DEFRA separately contested the naming of two individuals in the RILS. As we understand it, there was no serious challenge to DEFRA's submission that Regulation 12(3), an exception relating to personal data, applies. Any other

view would be incompatible with the Tribunal's earlier rulings on anonymity. When the material is disclosed the individuals should be referred to as "X" and "Y".

Signed on the original:

MR JUSTICE CHARLES

N J WARREN

MR A WHETNALL

Dated: 28 November 2014