



IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2014/0304**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FER0551499

Dated 4th December 2014

BETWEEN

Mr David Hendy

Appellant

And

The Information Commissioner

1st Respondent

And

The Animal and Plant Health Agency

2nd Respondent

Determined at a hearing on the papers at Field House 30th April 2015 and thereafter upon further consideration of the papers

Date of Decision 29th July 2015

BEFORE

Fiona Henderson (Judge)

Suzanne Cosgrave

And

Rosalind Tatam

Subject matter: EIRs reg 12(4)(b)– whether request for information manifestly unreasonable

Decision: The Appeal is refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FER0551499 dated 4th December 2014 which held that the Animal and Plant Health Agency (APHA) who are an agency of Department for the Environment, Food and Rural Affairs (DEFRA) and were formerly known as the Animal Health and Veterinary Laboratories Agency (AHVLA¹), correctly applied regulation 12(4)(b) EIRs to the request.
2. The Badger Vaccination Deployment Programme (BVDP) is a government funded project that enables licensed volunteers (from the private and charitable sector) to trap and vaccinate badgers against Bovine TB in part of Gloucestershire. It started in 2010 and was still running at the date of the information request. A catchment area was identified from which landowners were invited to participate. Participation was voluntary. Some farms would include land inside and outside the catchment area, and some herds from farms outside the catchment area would be grazed within the catchment area. Between 2010-2012 the area of land trapped and vaccinated annually varied between 84km² and 95 km² and the number of premises vaccinated varied between 86 and 115².
3. The project "*was not set up as a scientific trial to assess the effect of badger vaccination on cattle TB breakdowns. Rather it was designed to be a practical deployment exercise*"³ and "*to build confidence in the principle and practicalities of vaccination, develop practical know-how for vaccinating badgers and provide the capacity to train lay badger vaccinators*"⁴.

The lay vaccinators are trained by FERA⁵ and DEFRA provide 50% of the cost to become an accredited and certified lay vaccinator⁶.

¹ The Tribunal will refer to APHA unless quoting from a document in which their former name is used.

² P215 bundle written evidence of Defra to House of Commons Environment food and rural affairs (EFRA)committee

³ P393 bundle APHA letter to ICO 28 October 2014

⁴ P215 bundle written evidence from Defra to House of Commons EFRA committee

⁵ Food and Environment research agency

⁶ P126 bundle

4. All data on the number and location of badgers vaccinated in England and Wales is collated by APHA and is held in a database. This data is returned to APHA as one of the requirements of the certificate of competence scheme that lay vaccinators work under when vaccinating badgers.⁷ The collection of cattle data was not part of the BVDP.⁸

Information Request

5. On 18th May 2014 the Appellant wrote to APHA asking:

*“Please send me cattle data for the Badger Vaccination Deployment Project BVDP project in Gloucestershire referred to in [DEFRA’s reducing bovine tuberculosis policy website page] during the 46 months (3 years 10 months) since 1st May 2010 when the data has been available.”*⁹

6. APHA replied on 20th May 2014¹⁰ sending a link to a website which provided the cattle data for the whole of Gloucestershire; however, from this it was not possible to separate out the data for the BVDP area.

7. Following further correspondence from the Appellant in which he asked:

“Is cattle data for the BVDP area alone included somewhere in the spreadsheets?”

APHA wrote on 16th June 2014 refusing the request under EIRs:

“I can confirm that the data for the BVDP area is included within the original response sent you on 20th May 2014. The BVDP area is not defined specifically and we do not currently hold this information as requested.

The information you request would have to be created. We are withholding this under regulation 12(4)(b) “the request for information is manifestly unreasonable”. We

⁷ P41 bundle

⁸ Witness statement of Dr Katherine Webster

⁹ P28 bundle

¹⁰ P20 bundle

consider the cost and diversion of staff resources to create the information would be too great and therefore we are unable to provide this information”.

