



Scottish Information
Commissioner

Decision 044/2007 – Mr G Crole and Transport Scotland

Badger surveys and related information

Applicant: Mr G Crole
Authority: Transport Scotland
Case No: 200601282
Decision Date: 8 March 2007

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 044/2007 – Mr G Crole and Transport Scotland

Badger surveys and related information

Relevant Statutory Provisions and other Sources

Environmental Information (Scotland) Regulations 2004 (EIRs) regulations 1 (Interpretation); 5(1) (Duty to make available environmental information on request); 10(5)(g) (Exceptions from duty to make environmental information available); 13 (Refusal to make information available).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Crole asked Transport Scotland (an agency of the Scottish Executive) for information about road and other works relating to badgers, his request seeking information on a number of issues.

Transport Scotland provided a detailed response to Mr Crole, which answered several of his questions, but left him dissatisfied with some of the information provided. After review, Transport Scotland found that Mr Crole had not been provided with all the information it held in relation to his request, and supplied him with some additional details. However, Transport Scotland found that information relating to badger surveys should not be disclosed as badgers are a protected species and the information might fall into the hands of people who would abuse the animals.

During the investigation the Scottish Executive (the Executive) advised that the badger surveys were being withheld under the exception in regulation 10(5)(g) of the EIRs.

Mr Croll appealed against the decision to withhold the badger surveys, believing that the location of badger setts is information which can easily be established from other sources. He also complained about the way in which his request had been dealt with.



Background

1. On 23 March 2006, a request for information regarding badger works was forwarded to Transport Scotland on behalf of Mr Crole. Mr Crole asked for information on a number of points concerning badger works in general, and works carried out on the A95 and A96 in particular.
2. Transport Scotland responded on 24 April 2006. It provided information about the procedures laid down by the Scottish Executive (the Executive) for road and other works relating to badgers, and addressed Mr Crole's questions about the badger works on the A95 at Auchlunkart and on the A96 between Keith and Huntly.
3. Mr Crole wrote back on 18 May 2006, making general comments on the answers he had received and clarifying the scope of his request. He asked for Transport Scotland's observations on his comments and asked whether he should request a review. On 30 May 2006 he wrote again, giving notice that the information provided in respect of badger crossings on the A96 was insufficient.
4. Transport Scotland treated Mr Crole's letter of 30 May 2006 as a request for a review of its response of 24 April. On 28 June 2006 Transport Scotland wrote to advise Mr Crole of the outcome of the review. The review panel had identified additional information relating to the costs of the badger works on the A96 Coachford site, and this information was provided in the letter. However, Transport Scotland informed Mr Crole that badgers are a protected species and it was not required to pass on information relating to "badger surveys etc." in order to avoid information about habitats falling in to the hands of those who would abuse the animals.
5. On 27 July 2006 Mr Crole applied to me for a decision on the matter. After further correspondence with my Office, his application was validated on 13 October 2006, by establishing that he had made a request for information to a Scottish public authority, and had appealed to me only after requesting the authority to review its response to his request.



The investigation

6. A letter was sent to the Executive (its Freedom of Information Unit, being the office which co-ordinates responses to my investigations on behalf of the Executive and most of its agencies, including Transport Scotland) on 13 October 2006, informing it that an appeal had been received and that an investigation into the matter had begun and seeking comments in terms of section 49(3)(a) of FOISA.
7. The Executive was asked to supply copies of the information withheld from Mr Crole. It was invited to confirm which exemptions it had relied upon and provide an analysis of its reasons for applying those exemptions.
8. The Executive replied on 24 November 2006. It provided some background information about badger works on trunk roads and confirmed that the only information being withheld from Mr Crole related to badger surveys.
9. The Executive acknowledged that Transport Scotland's review response (28 June 2006) should have made it clear that the badger surveys were being withheld under the exception at regulation 10(5)(g) of the EIRs, and apologised for this oversight.

The Commissioner's Analysis and Findings

10. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Crole and the Executive and I am satisfied that no matter of relevance has been overlooked.

Information provided and withheld

11. In his application to me Mr Crole complained that the reply he had received from Transport Scotland (28 June 2006) in response to his request for review had failed to provide him with all the information which he thought necessary and in particular had declined to give out particulars of surveys. He also noted that he had not received any observations from Transport Scotland as requested in his letter of 18 May 2006.



