

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 September 2019

Public Authority: Public Health England
Address: Wellington House
133-155 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. The complainant has requested information relating to the London Food, Water and Environmental Microbiology Laboratory (LFWE), which is part of Public Health England (PHE).
2. In response, PHE has explained that it holds some, but not all, of the information falling within the scope of the request. PHE has provided some of the information it holds. However, it has withheld some of the requested information under section 31 of the FOIA. The complainant is concerned about PHE's reliance on section 31 of the FOIA to withhold some of the requested information.
3. The Commissioner's decision is that the withheld information does engage the exemption under section 31(1)(c), and that the public interest favours maintaining the exemption.
4. The Commissioner does not require any further steps to be taken as a result of this decision notice.

Request and response

5. On 13 June 2018, the complainant wrote to PHE and requested information in the following terms:

"Please treat this as an application for information in accordance with sections 1 and 8 of the Freedom of Information Act 2000 (FOIA)."

- 1) *Provide the UKAS schedule of accreditation for London Food, Water and Environmental Microbiology Laboratory (LFWE) covering the period from 1 April 2014 to 31 August 2014;*
- 2) *Provide the Clinical Pathology Accreditation for LFWE from 1 April 2014 to 31 August 2014;*
- 3) *Provide the MHRA site number for LFWE covering the period 1 April 2014 to 31 August 2014;*
- 4) *Provide the MHRA Good Manufacturing Practice certificate for LFWE from 1 April 2014 to 31 August 2014;*
- 5) *Provide the instructions to LFWE operators in force from 1 April 2014 to 31 August in respect of bioburden testing of GMP manufactured parenteral products made under the auspices of a MHRA licence, whether in the form of an SOP or any other form;*
- 6) *Provide the LFWE environmental monitoring results from 1 April 2014 to 31 August 2014 for the area/s in which the bioburden testing took place pursuant to the instructions in (5) above;*
- 7) *From 1 April 2014 to 31 August 2014, when LFWE undertook a bioburden test on a pharmaceutically produced sterile parenteral product or products made under the auspices of a MHRA licence, did it comply with European Pharmacopoeia 2.6.1?*
- 8) *From 1 April 2014 to 31 August 2014 when LFWE undertook a bioburden test on a pharmaceutically produced sterile parenteral product or products made under the auspices of a MHRA licence, did it comply with ICH Q4B Annex 8R1 Sterility Test?*
- 9) *Provide the instructions to LFWE operators in force from 1 April 2014 to 31 August 2014 in respect of testing lipids for Bacillus cereus, whether in the form of an SOP or any other form;*
- 10) *Provide the instructions to LFWE operators in force from 1 April 2014 to 31 August 2014 in respect of testing environmental swabs for Bacillus cereus whether in the form of an SOP or any other form;*
- 11) *Provide the instructions to operators from 1 April 2014 to 31 August 2014 in respect of transfer of cultures from LFWE to GBRU, whether in the form of an SOP or any other item;*
- 12) *Provide the SOP or any instructions or guidance on the collection, storage and preservation of cultures, in force from 1 April 2014 to 31 August 2014;*

- 13) *Confirm that LFWE is licensed by the MHRA to undertake Sterility testing for the period 1 April 2014 to 31 August 2014;*
 - 14) *Confirm that LFWE was licensed by the MHRA to undertake bioburden testing for the period 1 April 2014 to 31 August 2014;*
 - 15) *Provide a copy of MHRA's audit of LFWE for the period 1 April 2014 to 31 August 2014."*
6. PHE responded on 11 July 2018. It confirmed that it held some of the information requested, and provided the following responses for each part of the request –
- 1) *"A copy of the UKAS schedule of accreditation to ISO 17025/2005 is provided for the period from 1 April 2014 to 31 August 2014 as **Attachments 1 and 2.***
 - 2) *The laboratory does not hold Clinical Pathology Accreditation.*
 - 3) *The laboratory is not a MHRA site and so no MHRA site number can be provided.*
 - 4) *The laboratory does not hold a MHRA Good Manufacturing Practice certificate.*
 - 5) *A copy of the appropriate instructions used in respect of bioburden testing of GMP manufactured parenteral products received into the laboratory from 1 April 2014 to 31 August 2014 are provided as **Attachments 3 and 4.***
 - *The filter membrane was removed from the filter funnel using sterile forceps onto Columbia blood agar plates.*
 - 6) *Provide the LFWE environmental monitoring results from 1 April 2014 to 31 August 2014 for the area/s in which the bioburden testing took place pursuant to the instructions in (5)above;*
 - 7) *From 1 April 2014 to 31 August 2014, when LFWE undertook a bioburden test on a pharmaceutically produced sterile parenteral product or products made under the auspices of a MHRA licence, did it comply with European Pharmacopoeia 2.6.1?*
 - 8) *From 1 April 2014 to 31 August 2014 when LFWE undertook a bioburden test on a pharmaceutically produced sterile parenteral product or products made under the auspices of a MHRA licence, did it comply with ICH Q4B Annex 8R1 Sterility Test*

