



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**NCN: [2022] UKFTT 00424 (GRC)
Appeal Reference: EA/2022/0007**

**Heard by: remotely by video conference
Heard on: 1 November 2022
Decision given on: 22 November 2022**

Before

**JUDGE HAZEL OLIVER
DAVE SIVERS
PAUL TAYLOR**

Between

DR BRIAN JONES

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

**THE ANIMAL AND PLANT HEALTH AGENCY
(an Executive Agency of the Department of Environment Food and Rural Affairs)**

Second Respondent

Representation:

Appellant – in person

First Respondent – did not attend

Second Respondent – Mr C Streeten, counsel

Determined at a remote hearing via video (Cloud Video Platform) on 1 November 2022.

Decision: The appeal is Dismissed

REASONS

Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 10 December 2021 (the “Decision Notice”). The appeal relates to the application of the Environmental Information Regulations 2004 (“EIR”) and/or the Freedom of Information Act 2000 (“FOIA”). It concerns information about badger culling and bovine tuberculosis in cattle requested from the Second Respondent, the Animal and Plant Health Agency (“APHA”).

3. Bovine tuberculosis (“bTB”) is a bacterial infection that affects cattle. Several other mammals can be infected by bTB, including badgers. Licenced badger culling is permitted in parts of the UK in an attempt to control the spread of bTB. This is a controversial issue. There are scientific disputes about whether badger culling is effective, and others oppose culling on animal welfare and environmental grounds.

4. APHA is an Executive Agency of the Department for Environment, Food and Rural Affairs (“DEFRA”). Its remit is safeguarding animal and plant health. APHA’s Epidemiology workgroup leads the project within DEFRA which uses bTB data for monitoring and assessing effects in badger cull areas.

5. On 3 March 2021, the Appellant wrote to APHA and requested the following information (the “Request”):

“I wish to request information concerning statistics you hold for bovine tuberculosis. I believe release of the information could lead to better control of the disease...

...DEFRA does not release precise details of badger culling areas within the bovine tuberculosis (bTB) High Risk Area (HRA) of England, so it is not possible to definitively gauge from the reported overall incidence or prevalence of disease-restricted cattle (Ref 1) whether decreases in these parameters are due to badger culling or to improved measures of disease management, such as recently introduced more sensitive diagnostic testing with gamma-interferon and stricter interpretation of skin testing and improved regulation of slurry spreading, cattle movement, farm hygiene and biosecurity. Improved measures are in place throughout culled and non-culled areas of the HRA, so DEFRA should be able to provide the comparative data that would indisputably show either that badger culling is necessary for the reduction of bTB prevalence or that similar success to that achieved in Wales, where badgers are not culled, would have been achieved in the absence of the badger cull.

I am aware of the Downs et al 2019 publication (Ref 2) giving data up to 2017. There is no attempt in this paper to compare prevalence of restricted herds in culled and non-culled parts of the HRA.

Information requested:

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

2. It is therefore estimated that 33% of the England HRA has not been subject to badger culling between 2013 and 2020. **Please provide the data below in both (a) culled, and (b) non-culled areas of the HRA for each of the years 2010-2020.**

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

b. Numbers of animals slaughtered due to bTB.

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

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

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

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

6. APHA responded on 26 March 2021. APHA confirmed that it did hold the requested information, but it was withheld under regulation 12(4)(b) EIR on the grounds the Request was manifestly unreasonable. This was because responding to the Request would involve the diversion of resources and involve excessive cost, and the public interest in applying the exception outweighed the public interest in disclosure.

7. The Appellant requested an internal review on 29 March 2021. APHA responded on 21 April 2021 and maintained its position, providing more information about how long it would take to reply to the Request:

“(1) Clarify definitions for year, area, herds and observation periods over which disease status will be measured – 3 hours

(2) Adapt programming code for incidents, prevalence and reactors and implement area and date changes and test – 25 hours

(3) Generate new programming code (which would have to be created specifically for the extraction of the data requested) to group IFN-g tests and check – 10 hours

(4) Cross check data outputs – 5 hours

(5) Prepare accompanying explanatory text and review – 3 hours”

8. The Appellant complained to the Commissioner on 21 May 2021. APHA provided the same information as above to the Commissioner and confirmed this did not include programs run time. The Commissioner decided that the Request was manifestly unreasonable and that the public interest lies in maintaining the exception, and therefore APHA was entitled to refuse it in accordance with regulation 12(4)(b).

