Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **10 December 2021**

Public Authority: **Animal and Plant Health Agency**
Department for Environment Food and Rural Affairs

Address: **Woodham Lane**
New Haw
Addleston
Surrey
KT15 3NB

Decision (including any steps ordered)

1. The complainant has requested information relating to badger culling and bovine tuberculosis (bTB).

2. The Animal and Plant Health Agency (APHA) refused to provide the information, citing regulation 12(4)(b) of the EIR (manifestly unreasonable request).

3. The Commissioner's decision is that the request was manifestly unreasonable and that the public interest lies in maintaining the exception and therefore the APHA was entitled to refuse it in accordance with regulation 12(4)(b).

4. The Commissioner does not require the APHA to take any further steps.

Terminology

5. The APHA is not listed as a separate public authority in Schedule 1 of the FOIA because it is an Executive Agency of the Department for Environment Food and Rural Affairs (DEFRA).

6. The Commissioner recognises that the public authority is, ultimately, DEFRA. However, as it has its own FOI unit and as both the complainant and the Commissioner have corresponded with 'the APHA' during the course of the request and complaint, the Commissioner will refer to 'the APHA' for the purposes of this notice.

Request and response

7. On 3 March 2021, the complainant wrote to the APHA and requested information in the following terms:

"1. It has been calculated unofficially that in 2020 approximately 67% of the HRA in England was subjected to badger culling. Please provide confirmation of this estimate.

2. It is therefore estimated that 33% of the England HRA has not been subject to badger culling between 2013 and 2020.

Please provide the data below in both (a) culled, and (b) non-culled areas of the HRA for each of the years 2010-2020.

a. The total number of registered and active herds and of cattle.

b. Numbers of animals slaughtered due to bTB.

c. Numbers of Gamma-Interferon tests carried out. This will inform as to whether cattle measures have been enforced more rigorously in culled than not-culled areas and further information on severe interpretation of SICCT, use of SICT, and other improved measures of disease management on farms would be useful.

d. New herd incidents per 100 herd years at risk of infection

e. New herd incidents with officially TB-free status withdrawn (OTFW) per 100 herd years at risk of infection.

f. Number of herds under disease restrictions as a percentage of registered and active herds"

8. The APHA responded on 26 March 2021. It stated that it was refusing to comply with the request citing regulation 12(4)(b).

9. Following an internal review the APHA wrote to the complainant on 24 April 2021, upholding its original position.

Background information

10. BTB is an infectious respiratory disease which has been described by the British Veterinary Association[1] as '*a devastating chronic disease of cattle and a major challenge facing large parts of the UK cattle farming industry today.'*

11. BTB can be transmitted from badgers to cows and vice versa. It can also be transmitted from cows to humans usually through the consumption of infected cow's milk. However, mandatory testing and slaughtering of infected cattle, the pasteurisation of milk and the BCG vaccine for tuberculosis, means that bTB does not pose a significant risk to human health in society today.

12. In 2015 the government published its strategy for eradicating bTB in Britain by 2038[2]. This strategy outlined the continued need for licensed badger culling to decrease transmission rates in high infection areas.

13. A review[3] into the aforementioned strategy was published in 2020 and outlined the government's intention to cease the licensing of badger culls after 2022 and the possibility of existing cull licenses being cut short after two years, down from five, where supported by scientific research.[4] The review also brought to public attention the government's ongoing work into both cattle and badger vaccinations.

[1] Bovine tuberculosis (bTB) (bva.co.uk)

[2] Bovine TB Eradication Programme for England (rsb.org.uk)

[3] Next steps for the strategy for achieving bovine tuberculosis free status for England (publishing.service.gov.uk)

[4] Next phase of bTB eradication strategy confirmed - Defra in the media (blog.gov.uk)

Scope of the case

14. The complainant contacted the Commissioner on 4 May 2021 to complain about the way that their request for information had been handled.

