

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 01 November 2019

Public Authority: Animal and Plant Health Agency
Address: Woodham Lane
Addlestone
Surrey
KT15 3NB

Decision (including any steps ordered)

1. The complainant requested raw data from the Animal and Plant Health Agency (APHA), an executive agency sponsored by the Department for Environment, Food and Rural Affairs and the Welsh Government, relating to trap-side testing carried out on badgers suspected of carrying the bovine tuberculosis virus. APHA withheld the information under regulation 12(4)(d) of the EIR – materials in the course of completion, unfinished documents and incomplete data. APHA also stated that no information was held in relation part 8 of the request, as defined in this notice.
2. The Commissioner's decision is that the exception at regulation 12(4)(d) is not engaged. With regard to question 8, having reconsidered this, the Commissioner is satisfied that it was not a request for recorded information as defined in regulation 2(1) of the EIR.
3. The Commissioner requires APHA to take the following step to ensure compliance with the legislation.
 - Disclose the information requested in parts 2, 3, and 4 of the request, as set out in this notice, to the complainant.
4. APHA must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background to the request

5. On 12 November 2018, the complainant had made a request to the Welsh Government (WG). The WG had responded on 28 November 2018 and provided her with some information. It also explained that some of the requested information was not held by the WG, but was likely to be held by APHA.
6. The complainant had asked the WG to pass her request on directly to APHA if relevant; however, she received no further response.
7. On 6 December 2018, the complainant submitted the relevant parts of the request directly to APHA. She stated that she wished APHA to acknowledge receipt of her request, to confirm that it held the information requested in "Questions 2, 4, 5 and 8" (referring to her request to the WG) and to confirm that it was in the process of providing a response.

Request and response

8. On 10 December 2018, APHA asked the complainant for clarification of the request. It wished to check whether, since the WG had responded to question 5, the complainant could confirm that she had meant to state questions 2, 3, 4 and 8.
9. On 10 December 2018 the complainant confirmed that she wished APHA to respond to questions 2, 3, 4 and 8.
10. The clarified request of 10 December 2018 can therefore be set out as follows (questions numbered as per the original request to the WG):

"Please let me have all raw data/other information that is currently available even if it is intended to incorporate it into any overall report/assessment, and whether or not it is intended to publish any such overall report/assessment in the future... All questions relate to operations carried out as part of the WG's current bTB reduction policy.

2) During those operations in 2018

How many badgers have been trapped and tested (for the first time) altogether during 2018 (to date) on all of the farms?

How many of these were euthanized as the result of a positive result on the trapside test?

How many of these were later found to be a) confirmed as positive by all further postmortem testing in the lab? b) confirmed as positive by some tests only c) not confirmed as positive by any PM testing?

3) *Also during these operations in 2018*

How many badgers which were microchipped and released during earlier operations (in 2017 or 2018), but later found positive on blood tests in the lab, were recaptured and then euthanized?

Of these, how many were confirmed as positive at PM?

How many tested negative/were not confirmed positive at PM?

4) *How many badgers which had tested negative at trapside (either in 2017 or 2018), microchipped and then released but later found positive on blood tests in the lab, have not been recaptured?*

8) *In the same Committee meeting¹, [the Chief Veterinary Officer] also stated that she 'had had sight of' a report on the efficacy/ performance of the DPP trapside test. She said this was an 'independent report' but did not give any details and said that she did not know when the report would be published/available, though she expected it to be 'soon'. Please confirm that the CVO/TB team are aware of the findings of this report. Have members of the CCERA Committee also been informed of the findings of the report? Also please tell me how that report can be publicly accessed. If it is not publicly available, please explain why, and when its conclusions in relation to overall efficacy of the DPP trapside test will be made available for public scrutiny".*

11. APHA responded on 11 January 2019. It had interpreted the request as asking for a "report" with regard to questions 2 – 4 and stated that this was exempt under section 22 of the FOIA – information intended for future publication. With regard to question 8, it stated that it did not know which report was being referred to.

12. The complainant requested an internal review on 19 January 2019. With regard to questions 2, 3 and 4, she commented that she had requested "raw data" and not a report. With regard to question 8, she stated that the Chief Veterinary Officer ("CVO") and the WG bovine TB team were

¹ This refers to a meeting of the CCERA (Climate Change, Environment and Rural Affairs) Committee in July 2018.

apparently aware of the report she was referring to. She also stated that she considered the information was environmental, and the application of section 22 of the FOIA was therefore inappropriate since the request should be handled under the EIR.