12. Regarding the observations requested by Mr Crole, regulation 2(1) of the EIRs makes it clear that only information “in written, visual, aural, electronic or any other material form” is covered by the provisions of the EIRs. There was therefore no obligation upon Transport Scotland to provide Mr Crole with the observations of its officials unless their views were recorded in material form.
13. Following the review of the response to Mr Crole’s request, Transport Scotland advised him that “information relating to badger surveys etc.” had been withheld, but did not identify any other information which it sought to withhold. The Executive has confirmed that the only information withheld from Mr Crole relates to badger surveys.
14. In considering Mr Crole’s complaint that he had not received all the information which he thought necessary, I note that Transport Scotland provided a detailed reply to Mr Crole on 24 April 2006, which not only addressed the specific questions he raised but provided background information to explain what information is typically created in connection with badger works. After reviewing its response to his request, Transport Scotland accepted that Mr Crole had not been given all the information it held which was covered by his request, and additional information about the costs of the work was provided.
15. I have not found any evidence to suggest that Transport Scotland deliberately withheld any information which was covered by Mr Crole’s request, apart from the badger surveys and related information referred to in Transport Scotland’s letter of 28 June 2006.

Information withheld under regulation 10(5)(g) of the EIRs

16. As noted above, Transport Scotland did not justify its decision to withhold information relating to badger surveys in terms of the exceptions in the EIRs, as required by regulation 13(b) and (c).
17. The Executive has advised my Office that it considers information relating to badger surveys to be excepted from the general requirement that environmental information should be provided on request. The Executive cited regulation 10(5)(g) of the EIRs, which allows information to be withheld where its disclosure would, or would be likely to, prejudice substantially the protection of the environment to which the information relates. The Executive believes that the disclosure of information pertaining to the habitats of badgers is potentially harmful to their safety and wellbeing. This exception is subject to the public interest test in regulation 10(1)(b), so information to which the exception applies can be withheld only if, in all the circumstances, the public interest in making it available is outweighed by that in maintaining the exception.



18. There are therefore three questions for me to consider in relation to the information withheld:
 - does the information withheld meet the definition of “environmental information” laid down in the EIRs?
 - if so, does the exception in regulation 10(5)(g) apply to the information?
 - if so, is the public interest in making the information available outweighed by that in maintaining the exception?
19. I am satisfied that the purpose of the surveys is to record badger activity and other wildlife in the areas surveyed, and that as the surveys relate to “biological diversity and all its components”, the information within them falls within the definition of “environmental information” in regulation 2 of the EIRs.
20. For the exception in regulation 10(5)(g) to apply to the information, the Executive must be able to demonstrate that disclosure would, or would be likely to prejudice substantially the protection of the environment to which the information relates.
21. The Executive presented evidence of incidents of cruelty towards badgers, and argued that disclosure of information about the location of badger setts was potentially harmful to their safety and wellbeing.
22. Against this, Mr Crole has argued that information about the location of setts is otherwise obtainable. He stated that “The location of setts and routes are publicised and rambles organised to view them” and also remarked that the presence of the animals would be apparent to local landowners, from the damage they do.
23. The Executive has advised that Transport Scotland has no information about the publication of the location of badger setts and routes, nor of rambles organised to view them. The information that Transport Scotland holds about badger setts and routes is used in consultation with environmental bodies such as SHN, SEPA and Historic Scotland to determine the works necessary to avoid, protect and mitigate any effects on these environments, as required by European and domestic legislation and in accordance with best practice. If information collected was passed on to members of the public, this could (the Executive argues) potentially endanger many protected species, and leave Transport Scotland open to criticism, if not prosecution. Statutory environmental bodies might also withhold their co-operation.