- a. After considering an estimate of time and cost from APHA, the Commissioner accepted 38 hours of compliance time, not including the time it would take to respond to part 2(c) of the Request.
- b. The Commissioner accepted that complying with the Request would impose a manifestly unreasonable burden on APHA.
- c. The public interest in maintaining the exception outweighed the undoubtedly strong public interests in disclosure, taking into account the small size of the APHA team, concerns about accuracy of data, and the intention to publish statistics on bTB in licensed cull areas up to 2020 in 2022.

The Appeal and Responses

9. The Appellant appealed on 6 January 2022. His grounds of appeal are:

- a. Regulation 12(4)(b) EIR does not apply to the request:
 - i. APHA has claimed that it would take 46 hours to provide the information. This is insignificant considering the £100s of millions at stake in this issue.
 - ii. APHA should already have developed programming code to extract the raw data before introducing Gamma Interferon testing.
- b. Even if Regulation 12(4)(b) EIR does apply, the public interest in the information overrides this exception:
 - i. Independent data submitted for publication shows that culling is ineffective in preventing bTB. Badger culling and its policing are funded by the taxpayer, and so APHA should comply with this request for information.
 - ii. The current policy of badger culling deflects away from more effective measures for controlling bTB. The policy assumes that because bTB can infect badgers they are able to pass it to cattle, which has never been definitively shown in real-life farming situations.
 - iii. Statistical methods used by APHA and DEFRA are often subject to bias, because they are heavily inclined via coercive pressures to support government policy.
 - iv. APHA have stated that bTB statistics in license cull areas up to 2020 will be disclosed in 2022, which is an unacceptable delay for farmers and the general public.

10. The Commissioner's response maintains that the Decision Notice was correct. In response to the specific points in the Appellant's appeal:

- a. He had accepted it would take 38 hours to comply with the Request, and the burden and costs to public authorities when complying with requests is a valid consideration.
- b. EIR is concerned with information public authorities already have, not information which the Appellant believes they should hold. The Appellant also makes this point in relation to part 2(c) of the Request, which was not included in the hours calculation.
- c. The public interest in this case is very finely balanced, but still tips in favour of maintaining the exception due to the fact that complying with the request would

divert APHA from their key work and also due to the fact that APHA will publish statistics in 2022.

11. APHA was joined as a party to the proceedings. APHA submitted a summary response which makes the following points:

- a. The second part of the Appellant's request for information, i.e. that which concerns incidences of bTB, fall properly to be considered under FOIA and not EIR.
- b. Regardless of whether FOIA or the EIR apply, the Appeal should be dismissed as the request is manifestly unreasonable and/or (1) the cost of complying with the request would exceed the appropriate limit in FOIA section 12(1) and/or (2) vexatious within the meaning of FOIA section 12(4)(b).

Applicable law

13. The relevant provisions of EIR are as follows.

2(1) *...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely 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;

....

(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);

.....

5(1) *...a public authority that holds environmental information shall make it available on request.*

.....

12(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.

12(2) *A public authority shall apply a presumption in favour of disclosure.*

.....
12(4) *For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that –*

.....
(c) *the request for information is manifestly unreasonable;*

14. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 (“FOIA”) in section 39 and must be dealt with under EIR.

15. It is well established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. The definition was explained by the Court of Justice of the European Union in Case C-316/01 **Glawischig v Bundesminister für soziale Sicherheit und Generationen** [2003] All ER (D) 145 as follows: “*The Community legislature’s intention was to make the concept of information relating to the environment defined in Article 2(a) of Directive 90/3134 a broad one, and it avoided giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities ... Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision.*”

16. The definition was considered by the Court of Appeal (CA) in **Department for Business, Energy and Industrial Strategy v Henney and ICO** [2017] EWCA Civ 8444.