13. APHA provided the outcome of its internal review on 11 March 2019. It had considered the request under the EIR. It provided a link to a report which it considered was relevant to questions 2, 3 and 4. However, it stated that the raw data requested (questions 2, 3 and 4) was exempt from disclosure under regulation 12(4)(d) – material in the course of completion. With regard to question 8, it provided a link to a report which contained information about the Dual Path Platform (“DPP”) Test Validation.

Scope of the case

14. The complainant contacted the Commissioner on 14 April 2019 to complain about the way her request for information had been handled.
15. The following analysis considers whether APHA correctly withheld information falling within the scope of questions 2, 3 and 4 under the exception at regulation 12(4)(d) of the EIR. It also considers APHA’s handling of part 8 of the request.

Reasons for decision

Regulation 2(1) – is the information environmental?

16. Regulation 2(1) of the EIR provides the following definition of environmental information:

“...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;

(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) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) 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)".

17. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
18. The Commissioner has produced guidance² to assist public authorities and applicants in identifying environmental information. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
19. The Commissioner notes that the withheld information comprises data, presented in Microsoft Excel format, which provides details of badgers trapped and tested during 2018, together with any further outcome.
20. The Commissioner has considered the information in light of the definition at regulation 2(1). She is satisfied that the information relates

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https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

to measures affecting, or likely to affect, the elements and factors of the environment. She agrees that it is information "on" these measures. The information therefore falls within the definition of environmental information at regulation 2(1)(c) of the EIR, and the Commissioner is satisfied that APHA considered the request under the correct access regime.

Regulation 12(4)(d) - material which is still in the course of completion, unfinished documents or incomplete data

21. Regulation 12(4)(d) states that a public authority may refuse to disclose information to the extent that the request relates to:
 - material which is still in the course of completion;
 - unfinished documents; or
 - incomplete data.
22. The exception is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception.
23. If engaged, regulation 12(4)(d) is a qualified exception, so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
24. The exception sets out three distinct categories, or limbs, and the information must fall within one of these for the exception to be engaged.
25. In this case, APHA stated in its response to the Commissioner: "*the request relates to material which at the time was still in the course of completion, and included both unfinished documents (the report) and incomplete data (the results)*". APHA therefore referred to all three limbs of the exception.
26. The Commissioner notes that the relevant parts of the request; that is, parts 2 – 4, refer to "*all raw data/other information that is currently available even if it is intended to incorporate it into any overall report/assessment, and whether or not it is intended to publish any such overall report/assessment in the future*" and she has taken this into account in her investigation.

27. The Commissioner considers that the request specifically makes clear that the complainant is seeking data whether or not it was to be used in any forthcoming report. In her view, the wording of the request requires her to draw a distinction between the intended report and the raw data itself. She therefore disagrees that the complainant's request "*included unfinished documents (the report)*".
28. She has therefore focused on the arguments which APHA has provided which relate to the raw data itself. APHA has argued that the spreadsheet comprises material in the course of completion (limb 1 of the exception) and incomplete data (limb 3).

Is the information material in the course of completion?

29. With regard to limb 1, APHA has explained that, at the date of the request, it was in the process of preparing a report for the WG, which has since been published³ ("the report"). It explained: "*the data was not a formal record but part of the ongoing process of preparing the report*".
30. The Commissioner has considered whether the withheld information comprises material in the course of completion. The ICO's published guidance on this exception⁴ explains that, in some cases, information which is being gathered in the process of a public authority formulating its policy, or deciding how to proceed in relation to a particular matter, can be said to form part of that overall, larger, "end product" which is in itself still in the course of completion. APHA considers that the spreadsheet is part of a larger project – the report – and is therefore material in the course of completion.
31. Issues relevant to this case were considered by the Upper-tier Tribunal (Information Rights) ("the UT") in *Highways England v IC and Henry Manisty* (2018) GIA/1589/2018⁵ ("Manisty"). The UT stated that the exception may apply where the requested information *relates to* material in the course of completion, as well as where the request is, in itself, *for* material in the course of completion. In doing so, the UT

³ <https://gov.wales/sites/default/files/publications/2019-07/bovine-tb-badger-trapping-and-testing-on-chronic-tb-breakdown-farms-2018.pdf>

⁴ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

⁵ https://assets.publishing.service.gov.uk/media/5c7fad1640f0b6332c6c6851/GIA_1589_2018-01.pdf

emphasised that any relevant incomplete project or larger piece of work must in itself be "material".

