



**Neutral Citation Number**

**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**Case No. EA/2018/0063**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50713711**

**Dated: 20 March 2018**

**Appellant:** Mr David Hendy

**Respondent:** Information Commissioner

**Public Authority:** Animal & Plant Health Agency (APHA) an executive agency of the Department for Environment Food and Rural Affairs (DEFRA)

**Heard at:** Judge's Chambers London

**Date of hearing:** 20 September 2018

**Date of decision:** 11 October 2018

**Before**

Angus Hamilton DJ(MC)  
Tribunal Judge

**Subject matter: s 12(1) Freedom of Information Act 2000 and the Freedom of Information & Data Protection (Appropriate Limit & Fees) Regulations 2004**

**Cases considered:**

*Roberts v Information Commissioner (EA/2008/0050)*

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal dismisses the appeal for the reasons given below.

## **REASONS FOR DECISION**

### **Application by APHA (DEFRA) to Adjourn the Tribunal Hearing**

1. Before dealing with the substantive judgment in this matter I need to address the application made on behalf of APHA on 17 September 2018 (It should be noted that APHA is not a public authority but is an executive agency of DEFRA which is a public authority. For simplicity I shall from now on be referring to the public authority as APHA which is the same approach as adopted by the parties) to adjourn the Tribunal hearing of this case.
2. On 27 July 2018 the Registrar to the Tribunal gave Directions (which followed earlier Directions) that the parties had until 10 August 2018 to provide final submissions. Mr Hendy, the Appellant provided his final submissions by email on 10 August 2018. APHA did not provide any final submissions and nor did it apply within the time limit for further time to file such submissions. Furthermore, APHA did not apply within a reasonable time of the receipt of Mr Hendy's submissions for leave to respond to those submissions and deal with any new issues that those submissions may have raised.
3. Rather on 17 September – over 5 weeks after the 10 August deadline and apparently in response to a notification that the matter was to be considered by me on 18 September – APHA emailed the Tribunal to say that it wished to respond to Mr Hendy's submissions but had failed to do so because of various, rather vaguely asserted, staff absences.
4. I would mention here that as a Tribunal Judge sitting alone I am given a degree of flexibility as to when I consider a case. This matter was scheduled to be considered between 17 and 21 September rather than on 18 September.
5. On any analysis APHA's conduct in this matter has been very poor and no proper explanation has been given for the absence of any application for

further time to respond. The matter has clearly been totally overlooked. Mr Hendy acts for himself without the support of a legal team and has managed to keep to the timetable and I would expect the same, if not better, of an agency connected to a government department with access to legal support.

6. Although APHA's application was sent to the Commissioner and Mr Hendy by APHA for their observations I have not received any formal response from either party. I am inferring however from Mr Hendy's recent correspondence which basically 'chases' the Tribunal as to when the matter is going to be considered, that he, having submitted his final submissions, wishes the matter to be considered as soon as possible. I can only infer that the Commissioner has no strong view on the matter.
7. To adjourn the Tribunal's hearing now would be to indulge APHA's poor preparation and poorly explained failure to comply with clear Directions. It would also be unfair to Mr Hendy who is entitled to have his appeal considered as soon as reasonably practicable. I therefore refuse APHA's application to adjourn. I would add that between my consideration of this matter and the completion of this judgment further submissions arrived from APHA – despite no extension of time being granted. I did not consider these for the reasons already given.

### Introduction

8. Under section 1(1) of FOIA (the Act) a person who has made a request to a public authority for information is, subject to other provisions of FOIA:
  - (1) entitled to be informed in writing by the public authority whether it holds information of the description specified in the request (section 1(1)(a)); and
  - (2) if the public authority does hold the information, to have that information communicated to him (section 1(1)(b)).

9. Section 12 of FOIA provides, so far as material, as follows:

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

10. The Secretary of State has made regulations which prescribe the appropriate limit for the purposes of section 12 of FOIA, namely the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations').

11. Regulation 3 of the Regulations prescribes that the appropriate limit for public authorities listed in Schedule 1 of the Regulations is £600 and for all other public authorities is £450. In this Appeal the appropriate limit is £600.

12. Regulation 4(3) of the Regulations provides that in estimating the cost of complying with a request to which section 1(1) of FOIA would otherwise apply, a public authority may "take account only of the costs it reasonably expects to incur in relation to the request in-

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."

13. Regulation 4(4) of the Regulations provides that where costs are attributable to the time that is expected to be taken by persons undertaking the activities specified in regulation 4(3), "those costs are to be estimated at a rate of £25 per person per hour". £600 is therefore the equivalent of 24 hours' work.

#### Request by the Appellant

14 It is not in dispute that the Information Commissioner in her Response to the Appeal dated 26 April 2018 has correctly set out the chronology of this matter and I have therefore adopted that chronology:

15 The Appellant requested information from the Animal and Plant Health Agency ("APHA") regarding tuberculosis in herds with and without moved-in cattle.