The information you have requested for questions 6-8 are exempt from disclosure as there is an ongoing criminal investigation. Accordingly, under the Section 31 (2)(c) – law enforcement, exemption, the information you have requested is exempt from disclosure. We will not be able to disclose the information you have requested until the criminal matter is resolved or we are directed to provide material by the court. Premature disclosure of the information could prejudice the legal proceedings.

- 9) *A copy of the appropriate instructions to operators used in respect of the transfer of cultures to GBRU from 1 April 2014 to 31 August 2014 are provided as **Attachment 5**.*
 - 10) *A copy of the appropriate instructions to operators used in respect of the collection, storage and preservation of cultures in force from 1 April 2014 to 31 August 2014 are provided as **Attachment 6**.*
 - 11) *The LFWE is not licensed by the MHRA for any of its activities.*
 - 12) *The LFWE is not licensed by the MHRA for any of its activities.*
 - 13) *As the LFWE is not licensed by the MHRA for any of its activities, no audits have been undertaken by the MHRA."*
7. On 19 July 2018, the complainant responded to PHE advising that one of the Standard Operating Procedure's (SOP's) it had sent him had expired and requested the SOP that superseded the one he had been sent. The complainant also advised PHE that the SOP's it had provided related to filtration of water samples, and requested the SOP's in relation to the filtration of lipids. The complainant also asked PHE to review its position in relation to its reliance on section 31 to withhold the information requested in parts 6, 7 and 8 of the information request.
 8. The Commissioner understands that PHE responded to the complainant on 7 August 2018. However, she has not been provided with a copy of this correspondence.
 9. On 9 August 2018, the complainant wrote to PHE requesting an internal review of its decision to rely on section 31(2)(c) to withhold the information requested in parts 6, 7 and 8 of the information request.
 10. Following an internal review PHE wrote to the complainant on 30 August 2018, maintaining its original position.

Scope of the case

11. The complainant contacted the Commissioner on 17 September 2018 to complain about the way his request for information had been handled.
12. The complainant is of the view that "*PHE has failed to establish that –*
 - 1) *There is a plausible causal link between the disclosure of the information in question and the argued prejudice; and*
 - 2) *there is a real possibility that the circumstances giving rise to prejudice would occur, i.e. the causal link must not be purely hypothetical; and*
 - 3) *the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote.*"
13. During the course of the Commissioner's investigation, PHE clarified that it was relying on section 31(1)(b) and (c) of the FOIA.
14. The Commissioner has therefore considered whether PHE was entitled to rely on section 31(1)(b) and (c) of the FOIA to refuse to provide the information requested in parts 6, 7 and 8 of the information request.

Reasons for decision

Section 31 – law enforcement

15. Section 31 of the FOIA provides a prejudice-based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. Firstly, in order for the exemption to be engaged, disclosure of the requested information would need to prejudice, or be likely to prejudice, one of the law enforcement interests protected by section 31 of the FOIA. Secondly, the exemption is subject to a public interest balancing test. This means that the information should be disclosed if the balance of the public interest favours this, even where the exemption is engaged.
16. The relevant part of section 31(1) of the FOI provides that:
 - "(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*
 - (b) the apprehension or prosecution of offenders*

(c) the administration of justice..."

17. In order to engage a prejudice-based FOIA exemption, such as section 31, there must be at least a likelihood that disclosure would cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
 - first, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the interests protected by the exemption (in this case, the apprehension or prosecution of offenders and the administration of justice);
 - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. whether disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
18. Consideration of the exemption at section 31 of the FOIA is a two-stage process. Even if the above test is met and the exemption is engaged, the information should still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
19. In its submission to the Commissioner, PHE has stated that because of its central role in the investigation and management of outbreaks of infectious diseases, including its laboratory services, it has been supporting a criminal investigation. PHE has stated that it is a witness to the prosecution and has been required to provide all documentation it holds to the police.
20. PHE explained that *"the Crown Prosecution Service (CPS) prosecutes criminal cases that have been investigated by the police."* It went on to explain that *"the CPS is responsible for deciding which cases to prosecute, determining the appropriate charges in more serious or complex cases, preparing cases and presenting them to courts, provide information, assistance and support to victims and prosecution witnesses. As such, PHE documentation passed to the Police is shared with the CPS to present in the criminal trial."*
21. PHE has stated that the police have confirmed that PHE has supplied a considerable amount of key evidence in respect of the case. It has

confirmed that this case is ongoing and is listed for trial in January 2020.