15. The complainant explained that they possessed evidence that culling badgers is not helping to stop the spread of bTB. The complainant did not provide the Commissioner with any more detail relating to this evidence. The complainant indicated that, if the APHA complied with the request, it would reach the same conclusion and then would be able to concentrate on more effective bTB prevention methods.

16. The Commissioner therefore considers the scope of her investigation to be to determine whether the APHA is entitled to rely upon regulation 12(4)(b) as a basis for refusing to comply with the request.

Reasons for decision

Would the requested information be environmental?

17. Regulation 2(1) of the EIR defines environmental information as information relating to:

'(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;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)…as well as measures or activities designed to protect those elements;'

18. The Commissioner has not seen a copy of the requested information but, as it relates to badger culling and bTB, the Commissioner is satisfied that this information represents '*a measure likely to affect the*

elements and factors referred to in (a)' – namely biological diversity. The Commissioner has therefore assessed this case under the EIR.

19. The EIR contains exceptions from the duty to disclose information but there is a presumption in favour of disclosure. This presumption of disclosure stems from the Aarhus Convention on access to environmental information. The principle behind the Aarhus Convention was to enable citizens to participate in decision making about environmental matters by giving them powerful rights of access to the information used to inform such decision-making.

20. Since the EIR is based upon, and guided by the Aarhus Convention, the Commissioner considers that there is a high burden on all public authorities to demonstrate to the Commissioner why an exception under the EIR has been properly engaged.

Regulation 12(4)(b) – Manifestly Unreasonable

21. Regulation 12(4)(b) of the EIR states:

'A public authority may refuse to disclose information to the extent that –

(b) the request for information is manifestly unreasonable;'

22. The Commissioner considers that a request can be manifestly unreasonable for two reasons: firstly, if the request is vexatious and secondly where compliance with the request would incur an unreasonable burden on the public authority both in terms of costs and the diversion of resources. The APHA has relied on the latter theme of 12(4)(b).

23. Following the lead of the Upper Tribunal in Craven v Information Commissioner & DECC [2012] UKUT 442 (AAC), the Commissioner considers that there is no difference between a request that is vexatious under section 14(1) of the Freedom of Information Act (FOIA) and one which is manifestly unreasonable under the EIR. If a request would be found to be vexatious under section 14, then it will also be manifestly unreasonable and hence 12(4)(b) of the EIR will be engaged.

24. The singular practicable difference is that a public authority must consider the balance of public interest, in order to inform the purpose and value of a request, when refusing a request under the EIR whereas it does not have to do so under the FOIA.

Unreasonable burden

25. Given the high burden required to engage the exception, the Commissioner expects a public authority to provide both a detailed explanation and quantifiable evidence to justify the cost of complying with a request both in monetary terms and resourcing.

26. The EIR do not provide a definition of what constitutes an unreasonable cost. This is in contrast to the FOIA under which a public authority can refuse to comply with a request if it estimates that doing so would exceed the 'appropriate limit'. This appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') as £600 for central government departments and £450 for all other public authorities.

27. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time which equates to 24 hours and 18 hours of work respectively:

    • Determining whether the information is held;

    • Locating the information, or a document which may contain the information;

    • Retrieving the information, or a document which may contain the information; and

    • Extracting the information from a document containing it.

28. Although the Regulations are not directly applicable to the EIR, in the Commissioner's view[5] they can provide a useful point of reference for a public authority that is considering the application of 12(4)(b) of the EIR.

The APHA's position

29. The Commissioner asked the APHA to provide a detailed estimate of the time and cost taken to provide the information falling within the scope of the request.

30. The Commissioner acknowledges that the request is complex, seeking information on various biological diversity issues that affect the English countryside. With this in mind, the Commissioner asked that the APHA

[5] Manifestly unreasonable requests - regulation 12(4)(b) (ico.org.uk)

include a description of the work that would need to be undertaken in relation to any calculations that it provided.

31. The APHA confirmed to the complainant and the Commissioner that compliance with the request would take 46 hours. The APHA has broken this figure down into five stages.