- a. The Regulations, the Directive, and the Aarhus Convention “*are to be construed purposively. Determining on which side of the line information falls will be fact and context-specific.*”
- b. The CA went on to provide some general guidance. The CA used as a starting point the recitals to the Aarhus Convention and the Directive – “*They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as “on” a given measure.*”
- c. The CA went on to say that it is permissible to look beyond what the information is directly or immediately concerned with: “*...identifying the measure that the disputed information is ‘on’ may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned ... It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of those matters may be apparent on the face of the information itself.*”
- d. At paragraph 52 of its judgment, the CA warned against an “*overly expansive reading that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition.*”

17. The Upper Tribunal in **Department for Transport v Information Commissioner and Cieslik** [2018] UKUT 127 (AAC), put the point as follows: “...*the principle established by the Court of Appeal in Henney and in Glawischnig [is] that information which has only a minimal connection with the environment is not environmental information. The principle must apply not only in deciding whether information is on an environmental matter but whether a measure or activity has the requisite environmental effect.*”

18. There is no further guidance on the meaning of “manifestly unreasonable” in the legislation. The leading guidance on the meaning of the parallel term “vexatious” in FOIA is contained in the Upper Tribunal (“UT”) decision in **Information Commissioner v Dransfield** [2012] UKUT 440 (AAC), as upheld and clarified in the Court of Appeal (“CA”) in **Dransfield v Information Commissioner and another & Craven v Information Commissioner and another** [2015] EWCA Civ 454 (CA). Arden LJ confirmed in the CA decision in **Dransfield** that to all intents and purposes “manifestly unreasonable” in the EIR means the same as “vexatious” in FOIA.

19. As noted by Arden LJ in **Dransfield**, the hurdle of showing a request is vexatious is a high one: “...*the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public.*” (para 68).

20. Judge Wikeley’s decision in the UT **Dransfield** case set out more detailed guidance that was not challenged in the CA. The ultimate question is, “*is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?*” (para 43). It is important to adopt a “*holistic and broad*” approach, emphasising “*manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests.*” (para 45). Arden LJ in the CA also emphasised that a “*rounded approach*” is required (para 69), and all evidence which may shed light on whether a request is vexatious should be considered. Overall, the purpose of the exemption is to “*protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*” (UT para 10), subject always to the high standard of vexatiousness being met. This applies equally to the question of whether a request is manifestly unreasonable under the EIR.

21. Section 12(1) of FOIA provides that a public authority is not obliged to comply with a request for information “*if the authority estimates that the cost of complying with the request would exceed the appropriate limit.*” The “appropriate limit” under section 12(1) FOIA is £600 for central government and £450 for any other public authority (regulations 3(2) and 3(3) of the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004). Costs are estimated at a rate of £25 per person per hour (Regulation 4(4)). This means that the limit for central government is exceeded after 24 hours of work. The costs which a public authority can take into account are set out in Regulation 4(3) as follows: (a) determining whether it holds the information; (b) locating the information, or a document which may contain the information; (c) retrieving the information, or a document which may contain the information; and (d) extracting the information from a document containing it. The appropriate limit is assessed based on the information storage and retrieval systems that a public authority actually has - not the ideal systems, or the systems that an Appellant thinks a

public authority ought to have (*Commissioner of Police for the Metropolis v Information Commissioner and Mackenzie* [2014] UKUT 0479 (AAC)).

22. Unlike FOIA, the EIR does not provide a costs limit for complying with a request for information. The costs of answering a request can be taken into account when deciding whether a request is manifestly unreasonable. The costs limits in FOIA can be used as a guide, although exceeding these limits does not automatically mean that a request is manifestly unreasonable.

Issues and evidence

23. The issues are:

- a. Is some or all of the requested information held by APHA? This is an issue which emerged during the hearing in light of Dr Parry's evidence.
- b. Does EIR or FOIA apply to the Request?
- c. If EIR applies:
 - i. Was the Request manifestly unreasonable under regulation 12(4)(b) EIR?
 - ii. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?
- d. If FOIA applies:
 - i. Would the cost of complying with the Request exceed the appropriate limit of £600?
 - ii. Is the Request vexatious?

24. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A written statement from the Appellant.
- c. A written statement from Thomas Langton for the Appellant.
- d. A written statement from Dr Jessica Parry for APHA
- e. Oral evidence from the Appellant, Mr Langton and Dr Parry.
- f. Written and oral submissions from both the Appellant and APHA.