22. PHE considers that the withheld information is exempt from disclosure under section 31(1)(c) of the FOIA (i.e. disclosure would prejudice the administration of justice).
23. PHE has stated that the early disclosure of the withheld information would have a detrimental effect on the administration of justice, mainly in relation *"to the CPS' function of criminal prosecutions in outbreak incidents where causation may be reliant on complex scientific interpretation of a range of testing methodologies to determine results."*
24. PHE has noted that the prejudice test relates to circumstances at the date of the request and accepts that once the trial has started the prejudice to the administration of justice dissipates as well as the need to withhold the information. In view of this, PHE has advised that it would expect to be in a position to provide any outstanding material to FOIA applicants in February 2020.
25. PHE has stated that the CPS must be allowed to carry out its function of criminal prosecutions in the most effective manner possible. PHE has argued that early disclosure of the withheld information has the potential to affect and hinder the maintenance of due process of the court proceedings.
26. PHE has confirmed the nature of the prejudice is actual. It has stated that public prosecutions are dropped if there is not a strong likelihood of winning the case. PHE has explained that it is not in the public interest to dedicate time and resources in proceeding with the prosecution of a case unless it will result in a prosecution. PHE has stated that prosecutions act as a deterrent to those who may repeat the crimes being prosecuted. PHE has argued that in the absence of an effective prosecution relating to outbreaks, the health and safety of the public is significantly compromised.
27. The Commissioner accepts there is a genuine risk that the disclosure of the withheld information would have an impact on the criminal investigation that is awaiting trial.
28. The Commissioner therefore finds that section 31(1)(c) (prejudice to the administration of justice) is engaged, as disclosure would prejudice the CPS' ability to discharge these functions. Section 31 is a qualified exemption and the Commissioner must therefore consider the public interest test before reaching a conclusion.

Public interest test

Public interest in disclosing the information

29. PHE acknowledges that disclosure of the information would be consistent with policies for greater transparency about its work.
30. It also acknowledges that it is in the public interest to know that PHE's laboratories are accredited to perform the necessary testing services required.
31. PHE accepts that a wider dissemination of scientific and public health information can promote interest and greater understanding of its role within the health system in the UK and internationally.

Public interest in maintaining the exemptions

32. PHE has argued that there is a strong public interest in the CPS being able to carry out its function in the most effective manner possible.
33. PHE has stated that the early disclosure of the withheld information has the potential to affect and hinder the maintenance of due process of the court proceedings. PHE gave the example that counsel for defence may delay submitting its plea while interpreting information obtained via an FOIA request instead of actively engaging with the court disclosure process. PHE has stated that such delays have a detrimental impact on those seeking a fair and timely trial.
34. PHE has explained that early disclosure of the withheld information could lead to unnecessary speculation about the guilt of the defendant which it says will hinder and prejudice the progress of the trial.
35. PHE has confirmed that disclosure of information under the FOIA is a disclosure into the public domain. PHE accepts that it is appropriate for the defence's counsel to have all information made available at the start of the proceeding. However, PHE has stated that it may undermine the case to disclose information, which it says constitutes evidence, to the public where it is likely to become the focus of the media's attention because of the serious and sensitive nature of the wider situation to which the requested information relates. PHE is of the view that the information is likely to be simplified which could result in misrepresentation or over interpretation.
36. PHE has stated that journalists will refer to the information in their articles which will be read by the families of those affected by the contamination incident. It explained that not only would this be upsetting for the families but presenting information out of context is unhelpful to the administration of justice.

37. PHE has argued that neither the prosecution nor the defence would benefit from the unnecessary interference from the media into a matter that is listed for trial in January 2020.
38. PHE has stated that in accordance with the criminal prosecution proceedings, counsel for the prosecution and the defence is in the process of disclosing information as evidence in respect of the case. It has argued that the public interest is best served by avoiding early disclosures that could deny families the right to justice of those affected by the contamination incident.