32. In this case, the Commissioner is satisfied that the upcoming *report* was material in the course of completion at the date of the request. However, the request was for the raw data, and the complainant was at pains to make clear from the wording of the request that she was interested in the data itself regardless of any larger report which may have been being prepared.
33. The UT concluded that, while the exception may still apply where the requested information *relates to* material in the course of completion, rather than only being *for* information which is in itself in the course of completion, the EIR require a judgment to be made. This judgment involves consideration of whether the requested information can be considered as separate from any continuing work.
34. In *Manisty*, the requester had requested route maps, which, the public authority argued, related to wider material in the course of completion; specifically, work relating to the expressway between Oxford and Cambridge. However, the UT in *Manisty* upheld the decision of the First-tier Tribunal, which had stated: "*In our view it would be artificial to regard the request as relating to any wider or other policy questions concerning the Report or the study more generally*".
35. The Commissioner considers that a similar judgment can be made in this case. In her view, the spreadsheet which presents the raw data held at the date of the request can be considered discretely.
36. In reaching this view, she is also mindful of her guidance on the exception, referenced previously, which was acknowledged by the UT. In her guidance, the Commissioner explains that "*the fact that a public authority has not completed a particular project or other piece of work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception*".
37. The guidance also suggests that this limb of the exception relates to a public authority's need for a thinking space for policy development, in line with the wording of the original proposal for EU Directive 2003/4/EC on public access to environmental information, which the EIR implement.
38. In this case, the information comprises a statistical record of trap-testing data. The Commissioner notes that the request, which defined the requested information precisely, recognised that some data may subsequently be presented in a report.

39. She is satisfied in this case that the spreadsheet should not be considered more widely as “material in the course of completion” and that it does not fall within the scope of the first limb of this exception.

Is the information incomplete data?

40. With regard to limb 3 (incomplete data), APHA has explained that it was “*still working*” on the data at the date of the request. It states that the information was “*still in the course of analysis, completion and discussion*”.
41. APHA’s responses to the Commissioner also state some further data was added to the spreadsheet prior to the report being published, although it is unclear as to the date when this happened.
42. However, the Commissioner considers that her guidance, referenced previously, is clear on this point. It states that:
- “If a public authority has collected raw data and is using it as part of ongoing research, that data is not incomplete, even though the data may later be published in a more meaningful form. Where data is collected on a regular basis, it is not incomplete simply because the data collection is ongoing.”*
43. The guidance reflects the *Implementation Guide for the Convention (2nd edition 2014)* (“the Guide”)⁶, which provides guidance on the implementation and interpretation of EU Directive 2003/4/EC, which the EIR implement, as previously stated. It summarises the relevant provisions on access to environmental information from page 78. Referring to what has now been implemented in the UK as regulation 12(4)(b) of the EIR, the Guide states (page 85) that “*a request for access to raw environmental data cannot be refused on the grounds that it is ‘material in the course of completion’ to be made publicly available only after processing or correction factors have been applied*”.
44. The Commissioner considers that APHA has not provided arguments which would be sufficient to refute the presumption in favour of disclosure inherent in the EIR and to engage the exception, as to why the information should be regarded as “incomplete”.

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https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

45. While the data in this case was used subsequently in a report, the Commissioner is satisfied in this case that the withheld information does not in itself comprise "incomplete data" for the purposes of regulation 12(4)(d).

Regulation 12(4)(d) - the Commissioner's decision

46. The Commissioner has determined that the exception at regulation 12(4)(d) of the EIR is not engaged. She has not, therefore, been required to consider the public interest test.

47. She therefore orders APHA to disclose the withheld information.

Regulation 5(1) – duty to make available environmental information on request

48. Regulation 5(1) of the EIR states that:

"a public authority that holds environmental information shall make it available on request".

49. As set out previously, "environmental information" is defined in regulation 2(1) of the EIR, in line with the EU Directive 2003/4/EC on public access to environmental information, which the EIR implement. It is defined as:

"any information in written, visual, aural, electronic or any other material form".

50. From this definition, it is clear that the EIR provide access to information that exists in recorded form. The Commissioner has considered the wording of part 8 of the request.

51. In part 8, the complainant referred to a report which she understood the CVO had had sight of. The relevant part of the request (originally addressed to the WG) states: *"Please confirm that the CVO/TB team are aware of the findings of this report. Have members of the CCERA Committee also been informed of the findings of the report? Also please tell me how that report can be publicly accessed. If it is not publicly available, please explain why, and when its conclusions in relation to overall efficacy of the DPP trampoline test will be made available for public scrutiny".*

52. Having reviewed the wording of part 8, the Commissioner considers that the complainant was making an enquiry to APHA rather than asking for recorded information.

53. She has therefore determined that APHA was not required to respond to this enquiry under the EIR, and does not require any further steps to be taken in respect of this.

Right of appeal

54. 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

55. 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.
56. 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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