Summary of the witness evidence

25. **The Appellant's evidence** explained his view that the culling of badgers to control bTB is neither necessary nor efficient. He believes the data he requested should be at APHA's fingertips. Although DEFRA releases regular epidemiological reports, these give only a rough idea of culling effectiveness and interpretation of the results is controversial. A way to show conclusively whether culling is or is not effective in disease control is to compare bTB prevalence and incidence in the culled and neighbouring uncultured parts of the High-Risk Area ("HRA"). APHA only publish part of this information. The Appellant says that farmers need to have confidence that livelihood-threatening cattle diseases are being investigated without policy-driven bias, the taxpayer needs to know that their contributions are not being misused,

and the public needs to believe that nature and the rural environment are being managed effectively. The Appellant confirmed in cross-examination that he wanted APHA to do this analysis, to enlighten the problem and save time in the future. He assumed this analysis had been done by APHA, and if not it should have been done.

26. The Appellant explained that the main part of the Request was for the data needed to compare culled and unculted areas of the HRA. The first part of the Request was to confirm his understanding of how much of the HRA was subjected to badger culling, in light of a presentation by Dr Colin Birch which said that by 2019 there was insufficient unculted areas to allow a comparison of bTB in cattle between culled and never-culted areas.

27. **Mr Langton** is an ecologist and nature conservation consultant, and the lead author of a peer-reviewed paper entitled *“Analysis of the impact of badger culling on bovine tuberculosis in cattle in the high-risk area of England, 2009–2020”*, which was accepted for publication in Vet Record in January 2022. This uses information similar to that requested by the Appellant to analyse the incidence and prevalence of bTB across the HRA, by comparing places where badger culling was taking place with areas where it was not. The paper concludes that badger culling can make no meaningful contribution to the control of bTB in cattle. This paper was initially rebutted by DEFRA. It was later admitted by DEFRA that the data they had used in this rebuttal was incorrect, and DEFRA provided a new graph which shows that levels of bTB in cattle are now similar in culled and unculted areas.

28. Mr Langton explained that he conducted his analysis by subtracting published data on bTB in culled areas from published data on bTB across the whole HRA area. He said this was a crude analysis, and it would be more accurate to have clear data on areas that had never been culled. Mr Langton’s view is that we would be much closer to resolving the cattle TB epidemic crisis in England if APHA had given the Appellant the data he requested in March 2021. In evidence he said he has a strong reason to believe a mistake has been made on a great issue of the time.

29. **Dr Parry** is the Epidemiology workgroup leader in the Department of Epidemiological sciences at APHA. She explained that there are three main publications by APHA relating to bTB. There is an annual report on bTB in Great Britain. There is an annual epidemiological analysis of bTB in England in the risk areas. There is also an annual report on the incidence of TB in cattle in licenced cull areas. Mr Langton used these last two reports to obtain the data for his published paper. Dr Parry confirmed that APHA does not produce an annual report comparing data for culled and non-culted areas in the HRA. The monitoring report relating to badger culling only reports on bTB in culled areas.

30. In relation to part 1 of the Request (confirmation of the percentage of the HRA subjected to badger culling), Dr Parry’s evidence was that APHA did not record this information as far as she was aware. She said they held relevant data but it had not been calculated.

31. In relation to part 2 of the Request, Dr Parry explained that the boundaries between culled and non-culted land do not align with established administrative boundaries. This is why it is so complex to produce the information requested by the Appellant. Data held on matters such as bTB tests and infections does not match with culling boundaries. Her written statement confirmed that, *“The complexity and time in this request lie in the need for data extraction, mapping to apply specific spatial boundaries, aggregation, and coding to join up multiple data tables to identify and subsequently calculate the output numbers requested.”*

These numbers have not previously been calculated and require generation and the time of several specialist individuals to undertake steps of the process.” This would involve both amendment of existing code and generation of new code. Gamma-Interferon testing numbers are not currently calculated for the cull areas and new code will be required to be written. There is a data field for severe interpretation of SICCT, but limited information on disease management measures which would require text mining or manual extraction.