Balance of the public interest

39. The Commissioner has considered the public interest arguments for and against disclosure. She notes that there is a public interest in the general openness, transparency and accountability of public authorities. She also accepts that providing the public with access to information assists them in understanding how certain functions are being carried out, evaluate the effectiveness of that function and assess whether the resolutions reached are indeed fair and reasonable.
40. The Commissioner believes that there is a compelling and competing public interest in ensuring that criminal investigations should not be jeopardised. There is therefore a very strong public interest in protecting the law enforcement capabilities of public authorities. The Commissioner has seen the withheld information and understands the nature of the proceedings. She considers that this supports the argument against disclosure, as it is clear that this information, if disclosed, would undermine the proceedings by allowing for speculation, undue scrutiny and a lack of neutrality. The Commissioner is therefore of the view that it would clearly not be in the public interest to release the withheld information into the public domain when criminal investigations are still ongoing and the matter is listed for trial in January 2020.
41. The Commissioner therefore concludes that the balance of the public interest in all the circumstances of the case lies in favour of maintaining the exemption at section 31(1)(c).

Other matters

Submission to the Commissioner

42. Whilst the Commissioner agrees that PHE is entitled to withhold some of the requested information, she has concerns about the way in which PHE responded to her enquiries. In particular, PHE failed to respond to

the Commissioner's enquiries within any of the deadlines set by the Commissioner.

43. On 14 January 2019, the Commissioner wrote to PHE, asking it to reconsider the way it has handled the request. She set out the scope of her investigation and asked for a copy of the withheld information and submissions in support of its reliance on section 31 of the FOIA. She gave PHE 20 working days to provide the withheld information and submissions.
44. As the Commissioner did not receive a response from PHE, she re-sent her correspondence of the 14 January 2019 on the 5 March 2019. The Commissioner asked PHE to provide a response by 19 March 2019.
45. On the 19 March 2019, PHE wrote to the Commissioner requesting an extension of the deadline to respond to the Commissioner's correspondence of 5 March 2019.
46. The Commissioner responded to PHE on 20 March 2019, advising that it had not stated how much further time it required to provide the Commissioner with the requested information. Given the delays that had already occurred in this matter, the Commissioner gave PHE five working days to provide the requested information.
47. On 27 March 2019, PHE provided the Commissioner with the withheld information and stated that it would provide its rationale for the application of the exemption by 29 March 2019.
48. As the Commissioner did not receive a response from PHE on 29 March 2019, she served PHE with an Information Notice.

Information Notice

49. An Information Notice is a formal legal document that the Commissioner can serve on a public authority under section 51 of the FOIA, requiring a public authority to provide her with the information she needs to enforce the requirements of the FOIA. An Information Notice clearly states that failure by the authority to comply with steps detailed within it may be dealt with as a contempt of court.
50. The Commissioner served an Information Notice on PHE on 2 April 2019, requiring it to provide her with its justification for its reliance on section 31, including the public interest arguments. The Commissioner gave PHE 30 calendar days to provide its response to that Information Notice.
51. As the Commissioner did not receive a response from PHE within the 30 calendar days, she contacted PHE on 8 May 2019 for an update. The

operator was unable to put the Commissioner through to anyone in the FOIA Department. She therefore requested that someone call back.

52. As the Commissioner did not receive a call back from PHE, she contacted it again on 9 May 2019 and was advised by the FOIA department that it required another week to respond. PHE advised that it would respond on 17 May 2019.
53. On 17 May 2019, PHE contacted the Commissioner to advise that its submission should be with her on 22 May 2019.
54. As the Commissioner did not receive a response from PHE on 22 May 2019, she wrote to it on 28 May 2019 requiring it to provide the information requested in the Information Notice within 7 days. She stated that if PHE did not comply with the requirements of the Information Notice within this timescale, then the case would be passed to the Commissioner's enforcement solicitors with the view to the commencement of proceedings for contempt of court.
55. PHE provided its submission to the Commissioner on 5 June 2019. It therefore had 62 days in which to prepare a thorough and well-considered response to the Information Notice.
56. It is not normally necessary to serve an Information Notice on a public authority. The Commissioner would not expect to have to serve another on PHE in the course of any future investigations. However, if such a course of action is necessary and if PHE again does not comply with the Information Notice, the Commissioner will be more readily prepared to deal with the matter as a contempt of court.

Right of appeal

57. 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

58. 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.
59. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF