

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 22 July 2019

Public Authority: Animal and Plant Health Agency (APHA)

Address: Weybourne Building
Ground Floor
Woodham Lane
New Haw
Addlestone
Surrey
KT15 3NB

Decision (including any steps ordered)

1. The complainant made a request relating to TB testing results. APHA refused to comply with the request under section 14(1) FOIA as it considered the request to be vexatious.
2. The Commissioner considers that APHA incorrectly dealt with the request under FOIA. However the Commissioner does consider that the request can be categorised as vexatious under regulation 12(4)(b) EIR.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 22 November 2018 the complainant requested information of the following description:

"TB results with and without moved-in cattle for 2015 and 2016

Dear Sir / Madam,

Please provide me with the quantities shown on Page 2 under the conditions shown on Page 3.

I understand from Page 4 that this will incur a total delivery time of 23 hours."

5. On 19 December 2018 APHA responded, it refused to comply with the request under section 14 FOIA as it considers it to be vexatious.
6. The complainant requested an internal review on 17 January 2019. APHA sent the outcome of its internal review on 25 March 2019. It upheld its original position.

Background

7. This request follows a previous similar request made by the complainant to APHA on 5 September 2017. The Commissioner issued a Decision Notice in relation to this request under FS50713711¹ which upheld APHA's application of section 12 FOIA as it would exceed the cost limit to comply with the request. The complainant appealed this Decision Notice to the First Tier Tribunal (EA/2018/0063). The First Tier Tribunal dismissed the appeal.
8. The complainant made the request on 22 November 2018, in an attempt to refine the previous request made on 5 September 2017 to fall within the cost limit.

Scope of the case

9. The complainant contacted the Commissioner on 20 March 2019 to complain about the way his request for information had been handled. He does not accept that his request is vexatious and also questioned whether APHA has dealt with his request under the appropriate access regime.
10. The Commissioner has considered whether the APHA dealt with the request under the appropriate access regime and whether it was correct to refuse to comply with the request by virtue of it being vexatious.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2258578/fs50713711.pdf>

Reasons for decision

Access Regime

11. As part of her investigation the Commissioner asked APHA to consider whether it had dealt with the complainant's request under the appropriate access regime.
12. APHA considers that this request has been properly dealt with under the FOIA. This is because the information requested relates to cattle, which is a farmed commodity. It does not consider that the requested information fits into the definition of 'environmental information' as set out in regulation 2 EIR. It also noted that this has not been raised as an issue during previous involvement by the ICO in FS50713711 which related to a similar request nor the resulting First tier Tribunal.
13. Regulation 2(f) EIR states that environmental information includes any information on "the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);"
14. The requested information relates to a programme run by Defra (APHA's sponsoring government agency) which aims to reduce and ultimately eradicate bovine TB and one part of this is the ongoing testing of herds for bovine TB. Defra has stated that the risk to human health from bovine TB is very low due to milk pasteurisation and the early identification of cattle with TB on farms and in abattoirs.
15. Whilst the risk to human health and contamination of the food chain is low, the programme is clearly in place to reduce and ultimately eradicate this risk and so information relating to TB testing under this initiative is information on human health and potential contamination of the food chain.
16. The Commissioner has therefore considered this request under EIR rather than FOIA.
17. However she would note that given the nature of section 14 (and section 12 in relation to the previous request), there is a corresponding exception under EIR. This is regulation 12(4)(b), where a request is deemed to be manifestly unreasonable either by virtue of costs or because the request is deemed to be vexatious. Therefore whether this or the previous request had been dealt with under FOIA or EIR, the outcome would be the same.

Regulation 12(4)(b) – manifestly unreasonable

18. There is no definition of 'manifestly unreasonable' under the EIR. The Commissioner considers that 'manifestly' implies that the request should 'obviously' or 'clearly' be unreasonable.
19. A request can be manifestly unreasonable for two reasons: Firstly where it is vexatious and secondly where the public authority would incur unreasonable costs or where there would be an unreasonable diversion of resources.
20. In this case, as APHA had applied section 14 FOIA, the Commissioner has considered whether the request is manifestly unreasonable by virtue of it being vexatious under EIR.
21. The term 'vexatious' is not defined in the FOIA but the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance² and, in short, they include:
 - Abusive or aggressive language;
 - Burden on the authority – the guidance allows for public authorities to claim redaction as part of the burden;
 - Personal grudges;
 - Unreasonable persistence;
 - Unfounded accusations;
 - Intransigence;
 - Frequent or overlapping requests;
 - Deliberate intention to cause annoyance.
22. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
23. The Commissioner's guidance goes on to suggest that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or