8. The decision was upheld upon internal review, although APHA provided a more detailed explanation of why the information would have to be created:

“...this would necessitate the creation of a new dataset, for the 100km2 area alone. This would entail the use of Geographic Information Systems software and resources to plot out the zone... and then for a detailed search of the “contained Holdings” records to be able to reconstruct the bTB^[11] condition of each, on a month by month basis covering a 46 month period. The search would require the writing and testing of a search script to interrogate our data base involving hours of specialist resources being diverted from their normal duties. The search would need to be run 46 times and each resulting data subset would then be compared to ascertain changes in bTB status.”

The Complaint to the Commissioner

9. The Appellant complained to the Commissioner on 13th August 2014. APHA provided more information to the Commissioner pursuant to his investigation in their letter of 28th October 2014 in which they stated that:

- The BVDP area is not accurately defined, as badger vaccination has not taken place uniformly even within the outline of the area that includes all badger vaccination,
- Some landowners refused access, others had their land surveyed and no evidence of badger activity was found,
- Some landowners did not participate for the full period (entering late or withdrawing their participation),
- Landowners where badger setts were not active in all the years concerned may not have had their land vaccinated for the full period,
- Landowners may have been assessed as having active setts but trapping efforts were unsuccessful and so no vaccination would have taken place,

¹¹ Bovine tuberculosis

- The cattle of a landowner who refused to participate may be influenced by vaccinations on neighbouring land,
- Determining an appropriate “area vaccinated” around the badgers trapped and vaccinated within the BVDP area is complicated and would be achieved through consensus with relevant scientific experts and possibly exploratory data analysis. This would create a new data layer, and has not been carried out to date.

10. Furthermore, APHA argued that in order to identify the holdings to be included and hence the area because of the changing “basic outline” of the BDVP project area¹²:

- i. A scientific consensus would need to be achieved (including a literature search of 6 working days and a one day workshop with 4 experts).
- ii. Data management of the results within the agreed area on the basis of agreed protocols would take approximately 5 hours.

11. The Commissioner’s Decision Notice upheld the refusal on the grounds that the request was manifestly unreasonable.

The Appeal

12. The Appellant appealed on the grounds that:

- i) The costs were for providing information which the Appellant was not seeking, as the scope of the request was wrong, the information could be obtained more cheaply.
- ii) Common sense should have been used to confirm the information which he was seeking,
- iii) The public interest favoured disclosure.

13. The Commissioner resists this appeal and relies upon the decision notice. APHA were joined by the Tribunal on 10th February 2015. All parties indicated that they

¹² Bundle p393

were content for the case to be determined upon the papers. The Tribunal is satisfied under rule 32(1)(b) of the *The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* (the GRC rules) that it can properly determine the issues without a hearing. The Commissioner provided a bundle of some 401 pages. A witness statement from Dr Katherine Webster (Director of Scientific Services at APHA) was provided by APHA which reached the Tribunal after the case had been considered upon the papers but before the Tribunal had concluded its deliberations. It was admitted having regard to rule 2 of the GRC rules as the Tribunal accepts the reasons given for the late submission and all parties were given the opportunity to make representations in relation to this evidence. All the material, including the witness statement and submissions from the Commissioner and Appellant were taken into consideration in reaching this decision.

The scope of the request

14. Mr Hendy asked for “cattle data”. Cattle data is defined by Dr Webster as including: *“the number of cattle herds in an area, the number of those herds where TB is detected in a given time period, the number of animals slaughtered due to TB and the number of herds under official movement restrictions (due to TB infection having been detected but not yet removed from a herd). This data is published at county level every month.”*
15. In their witness evidence, APHA have interpreted Mr Hendy’s reference in his reply of 23 March 2015 that he specifically wants *“data based on “TB52” forms, which list the OS map reference of where cattle are grazed where different from the location of the farm”* as being a request for disclosure of the information on TB52 forms rather than “cattle data”.
16. Mr Hendy did not dispute this definition of cattle data following receipt of the witness evidence and when originally provided with the email link to the cattle data for the county in May 2014, Mr Hendy did not argue that this was the wrong

type of information, rather he wanted it broken down to isolate the BVDP area. We are satisfied that the request was clear and that the Appellant was seeking cattle data and not disclosure of the data from TB52 forms.