Stage 1 - clarify definitions for year, area, herds and observation periods over which disease status will be measured

32. The APHA has explained that the High Risk Area (HRA) for TB was defined in 2013 and its boundaries have changed over time. Tracking of the herds found within the HRA is a task undertaken by the Department of Epidemiological Sciences (DES). The DES would then use this information to identify whether herds are located in cull areas.

33. Furthermore, the boundaries to cull areas are defined by Natural England and have changed since 2013. Natural England share this information with the APHA for the purposes of monitoring and evaluation.

34. To summarise, changes to the definitions as outlined in the request means that it is not clear, from the offset, if the APHA holds all of the information that the complainant is requesting.

35. Furthermore, the APHA suspects that it may not hold all of this information. This is because the APHA vets collect information about disease management from a proportion of infected herds but not all of them. Furthermore, corresponding information for uninfected herds is not collected.

36. The APHA has also explained that the method for collecting disease management information has changed over time, specifically, the format, content and completeness of information gathered on disease report forms. During the early stages of the bTB eradication programme information was gathered on disease report forms in free text format. The APHA has explained *'Identifying and extracting management information from these forms could have a considerable time requirement.'* The APHA also notes that data is unlikely to be available for all farms for all years due to an unwillingness to engage with the programme or other mitigating factors.

37. The APHA has concluded that it would take 3 hours to determine whether information is held in response to the request.

Stage 2 - Adapt programming code for incidents, prevalence and reactors and implement area and date changes and test

38. The APHA has explained that bespoke programming would be required to search two databases (the APHA TB data management system and the cattle tracing system) in order to extract raw data, create composite variables (e.g. time at risk), conduct quality checks and translate this data into an appropriate format.

39. The APHA has provided in its submission to the Commissioner a detailed technical summary of how it would adapt its current programming code in order to extract the data requested. The Commissioner does not consider it necessary to reproduce this technical summary. However, the APHA has provided a breakdown of the adaptions that it would need to make to its existing code and what results this new programme would yield.

40. The APHA has concluded that it would take 25 hours for the appropriate programmer to adapt the programming code.

Stage 3 - Generate new programming code in relation to Gamma-Interferon tests

41. The APHA has stated that it would have to generate new programming code specifically in order to extract raw data in relation to Gamma-Interferon tests.

42. The APHA has concluded that it would take 10 hours for the appropriate programmer to generate this new programming code.

Stage 4 - Cross-check data outputs

43. The APHA has stated that, having run the new programming code to extract the raw data, it would need to validate the data output.

44. The APHA has concluded that it would take 5 hours for the appropriate programmer to do so.

Stage 5 - Prepare accompanying explanatory text and review

45. The APHA has stated that having cross-checked the data, it would need to prepare an accompanying explanatory text and review the outputs created.

46. The APHA has explained '*A meeting would be held between the TB data programmer and epidemiologist to review the outputs and data dictionary. The epidemiologist would also independently review the outputs to determine whether they are consistent with other data*

routinely reported by APHA. Comprehensive checking of the outputs is required because a new data output is being produced.'

47. The APHA has concluded that it would take 3 hours to do so.

Total compliance time

48. During the course of her investigation, the Commissioner returned to APHA and questioned whether the totals provided for stages 2 and 3 included the run time of the programmes in question. The APHA confirmed that they did not.

49. The APHA has confirmed to the Commissioner that undertaking the work at these 5 stages would take a total of 46 hours.

50. Significantly, the APHA has elaborated that this total figure does not include the work required to address part c of the complainant's request relating to disease management or the categorisation of land as cull or non-cull e.g. by individual cull area or calendar year. The APHA has not gone onto explain to the Commissioner how it would begin to comply with this part of the request.

The Commissioner's view

51. As previously discussed, there is a high burden on public authorities to demonstrate that a request is manifestly unreasonable and the Commissioner agrees with the APHA that compliance with the request would be manifestly unreasonable.

52. However, the Commissioner does not consider this to be a clear cut case and the Commissioner notes that the APHPA's handling of the request and its submission contain some shortcomings.