16 On 5 September 2017, the Appellant submitted an information request ("the Request ") to APHA, which was further clarified on 7 and 11 September in the following terms:

#### *"QUANTITIES*

*The following 3 quantities will be provided for each year from 2003 to 2016 inclusive.*

- *Cattle herds registered on SAM*
- *Disease restricted herds - during (Only OTF withdrawn)*
- *Incidents OTF withdrawn*

*Definitions for each of these 3 quantities are as follows.*

#### **Definitions**

##### **Cattle herds registered on Sam**

*The number of herds registered as active on the APHA's SAM system*

***Disease restricted herds - during (Only OTF withdrawn)***

*These are herds which were not officially TB-free due to OTF being withdrawn (i.e. herds under movement restrictions with OTF status withdrawn) at some point during the period shown, due to a TB incident. A herd with more than one incident in the period will be counted more than once.*

***Incidents OTF withdrawn***

*New herd incidents where OTF status was withdrawn from the herd due to the detection of lesions typical of TB during post-mortem examination of one or more test reactors or inconclusive reactors, or where samples from one or more reactor, inconclusive reactor or a slaughterhouse case produce positive culture results for *Mycobacterium bovis* (the causative bacterium of bovine TB).*

**CONDITIONS**

*The quantities above will be provided under the following conditions.*

**EITHER**

*numbers for the 3 quantities when holdings (CPH's), which have for 5 years prior to the report year,*

- 1. existed in Devon,*
- 2. undergone annual whole herd tests,*
- 3. only ever consisted of one herd, and*
- 4. have had an animal tested which has been moved into the herd from another herd*

*and numbers for the 3 quantities when holdings (CPH's), which have for 5 years prior to the report year,*

- 1. existed in Devon,*
- 2. undergone annual whole herd tests,*
- 3. only ever consisted of one herd, and*
- 4. have **never** had an animal tested which has been moved into the herd from another herd*

OR

*numbers for the 3 quantities when holdings (CPH's), which have for 5 years prior to the report year,*

- 1. existed in Devon,*
- 2. undergone annual whole herd tests,*
- 3. only ever consisted of one herd, and*
- 4. have had animals moved into it*

*and numbers for the 3 quantities when holdings (CPH's), which have for 5 years prior to the report year,*

- 1. existed in Devon,*
- 2. undergone annual whole herd tests,*
- 3. only ever consisted of one herd, and*
- 4. have **not** had animals moved into it."*

- 17 APHA responded on 2 October 2017 providing part of the requested information relating to the 'quantities' but refused to disclose the remainder of the information relating to the 'conditions', citing section 12(1) FOIA on the basis that the cost of complying with the request would exceed the appropriate limit of £600, or the equivalent of 24 working hours. In its response dated 2 October 2017 APHA explained to the Appellant that the request could not be processed without a considerable amount of work extracting and creating new data, therefore placing a '*disproportionate and unreasonable burden on resources*'.
- 18 APHA provided a breakdown of the hours required to comply with the request and a breakdown of estimated costs involved in order to answer each part of the request in full. APHA explained to the Appellant that to provide part of the requested information (that relating to between 2003 and 2010) would require considerable time and research into an old database system, therefore only the information recorded on the updated systems would be accessible - that being information from 2011 onwards. APHA explained that a



sampling exercise was carried out to extract the data requested for 2016 and, although not fully completed, the combined time spent in extracting data from this year alone was 42 hours (the relevant table appears at para 23 of the Commissioner's DN and is reproduced as Appendix A to this judgement). APHA went on to advise the Appellant that he may wish to refine part of his request to comply with a narrower category of information.

- 19 The Appellant sought an internal review which resulted in the public authority maintaining its reliance on s.12(1) FOIA. The Appellant then contacted the Commissioner to complain about the handling of his request and the Commissioner investigated the matter. The Appellant argued that:

*'It is my belief that the reasons stated by APHA to claim exemption under s.12 are not valid. I believe this because, in the more detailed Internal Review ... APHA appear to be referring to methods designed for managers wishing to create reports and not for technicians wishing to extract data. The methods are appropriate for producing reports when the user lacks basis knowledge of writing data extraction queries... I would expect technicians within APHA, who are responsible for extracting data, to have a basis knowledge of how to handle data for the purposes of extracting data'.*

- 20 The Commissioner's DN accepted APHA's calculations for the time that would be needed to extract the relevant data for 2016 alone as being over 42 hours and the time to complete 2011 to 2016 data as over 100 hours. The DN stated that the Commissioner considered APHA's estimate of time to comply with the request was reasonable and would exceed the appropriate limit of 24 hours and consequently the relevant costs limit. The DN was dated 20 March 2018

### The Appeal to the Tribunal

21 On 24 March 2018 the Appellant submitted an appeal to the Tribunal (IRT).

22 In his appeal the Appellant states:

*'DEFRA have calculated times based on methods designed for business users. Such methods are deployed when data reports are run. This approach avoids the need for the user to directly write data extraction queries. However directly writing queries is often better suited and offers more scope for producing figures which are not routinely reported on ...*

*Time estimates do not have to be precise, but they do have to be realistic. DEFRA have not justified why they have estimated effort to comply to my request using an approach which is designed for users who lack data handling knowledge when they employ data scientists.'*

### The Questions for the Tribunal

23 This matter was considered on the papers only. APHA was joined as a party to the proceedings and made its own written representations to the Tribunal. These very much supported the Commissioner's analysis.