17. In our judgment the relevance of the TB52 forms is that these forms link the location or grazing location of a herd to an OS reference:

“Herd tests can be selected based on whether the supplied grid reference on the TB52 test form (now superseded by online submission) lies outside or inside that boundary. The TB form contains the grid reference of the main farm premises and to cater for when the cattle location is different from that of the main farm premises, that of the cattle location too”.

18. Dr Webster’s evidence is that TB52 data *“is not routinely and accurately captured. Therefore we cannot guarantee that we would only supply farms that have grazed and not omitted farms from outside the zone that may have occasionally grazed animals within the BVDP area. In other words, we would not hold the data to answer Mr Hendy’s request even if it had been expressed as being for TB52 data”.*

19. The Tribunal takes into consideration the letter from APHA dated 14th May 2014¹³ which seems to indicate that CPHH number and OS¹⁴ map reference amongst other information is routinely retained (although it may be that prior to September 2011 some of this is in paper format). We are satisfied that it is not necessary to seek clarification of this point from APHA because even if the information from the TB52 forms was retained and its use helped to identify farms whose cattle had grazed on land where vaccination had taken place, that is not the only determinant in assessing which herds should be considered to form part of the BVDP project.

20. APHA’s evidence is that in order to define the area so that they could isolate the relevant cattle data they would need to determine what constituted the area

¹³ P218 bundle

¹⁴ Ordinance survey

involved in the BVDP project in each of the 46 periods. Mr Hendy does not dispute the time or process that the APHA say that it would take them to define the protocols to ascertain which areas of land and herds would be included in the project. Rather he argues that he was not seeking details of only those areas within the BVDP area where badgers had been vaccinated but rather monthly cattle TB figures for the BVDP outline catchment area as a whole on the basis that this outline will include both vaccinated and unvaccinated areas.

“only data from tests on herds which are grazed within the outer boundary of the Catchment area are required.

He argued that fulfilling his request was simple *“subject to appropriate assumptions being made”*.¹⁵

21. We agree with APHA that the request must be construed objectively. Mr Hendy’s request was not for cattle data for all cattle grazed within the 100km² outline, it was linked to the Badger Vaccination Deployment Project. APHA maintain that the area is not defined, Mr Hendy appears to concede that assumptions would have to be made in order to supply that information in scope.

22. In concluding that the BVDP area is not defined and would not constitute the outline catchment area, we take into consideration the assumptions that were made in relation to the Welsh IAA¹⁶ protocol:

“In this project, herds were registered as using IAA land and the identity of the herds was reported monthly. Sometimes the map reference attributed to an IAA herd in SAM6 was outside the IAA geographical area, but this was not considered an error because many herds in the IAA do not use land in the IAA continuously. The areas in which non IAA herds fall are defined by their map references in SAM6. Bovine TB in herds located in the 2km wide buffer around the IAA is reported because of the proximity of herds to the IAA. Bovine TB in non IAA herds having a map reference

¹⁵ P67 Appellant’s letter of 23rd March 2015

¹⁶ Intensive Action Area – a project of badger culling and vaccination over 288 Km² in Wales p281

between 2 and 16 km from the edge of the IAA is ignored because the degree to which they have contact with IAA herds is uncertain.”¹⁷

23. Dr Webster’s evidence was that in relation to the BVDP:

i. While the initial area was selected and displayed on a map as noted by Mr. Hendy, participation in the BVDP was voluntary. More landowners joined as the BVDP progressed, so the precise area will vary from year to year.

ii. In addition, if a farm was just inside the boundary of the original area but never allowed vaccination on its land, then it is by definition outside the area where vaccination actually took place, but it was within the original area. There is no objective answer to whether this should be counted as inside or outside the BVDP.

iii. There will also be fragmented farms where farmers will own or rent parcels of land inside and outside the vaccination area and cattle can be moved between the different fields. This information is not captured routinely¹⁸ and so a decision again needs to be made on which cattle herds should or should not be included.

24. We are satisfied that although there was a catchment area from which landholdings could participate that was not the definition of the BVDP area because decisions would need to be made about whether a buffer zone was appropriate, whether any cattle that grazed on vaccinated land were included (even if this was on an occasional or one off basis¹⁹) and if so for how long, whether herds that grazed on adjoining but unvaccinated land were included, whether herds that grazed on land which had allowed access but upon which no vaccination had taken place were included.

25. Mr Hendy relies upon the provision of data in relation to Thornbury²⁰ in support of his contention that defining the area would not be onerous. In relation to the

¹⁷ P282

¹⁸ Although see references to TB52 above.

¹⁹ We conclude this from the references to the uncertainty surrounding herds where landowner’s participation varied during the project period.

²⁰ A badger culling project in Gloucestershire

Thornbury area where data has been provided up to 2012 we accept the evidence of Dr Webster that:

“Thornbury was a well-known and clearly defined area where the appropriate cattle TB data had previously been extracted as part of a previous scientific study. Indeed the Thornbury area was chosen in part due to its clear-cut geographic boundaries. Therefore, it was a much easier task to extract the more recent data supplied to Mr Hendy as much of the work had already been done.”²¹

26. Mr Hendy explains that his request is not a request for an analysis. He was asking for standard data routinely compiled from raw data submitted by veterinaries to the AHPA in standard format. The Tribunal is satisfied that the costs and work as detailed by APHA relates to defining the area relevant to each period, defining the cattle herds which are relevant and mapping the cattle data relevant to the area, according to the agreed protocols (see para 10) and this work does not include any further analysis.

Manifestly unreasonable

27. APHA rely upon regulation 12 EIRs which provides:

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

...

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(a) it does not hold that information when an applicant’s request is received;

(b) the request for information is manifestly unreasonable;

28. APHA accept that the evidence is held and do not rely upon regulation 12(4)(a) EIRs as it is capable of being separated from the rest of the data,

²¹ Witness statement of Katherine Webster para 43

however, their argument is that the amount of work in defining the area, then extracting the data by matching the held badger vaccination data from that area with the cattle data is manifestly unreasonable.

29. We accept the work that would be required to define the area and then extract the information as set out in the letters of 30th June 2014²², 28th October 2014²³ and the statement of Dr Webster and that this is work that would only be done in furtherance of the information request in that it is not necessary for the continuation of the project. The work required would as set out by APHA use considerable resources both financially and in diverting specialist resources from their normal work areas.
30. There is no prescribed limit in terms of cost at which point a public authority may refuse to provide information on the grounds of cost under EIRs. Whilst the *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* are not directly applicable or determinative in EIR cases; we agree with the Commissioner that they do nonetheless provide a useful starting point for looking at the costs of compliance with any requests. We observe that they must be read in the context that the EIRs require the burden of the request (in which cost will be a factor) to be weighed against the public interest and the presumption in favour of disclosure enshrined in the EIRs.
31. The Commissioner would base his calculations of cost on a rate of £25 per hour, (in reliance upon the *Appropriate Limit and Fees Regulations*) arguing that they provide an indication of what Parliament considers to be a reasonable charge for staff time. APHA rely upon the fact that the definition of the protocols for a project such as the BVDP require technical expertise and would need to be a band D scientist which is chargeable at £71 per hour. The Tribunal observes that where specialist technical expertise is required in EIR cases in order to extract information it might not be appropriate to limit the costs to those associated with

²² P33 bundle

²³ P392 bundle

more routine data extraction, since what is being assessed is the burden, however, given the overall costs of compliance in this case it is not necessary for the Tribunal to reach a conclusion on this point as we are satisfied that the cost of the work involved would substantially exceed the FOIA costs limit even if assessed at the chargeable rate. The Tribunal is satisfied that in assessing the burden upon the public authority (as opposed to the cost) the role of the staff member who would be tasked to undertake the work required and any duties that they would therefore be diverted from is relevant, in this case we accept that fulfilment of this request would require the use of specialists.

Public Interest test

32. Withholding information pursuant to regulation 12(4)(b) may only be done if the public interest in withholding the information outweighs the public interest in disclosure (regulation 12(1)(b) EIRs).