53. For example, before refusing a request as manifestly unreasonable the Commissioner expects public authorities to provide requestors with appropriate advice and assistance if it considers compliance with a request is manifestly unreasonable. The APHA has explained that the complainant '*was advised the time to produce the information could not be reduced as the same work would have to be undertaken if it was for one year or ten years worth of data.'*

54. The APHA also explained it has *'spent considerable time evaluating whether further comparative analyses could be made between cull areas and other areas of the HRA (similar to those reported in Brunton et al and Downs et al). This way forward was rejected on the basis there was insufficient suitable comparative land within the HRA after 2017*.'

55. Using that logic, the APHA may have wished to return to the complainant to advise them that a similar request with the scope of 2010-2017 would be less burdensome for it to deal with. However, the Commissioner acknowledges that such advice and assistance could only be provided in relation to one aspect of the request.

56. When demonstrating that a request would be burdensome, the Commissioner does not expect a public authority to essentially comply with the request in order to provide a quantifiable estimate relating to compliance. Clearly doing so would defeat the purpose of the exception. However, a public authority may wish to conduct a sampling exercise to determine how long it would take to provide a section of the requested information. The results of this sampling exercise can then be used as a reference point from which to provide a more robust estimate.

57. The APHA has failed to outline the details of any such sampling exercise that it has conducted to the Commissioner. For example, the APHA may have wished to study a sample of the disease report forms referred to within paragraph 35 to determine the time it takes to extract relevant data from the free text. It has not done so.

58. Furthermore, the APHA has failed to highlight to the Commissioner any previous work it, or DEFRA, has undertaken to adapt an existing programme code, or generate a new one. Whilst she has no reason to doubt the figures provided in paragraphs 39 and 42, the Commissioner has no idea where they have come from.

59. The Commissioner expects a public authority to present satisfactory evidence in support of its calculations of estimates for complying with the request. Whilst the APHA has outlined the time it expects each of the above stages to take, it has failed to provide quantifiable evidence of the burden that each of these processes would impose. A sampling exercise conducted, or examples of previous work undertaken, for any of these stages would have strengthened the APHA's submission.

60. As discussed in paragraph 27, the regulations are a useful guide only and are not determinative in any way when it comes to considering requests under the EIR. Public authorities may be required to accept a greater burden in providing environmental information than other information.

61. Furthermore, the regulations outline what activities a public authority may charge for, including: determining whether the information is held; locating the information; retrieving the information, and extracting the information.

62. The Commissioner acknowledges that the APHA may wish, if it were to comply with the request, to cross-check the data outputs and prepare an accompanying explanatory text. However, the legislation does not require the APHA to carry out such tasks and therefore the time required cannot be used to justify the APHA's position that compliance with the request would create an unreasonable burden. The Commissioner has therefore removed eight hours from the estimated compliance time which is now 38 hours.

63. Ultimately, the FOIA and EIR are mechanisms which apply to information held by public authorities, regardless of its accuracy. The APHA has explained to the Commissioner that it intends *'to publish a report on GOV.UK on TB in the cull areas licenced and culled up to 2019 later this year. TB data in areas licenced up to 2020 and culled in autumn 2020 will not be compiled, checked and analysed until 2022*.'

64. With the above in mind, were the APHA to comply with the request it may wish to publish a supplementary statement, explaining the reasons for any limitations in the raw data published as a result of the request. The APHA would also easily be able to publish corrected data once it becomes available.

65. The Commissioner's guidance states '*In assessing whether the cost or burden of dealing with a request is "too great", public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable*.'

66. As part of this consideration, a public authority should take into account: the nature of the request and the context in which it was made; any wider value in the requested information being made publicly available; the importance of any underlying issue to which the request relates and the extent to which responding to the request would illuminate that issue and the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services.

67. The purpose of the request is the complainant's concern that the culling of badgers is not helping to control the spread of bTB. The complainant believes that the APHA should be pursuing more effective routes of disease management for the benefit of both farmers and consumers.