24. The Executive has pointed out that disclosure of information under the EIRs in effect makes that information available to everyone. The Executive has argued that Transport Scotland is not in a position to determine whether or not an individual can be trusted with information, and nor do the EIRs require or enable them to make such judgements. However, Transport Scotland has a statutory duty towards the protection of species and their habitats, which it takes seriously, and which would lead it to take a precautionary approach towards information which might assist any individual intent on harming the creature.
25. The Executive advised that a badger survey sent to Mr Crole with Transport Scotland's initial response on 24 April 2006 was released in error.
26. I have found that it would not be impossible for someone determined to discover the location of badger setts in a particular area to do so. Obviously it is not possible for physical evidence of badger setts to be kept hidden; however, I accept that there is a difference between the availability of such local, physical evidence and the general availability of recorded information that would result from disclosure under the EIRs.
27. I have been advised that badger walks are generally organised by countryside rangers and the setts which are visited are usually well-monitored, so that the setts are not disturbed.
28. I accept that the measures currently practised by environmental and other bodies to restrict the availability of information about badger setts amount to a degree of protection for their habitat. I accept that disclosure of the information in the badger surveys would diminish the current level of protection for the badgers' habitat.
29. I have concluded that the information requested by Mr Crole would, or would be likely to, prejudice substantially the protection of the environment to which the information relates, and that regulation 10(5)(g) of the EIRs therefore applies.
30. I must go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception and withholding the information.



The public interest test

31. Mr Crole has argued that it is in the interest of the tax payer generally, and those immediately affected by the presence of badgers in particular, for the information to be disclosed. He considers that officials involved in the introduction and administration of the badger legislation are insufficiently concerned with these interests and that disclosure would permit the matter to be brought under review. He believes that the Protection of Badgers Act 1992 is being administered in a slavish, obsessive and extravagant manner.
32. Through his information requests Mr Crole has tried to establish the precise circumstances in which public money has (in his opinion) been carelessly or extravagantly laid out in compliance with the Protection of Badgers Act 1992 and associated legislation. He has found that such outlays are “lost” under general budget headings, and believes it is highly desirable that details of the proposals and costings should be made public and subjected to critical examination. He believes that the Executive is unaware of the total amounts which are being laid out on badger works and questions whether there is any scrutiny or audit applied to the proposals for work which incurs substantial expenditure.
33. The Executive has submitted that the public interest in maintaining the exception in regulation 10(5)(g) of the EIRs outweighs any public interest in making the information available. Its key concern is that disclosure of the information could see it fall into the hands of members of the public intent on harming badgers and their habitats.
34. More generally, the Executive has argued that any diminution of a natural resource is against the public interest, as is demonstrated by the existence of numerous international, government and non-government, public, private and charitable organisations whose policies and actions promote nature conservation and biodiversity. The various European Commission Directives and UK or Scottish legislation giving legal protection to flora, fauna and their habitats are further evidence that the public interest in such matters is considered sufficiently important to be enshrined in law: the Protection of Badgers Act 1992 being one example.
35. I have weighed up the arguments presented to me, as I am required to do by regulation 10(1)(b). Although I accept that there is a general public interest in disclosure of information where this would contribute to ensuring effective oversight of expenditure of public funds, I have not found that the information withheld (the badger survey) contains any such information. Instead, I have found that it contains information which could, if misused, endanger the badgers’ habitat. I accept that to make such information generally available would increase the likelihood that the badgers’ habitat would be endangered.



36. I find that the public interest arguments put forward by the Executive are compelling and outweigh any public interest in disclosure of the information. Accordingly, I find that Transport Scotland was justified in withholding the information under regulation 10(5)(g).

Decision

I find that the Transport Scotland dealt with Mr Crole's request for information in accordance with the Environmental Information (Scotland) Regulations 2004 (EIRs) in that it correctly applied regulation 10(5)(g) of the EIRs to except from release the information Mr Crole had requested.

I find that the terms in which Transport Scotland replied to Mr Crole's request and request for review did not comply with regulation 13(b) and (c).

I do not require the Executive to take any further action as a consequence of this decision.



Appeal

Should either Mr Crole or the Executive wish to appeal against my decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
8 March 2007



Appendix

Relevant Statutory Provisions

Environmental Information (Scotland) Regulations 2004:

2. Interpretation

(1) In these Regulations-

(...)

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(...)

5. Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(...)

10. Exceptions from duty to make environmental information available

(...)

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

(...)

(g) the protection of the environment to which the information relates.



13. Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

(...)

(b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);

(c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;

(...).