² <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

- unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
24. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
 25. The Commissioner first questioned whether this request could be classified as vexatious as it appears that the complainant made it in an attempt to refine an earlier request to fall within the cost limit following advice and assistance provided by APHA.
 26. APHA explained that the refined request simply reduces the number of years. APHA said that this does not follow the advice and assistance it provided. It said that its advice at that time was to use only one of the three 'quantities' of the request. It confirmed that it had not advised that reducing the number of years would reduce the cost of complying with the request.
 27. It considers that this current request is an attempt by the complainant to cause irritation to APHA to re-open a case which has already been considered by the First Tier Tribunal.
 28. The Commissioner acknowledges that the new request does not appear to follow the advice and assistance provided by APHA. This does not in itself make the request vexatious, as whilst the new request did not follow the advice and assistance, the fact the years are reduced demonstrates that the complainant may have been attempting to make a refined request falling within the cost limit.
 29. APHA went on that it had already spent a considerable amount of time responding to the previous request (FS50713711) and the following appeal to the First Tier Tribunal.
 30. Including this request and the request relevant to FS50713711, since 2012 APHA has dealt with 32 information requests from the complainant relating to TB. APHA has said that it has spent 468 working days responding to these requests since 2012. APHA has disclosed a significant amount of information as a result of these requests. However 5 of these requests resulted in internal reviews, 5 resulted in complaints to the Commissioner and 2 resulted in appeals to the First Tier Tribunal. This has taken additional time to address over and above the 468 working days indicated.
 31. As the majority of these requests were for TB related statistical data, due to the amount of requests made by the complainant on this topic, APHA said that he is aware that the information has to be extracted

from databases designed for APHA business with its customers. The complainant has been advised in more than one of APHA's responses, that his TB related statistical requests often cover an enormous amount of information and that gathering it involves a significant cost and diversion of resources from APHA's other work. In spite of this APHA considers it has made every effort to assist.

32. APHA said that this particular request and the others referred to are causing distress to APHA staff. On receipt of requests from the complainant the Access to Information team are already aware that requests related to TB statistics is usually only to be interpreted and understood by the Data Scientists. This is shown in the previous request (EA/2018/0063) in which Judge Angus Hamilton DJ (MC) quotes;

"I found the Appellant's submissions at some points to be of a highly technical nature. They run to many, many pages of dense text and rely on concepts that a person qualified in data analytics would doubtless fully understand. Whilst [complainant] is fully entitled to expected a Tribunal well-versed in FOIA to consider his appeal it is not really reasonable of him to expect that Tribunal to be well acquainted with the finer details of data analytics and the necessary accompanying hardware and software".

33. APHA said that the complainant's requests have been complex, involved a high level of data extraction and manipulation, and usually resulted in a significant time allowance to fulfil.
34. When the requests are forwarded on to the Data Scientists they have to stop their regular work and spend extra time interpreting and discussing whether or not the requests can be met. The complexity of the data required determines how long this process takes. This potentially causes stress, in that their regular work is halted whilst they are distracted with the details of the requests and causes an additional burden in time being spent in catching up and meeting deadlines of other work.
35. APHA considers TB related requests from the complainant to be a burden by causing a disproportionate and unreasonable burden on APHA resources and disrupting its ability to carry out its daily roles.
36. The Commissioner does not consider that this most recent refined request is evidence that the complainant deliberately intended to cause annoyance. It is not unreasonable to submit a refined request following the application of section 12 FOIA in an attempt to fall within the cost limit and therefore it does have some purpose or value.

37. However due to the number of requests submitted by the complainant relating to this subject matter since 2012 and the very technical nature of the data requested which increases the burden of complying with the requests, the Commissioner is satisfied that this does demonstrate a high frequency of requests which by their nature puts a significant burden upon the public authority. APHA has responded to many of the previous requests providing information despite the burden this has posed. However it has now come to a point at which it is unable to sustain this level of disruption for the reasons outlined at paragraphs 33 and 34 above).
38. The Commissioner is satisfied that the complainant's current request is vexatious. The Commissioner is therefore satisfied that the request can be correctly categorised as manifestly unreasonable under regulation 12(4)(b) EIR.

Public interest test

39. APHA confirmed it is aware the subject of TB is of interest to the general population which is why it and Defra publish a variety of TB related information on GOV.UK It also publishes specific information such as Bovine TB in Cattle: Badger Control Areas Monitoring. It also provides information on Scientific Publications listed on GOV.UK, which cover the subject of TB.
40. It argued that requests related to TB statistics is usually only to be interpreted and understood by the Data Scientists, which is evidence that if it were to respond it is unlikely to be of use and understood by the general public.
41. The Commissioner considers that there is a strong public interest in not posing an unjustifiable burden upon APHA's resources. Whilst there is a public interest in information relating to TB, APHA already publishes a variety of information on this subject. The Commissioner considers that the public interest in disclosure is outweighed by the public interest in maintaining the exception in this case.

Right of appeal

42. 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: 0300 1234504
Fax: 0870 739 5836
Email: grc@Justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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.....

Gemma Garvey
Senior Case Officer

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