68. Badger culling to mitigate the spread of bTB is a controversial issue which arouses strong emotions on both sides. Whilst badger culling is legal under license, within the boundaries outlined by the HRA, there are those who, like the complainant, dispute the correlation between the prevalence of bTB and badgers and believe that the governments approach to bTB should '*focus more on cattle and less on badgers*.'

69. It is not the role of the Commissioner to have an opinion on the government's bTB strategy or to verify the claims made by either party. It is solely the Commissioner's task to determine whether the request is manifestly unreasonable and, in doing so, the Commissioner recognises that the more controversial and emotive an issue, the more likely any request for information made will hold value or serious purpose.

70. The APHA must offset the burden that compliance would cause with the wider value in the requested information being made publicly available, the importance of any underlying issue to which the request relates and the extent to which responding to the request would illuminate that issue.

71. Even though the APHA's submission is lacking in areas, the Commissioner cannot ignore the fact that compliance with the request begins at 38 hours, keeping in mind that this does not include addressing part c of the request.

72. The Commissioner is therefore satisfied that complying with this request would impose a manifestly unreasonable burden on the APHA and thus Regulation 12(4)(b) of the EIR is engaged. She has therefore gone onto consider where the public interest lies.

The Public Interest Test

Public interest arguments in favour of disclosure

73. In its internal review outcome the APHA explained to the complainant, *'To assist you with your request, our response advised some of the data could be found from currently published documents*[6] *possibly enabling you to make an approximate assessment of the change in TB prevalence in cattle herds in culled and un-culled areas of the HRA.'* If refusing such a request, the public authority must be certain that information that is already in the public domain satisfies the interest surrounding the issue.

74. The APHA has explained to the Commissioner that it considers these two documents already available cover the public interest. However, the monitoring report states *'The report shows changes over time in TB in cattle in areas subject to badger control but these data alone cannot*

[6] https://www.gov.uk/government/publications/bovine-tb-epidemiology-and-surveillance-in-great-britain-2019; Bovine TB in cattle: badger control areas monitoring report 2019 (publishing.service.gov.uk)

demonstrate whether the badger control policy is effective in reducing bovine TB in cattle.' The Commissioner notes that scrutinising the efficiency of the badger control policy is the purpose of the complainant's request, especially given the government's recent announcement that badger culling is to remain a viable method of bTB control for the immediate future. The Commissioner notes that this interest is not exclusive to the complainant.

Public interest arguments in maintaining the exception

75. The APHA has stated '*The profile of activity which APHA epidemiologists in TB undertake is subject to frequent priority assessment and re-assessment. The request requires the resources of a small specialist project team responsible for monitoring the effects from cull within APHA. Addressing this request would divert the team from other work.'*

76. The Commissioner considers the public interest in protecting public authorities especially strong where that burden will divert such a small team's resources to an unreasonable extent. The Commissioner is reminded of the APHA's role in monitoring the effects of badger culling and tackling bTB.

Balancing the public interest arguments

77. The public interest in disclosure is undoubtedly strong and this is strengthened by the presumption in favour of disclosure that is found in regulation 12(2) of the EIR.

78. However, returning to the APHA's concerns that the data compiled in relation to the request would not be accurate, the public interest in disclosing inconsistent data sets is significantly less than in disclosing data which the APHA has verified and cross-referenced.

79. Furthermore, the APHA has indicated statistics on bTB in license cull areas up to 2020 will be disclosed in 2022. The Commissioner must consider if, in the meantime, the public interest lies in diverting the APHA's resources, limited as they are, to comply with the request.

80. In this instance the Commissioner has decided that there is an even stronger public interest in protecting the public authority from requests whereby compliance would result in a manifestly unreasonable burden. The public interest lies in maintaining the exemption.

Right of appeal

81. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    LEICESTER,
    LE1 8DJ

    Tel: 0203 936 8963
    Fax: 0870 739 5836
    Email: grc@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

82. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

83. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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