In favour of disclosure:

33. The Tribunal has had regard to the *House of Commons Environment, Food and Rural Affairs Committee vaccination against Bovine TB Second Report of session 2013-14*²⁴. We accept from this that it is in the public interest that an effective method of reducing bovine TB in cattle is found. The consequences of bovine TB in cattle include: the distress to farmers of culling herds; and the drain on the economy and cost to the taxpayer in terms of management costs, regulation and testing, compensation and lost trade. We have therefore assessed the extent to which the data that is the subject of this request would further these aims.

34. The report notes that:

“To have another tool to use against bovine TB is valuable. However, what is also apparent is that substantial data clearly showing the effect of the vaccine in the field are lacking. Now that a vaccine is available the Government should consider

²⁴ P101 bundle

addressing this evidence gap by researching the efficacy of the badger BCG vaccine in the field.

There is no direct evidence that a programme of badger vaccination results in reduced transmission of TB to cattle. Dr Wilson²⁵ described the lack of data as “one of the most fundamental knowledge gaps that we have”.²⁶

35. In his evidence to the Committee, Dr Wilson said that:

“Computer modelling has indicated that sustained badger vaccination campaigns could be beneficial in lowering TB incidence in cattle but its precise contribution is unknown. To be able to quantify this contribution it is likely we would need to carry out a large scale field trial (on a comparable scale to the Randomised Badger culling Trial) the results of which would take many years to collect”.²⁷

36. The Appellant argues that evidence so far has not shown that badger vaccination has had a significant effect upon bovine TB in cattle. He argues that should the treatment be found to be lacking impact and not worthwhile, public money and effort is being wasted. The Tribunal observes that conversely if an impact were discernible this might add impetus and invigorate the use of the vaccine as a cost effective method of managing bovine TB in cattle. The disclosure of this information he believes would go some way to meeting the evidence gap identified by Dr Wilson. He argues that the BVDP analysis is needed to strengthen evidence for the impact of any future wide-area rollout.

37. He drew our attention to IAA which is a badger vaccination project being carried out simultaneously in Wales. He argues that confidence in any result derived from IAA will be limited as it is only being carried out in one area. Results from other areas would add confidence and meaning to any derived result. A meaningful picture would emerge of the impact that badger vaccination is having on cattle TB if the data from other vaccination areas were combined. Comparing

²⁵ Team Leader of the research team at Woodchester Park Outstation, which is part of FERA - the Food and Environment research agency's wildlife programme. The team does a range of research primarily funded by Defra.

²⁶ P121

²⁷ P214

data in BVDP area with areas that are untreated will help towards satisfying the need for further evidence. The Appellant argues that this is particularly important as other trials which cumulatively might have amounted to a sufficiently large area to provide the data for a large scale scientific trial were cancelled. There is no large scale field trial in prospect.

38. The Appellant acknowledges that data has not been collected during the course of scientifically controlled experiments.
39. The Tribunal gives weight to the presumption in favour of disclosure as set out in regulation 12(2)(b) EIRs. The Appellant argues that transparency and accountability are important factors in favour of disclosure in this case because:
- a. The BVDP was government funded,
 - b. Vaccination is carried out by charitable and voluntary organisations at significant expense each year– they need the data to know whether they are wasting their money or if it could be better spent elsewhere,
 - c. The project is publicly funded, plans are in place to increase areas covered by this treatment in the next 12 months and beyond. All forthcoming projects in the edge counties will be large scale and partly financed by public funds through government grants, this informs the public argument as to whether this public money could be better spent elsewhere,
 - d. FERA provide the training (they are funded at least in part by DEFRA) this generates significant income, there are doubts as to the efficacy so transparency is important if the public and charities are being expected to spend money on training which may be of little value.
 - e. DEFRA provides a grant to cover 50% of the training fees, disclosure would inform the argument as to whether this is public money well spent.
 - f. Considerable expense is being spent in developing this treatment to reduce the impact of badger TB on cattle. It is in the public interest that organisations applying the treatment and the farming industry who are in need of TB in the wild life being controlled are using the most cost effective treatment.

40. The Appellant's arguments all rest upon the data being of value and hence would inform the debate. We accept the arguments of the APHA on this point that the data serves no useful purpose in isolation – the position having also been clearly articulated in the House of Commons Vaccination against bovine TB report ²⁸ “*Dr Wilson told us that the area in Gloucestershire “is not large enough in its own right to look at the statistical effects of TB on cattle herd breakdowns..”*”- And further Dr Webster says “*its value would theoretically lie in undertaking comparisons between this data and data for other areas that are as similar to the BVDP as possible in terms of cattle herd numbers and levels of TB as possible.”*²⁹, “*...comparison with TB rates in control areas requires substantially more work... The statistical power of doing this analysis of the BVDP will be low (ie. unlikely to detect a statistically significant effect unless there has been a very large effect of vaccination).*³⁰

Against disclosure

41. In assessing the public interest against disclosure, we take into consider proportionality and the value of the request (as set out above). It was not the purpose of the BVDP to assess the effect of vaccinations on cattle, we accept that the definition of this area and the extraction of the data is not work that would be done in any event, it is extra work in furtherance of a different purpose and for which the project was not designed. We balance this against the diversion of resources (trained scientific staff) who would have to carry out this very costly analytical work to define the area and then extract the data. We accept APHA's argument that there is a strong public interest in a public authority being able to carry out its core functions and wider obligations fully and effectively and are satisfied that fulfilling this request would disrupt this work and divert resources.

42. We are satisfied that as APHA stated in their Grounds of Appeal a “simple analysis” can be intuitively appealing it “*would go against the public interest as*

²⁸ Bundle 101 – 144 HC258

²⁹ Witness statement Katherine Webster para 37

³⁰ Witness statement Katherine Webster para 38

the results could be misleading and would foster misunderstanding and erroneous conclusions". We are persuaded (having read the detail covered by the IAA reports³¹ in evidence) that such comparisons require careful planning and statistically rigorous methods and as advised by the evidence of APHA that no valid comparisons could be drawn from the information requested taken in isolation and such comparisons would likely to be unreliable and would not support any analysis which furthered the public interest.³²

43. The original BVDP specification document³³ makes it clear that *"it will take a number of years for reduction in disease levels in badgers to translate into an impact on cattle disease. ...it may take five years or more for a level of immunity to be reached in the badger population that will translate into a reduction in cattle herd breakdowns"* thus reinforcing the lack of a public interest in expenditure of public resources in generating the information requested when it is recognised it would not at this stage be expected to provide evidence that Mr Hendy is seeking.
44. The APHA also rely upon the precedent that would be set if the information were provided in this case. We are not satisfied that this is material and have not taken this into consideration in the balance of the public interest, as the risk of similar future requests in our view is speculative. In effect this would amount to aggregating the costs and burden of as yet unmade requests.
45. APHA also rely upon other information that is or will be in the public domain. A proposal has been made to DEFRA for funding to analyse the effect of badger vaccination in BVDP as part of a larger project. This does not appear to have been in contemplation at the relevant date and in any event it has not yet been approved, as such we do not take this into consideration.

³¹ Bundle pages 267-276,277-304 & 305-360

³² APHA Response to the Grounds of Appeal paras 21 and 22

³³ Bundle p86-98

46. Additionally APHA have been commissioned by DEFRA to develop an interactive map that shows the geographic location of bovine TB breakdowns over the previous 5 years in England which will be accessed via the DEFRA web pages and access will not be restricted. The argument appears to be that this will enable comparisons to be made within the original catchment area from which participants in BVDP were sought. As set out above in our judgment that was not what the request was for, and it is not apparent to us whether this was in contemplation at the relevant date, nor whether there will be sufficient specificity to enable the Appellant to conduct his own comparison with badger vaccination data. In light of our assessment as to the low value of the information that is within scope of the request as set out above, and the disproportionate burden in defining and extracting the data we are satisfied that it is not necessary to seek clarification of this point.

Conclusion

47. For the reasons set out above we are satisfied that the request is manifestly unreasonable and the public interest is in favour of withholding the information. We therefore refuse the appeal and uphold the decision notice.

48. Our decision is unanimous.

Dated this 29th day of July 2015

Fiona Henderson
Tribunal Judge