32. In relation to the resources required to fulfil the Request, Dr Parry explained that there is a small specialist multi-disciplinary project team of epidemiologists, geographic information system scientists and data analysts who handle and use TB data for monitoring and evaluating effects in badger cull areas in England. These specialists have the specific skills required for the Request. Her witness statement explains that these individuals work on multiple TB projects of high strategic importance in line with the priorities of APHA and its customers. At the time of the Request (and currently) these include the data work for phase 1 of the cattle vaccine trial, analysis of the effects of badger vaccination, production of the annual badger culling area monitoring report, national and regional TB annual epidemiology and surveillance data reports, provision of data required for APHA operational on-farm TB investigation and management for APHA field vets and customer services. Dr Parry confirmed this is a core team of around 5 people, and there are not many people available with the specialist skills needed to access and understand the requested data.

Discussion and Conclusions

33. ***Is some or all of the requested information held by APHA?*** This was not an issue that was raised with the Commissioner. APHA had told the Appellant that they held the requested information. However, Dr Parry’s evidence indicated that some of the information might not be held.

34. In relation to part 1 of the Request, Dr Parry’s evidence was clear that APHA has not analysed the percentage of the HRA that is subject to badger culling. They do not hold any record of this information. Although they hold underlying data, they would have to do various calculations to provide this information. APHA have never specifically answered this part of the Request. We find that this information is not held by APHA.

35. In relation to part 2 of the Request, we have some doubts as to whether some or even all of this information is actually held by APHA, based on Dr Parry’s evidence on how much data manipulation would be required to produce the requested statistics. However, as APHA has said that they do hold the information requested, we have proceeded to consider the remainder of the issues.

36. ***Does EIR or FOIA apply to the Request?*** APHA accepts that EIR applies to part 1 but not part 2 of the Request. They argue that just being connected to the environment is not enough, and the information requested is not “on” any of the relevant factors.

37. We were referred to the decision of the then Chamber President of this Tribunal in ***Hendy v Information Commissioner and APHA*** (EA/2019/0295P). This case also involved a request for information about bTB. It was decided that FOIA rather than EIR applied to the request (this point was not appealed). APHA submits that this decision was correct and should apply in this case as well.

38. We do not agree. We are not bound to follow a previous decision by this Tribunal. But more importantly, this Request is quite different from the issue in *Hendy*. That request was about bTB test results in cattle herds. It did not involve any information about badger culling. The Chamber President found that the request actually for was information about cattle herd movements and so was not “on” the state of human health and safety, and it was also quite unclear how this affected the state of an element of the environment.

39. The information requested in this case is not simply about bTB testing. Part 2 of the Request asks about bTB tests, infections and disease restrictions broken down by culled and non-culled areas of land. The requested information is “on” bTB in cattle in areas subjected to badger culling, and in areas not subjected to badger culling. As stated in *Henney*, this analysis is fact and context specific.

40. Information about bTB testing, infections and disease restrictions is “on” the state of human health and safety, in relation to contamination of the food chain. We understand that the risk to human health from bTB is relatively low. Nevertheless, bTB in cattle is a concern because it is a disease in animals that forms part of the human food chain. It therefore affects human health and safety. We do not agree with APHA’s submission that it is simply on the state of bovine health.

41. Information on human health and safety only falls under EIR to the extent it is or may be affected by the state of the elements of the environment referred to in regulation 2(1)(a). The context here is land that is or isn’t subject to badger culling. We agree with the Appellant that badger culling affects biological diversity, which is one of the elements listed. We accept that information about one species in isolation would not constitute information about biological diversity. However, badgers are apex predators in the wild food chain, and so their presence or absence will affect the biological diversity of other species. We also note that biological diversity would potentially cover farmed as well as wild animals, and information about badger culling involves information about the interaction between badgers and farmed cattle.

42. We therefore find that the Request is for information “on” the state of human health and safety (contamination of the food chain through bTB) and the extent to which this is affected by the state of biological diversity (the presence of absence of badgers, i.e. a comparison of data for culled and non-culled areas). We do not believe that this is an overly expansive reading of the regulations, or that the information has only a minimal connection with the environment. The Appellant is essentially asking for information about the effect of badger culling on bTB. This is information about the effect of changes in biological diversity on an illness in cattle that may affect human health and safety. This means that EIR rather than FOIA applies to both part 1 and part 2 of the Request.

43. ***Was the Request manifestly unreasonable under regulation 12(4)(b) EIR?*** We find that the Request was manifestly unreasonable. This is because of the time it would take to produce the requested information, taking into account the guidance in Dransfield about protecting the resources of the public authority from being squandered on disproportionate use of the information regime. We accept APHA’s estimate that it would take 38 hours to respond to part 2 of the Request, not including part 2(c). Dr Parry explained in her evidence why this would take so long, which is essentially because the data they hold on the areas requested by the appellant does not align with culling boundaries. The appellant accepted that he was not in a position to challenge the timings put forward by APHA, and that it would be a highly technical process. His point is that the information should already have been in

place. The caselaw is clear, however, that time taken to respond to a request is to be judged based on the systems a public authority actually has in place rather than systems an appellant says they should have had in place.

44. We have taken account of the 24-hour limit in FOIA. This is not binding in an EIR case, but it does indicate a level of work beyond which it may not be reasonable to expect a public authority to comply. We have also taken into account the small size of the specialist team that would need to be involved in producing the information. This would be a significant distraction from their core function, which is work of strategic importance in relation to TB. Taking all these factors together, we find that 38 hours of work for this small team is manifestly unreasonable. We also note that additional work would be required to respond to part 2(c) of the Request.

45. APHA also submitted that the Request was manifestly unreasonable based on the Appellant's motivation. They say that this was an attempt to force a government agency to re-organise its strategic priorities and do an analysis that the Appellant believes they should have done already. We do not agree. It is certainly correct that the Appellant feels strongly that APHA should have this information available. But, it was clear to us from the evidence that his main aim was to obtain information required to show whether badger culling is effective or not.

46. *If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?* A public interest in disclosure does need to be particularly strong in EIR cases involving a manifestly unreasonable request. We have found that this Request was manifestly unreasonable based on the time it would take a small and specialised team to respond to it, and the distraction this would cause from other important strategic work. We are therefore looking for a public interest which is sufficiently strong to outweigh these concerns.

47. Although the hearing involved some detail about data and scientific analysis, the Appellant's basic point is quite simple. He is concerned that badger culling is not an effective way to control bTB in cattle. A good way to test effectiveness is to compare levels of bTB in areas that have been culled with areas that have not been culled. If there are lower levels of bTB in areas that have been culled, it suggests that culling does have an effect. If not, it suggests that culling does not have an effect. The Appellant believes APHA should have done this analysis, and his Request asks for this information.

48. The Commissioner's Decision Notice says that the public interest in disclosure is "undoubtedly strong", and we agree with this. Badger culling involves a lot of time and public money. It is controversial and expensive. If culling is not effective, the focus on culling as a solution may mean that other more effective ways of controlling bTB are missed or not given sufficient focus. Badger culling has an effect on wild animal populations and the balance of nature. The Appellant makes the point in his appeal that publication of data two years late is an unacceptable delay for farmers and the general public. We have also taken into account the presumption of disclosure in EIR cases.

49. Because of the importance of this issue to the public, this might be one of the unusual cases where the public interest in disclosure outweighed the manifestly unreasonable exception – but only if there was no other available data comparing bTB in culled and non-culled land. We do not agree with the Commissioner's finding that the planned publication of

data up to 2020 would satisfy the Request. This is data about culled land only. It does not provide the comparison that the Appellant is looking for. However, this is not a situation where it is impossible to compare culled and non-culled land without the information requested by the Appellant. Mr Langton made this comparison in his published paper by using other existing reports. This may not be as accurate as the specific data the Appellant requested, but it means it was still possible to do an analysis of whether rates of bTB appeared to be lower in culled land as compared to non-culled land. It has been at least partially possible to analyse whether badger culling has been effective in reducing bTB. This goes some way towards satisfying the public interests in disclosure of the information requested by the Appellant.

50. We therefore find that the public interest in maintaining the exception does outweigh the public interest in disclosure. The undoubtedly strong public interests in disclosure are not sufficient to require APHA to do something that is manifestly unreasonable, in circumstances where those interests can be at least partially met in another way.

51. These findings mean that APHA was entitled to rely on regulation 12(4)(b) EIR to refuse to reply to the Appellant's Request. We dismiss the appeal.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 21 November 2022