24 I judged that the sole question for me was to consider whether the Appellant was correct to claim that on the balance of probabilities that the work involved in answering his requests for information under FOIA would have involved 24 hours or less work.

- 25 I considered all the written material before me presented by the Commissioner, the Appellant and APHA with the exception of APHA's final submissions.
- 26 I also considered the decision of the IRT in *Roberts v Information Commissioner* (EA/2008/0050) in relation to the nature and quality of the evidence or information that should be provided by a public authority which is seeking to rely on s12 of the Act.
- 27 The *Roberts* case confirms that a public authority is not required to provide a precise calculation of costs, only an estimate:

*That estimate, however, must be a reasonable one and may only be based on the activities covered by Regulation 4(3) .... It is not sufficient for a public authority simply to assert the appropriate limit has been exceeded. As was made clear in Randall (EA/2007/0004) and estimate has to be 'sensible, realistic and supported by cogent evidence'. The word estimate ... points to something more than a guess or an arbitrarily selected figure. It requires a process to be undertaken which will involve an investigation followed by an exercise of assessment and calculation. The investigation will need to cover matters such as the amount of information covered by the request, its location ... The second stage will involve making an informed and intelligent assessment of how many hours the relevant staff members are likely to take to extract the information. Clearly the whole exercise must be undertaken in good faith and, as the Regulation provides, involve an element of reasonableness.*

- 28 Although the *Roberts* case was not binding on the Tribunal I accepted and adopted the comments in that case as being an eminently sensible approach to the requirement placed upon a public authority which seeks to rely on s.12 of the Act.

- 29 I do not intend to reproduce the parties submissions at length here. The parties very much adhered to their original positions which have been outlined above. I also consider that the issues in this case are relatively narrow.
- 30 It is of note that APHA clarified in its submissions that it had now examined the data that it holds for the years 2003-2011 on its previous computer system (VetNet) and had found that for those years it only holds animal testing data for animals that tested positive for TB. APHA stated that it does not hold data about animals that were tested and 'passed' their TB test. Consequently, APHA asserts that it cannot provide the sought information for those years as the sought information concerns all tested animals regardless of whether they passed or failed the test. The Appellant raises a fairly restrained objection to this assertion - pointing out that at an earlier stage APHA stated '*we believe that this data may be available on our old decommissioned system VetNet*'. However, this is clearly a tentative and speculative comment which was made before any examination of VetNet had been carried out. It is not a contradictory statement. Arguably, APHA are relying on a form of late claimed exemption which it is entitled to do. In the absence of any evidence or material casting doubt on their current assertion I do conclude on the balance of probabilities that APHA did not hold the requested information for this period.
- 31 I found the Appellant's submissions at some points to be of a highly technical nature. They run to many, many pages of dense text and rely on concepts that a person qualified in data analytics would doubtless fully understand. Whilst Mr Hendy is fully entitled to expect a Tribunal well-versed in FOIA to consider his appeal it is not really reasonable of him to expect that Tribunal to be well acquainted with the finer details of data analytics and the necessary accompanying hardware and software.

- 32 What I did glean from the Appellant's submissions however is that he appears to be contending that if APHA wrote particular software or data analysis systems or new 'reporting tools' (or possibly employed better qualified staff or had better and faster hardware or a better IT subcontractor and a less restrictive contract with that subcontractor), then to extract the information he is seeking would take much less time than APHA asserts.
- 33 I do not accept that the legislation can be read in the way that the Appellant appears to be suggesting. I think that s.12 and the accompanying Regulations have to be read as 'how long would providing the requested information take approximately with the public authority's current staff, equipment and processes?'. I do not see how the legislation can be read so as to impose a requirement on a public authority first to upgrade staff equipment and systems and then to provide a time estimate. This is not to say that the public authority is permitted to engage in any 'foot-dragging' or to exaggerate the time that tasks would take. They are clearly not. Similarly, it would not be permissible for the public authority to provide an estimate based upon an inappropriate and unqualified member of staff undertaking the necessary work – which would inevitably lead to an inflated costs and time estimate. Clearly a suitably qualified member of existing staff would have to be assigned to undertake the task. My reason for contending that the legislation should be read in the manner I suggest is that s.12 is a 'costs limit' designed to limit the costs that a public authority might incur in responding to a FOIA request. I do not think it can be interpreted therefore as imposing an obligation on the public authority to incur the expense of 'upgrading' staff systems or contracts with subcontractors in order to bring the costs of the actual search down to a reasonable level. That would effectively render the costs cap meaningless.
- 34 An alternative approach is to look at what Regulation 4(3) of the Regulations allows a public authority to take into account when

calculating time and costs estimates. It allows the public authority to include the costs it reasonably expects to incur in relation to the request in -

- 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.

Thus, if providing certain requested information would require the design and implementation of a new system or reporting tool then the Regulations permit the inclusion of the time that the design and implementation of such a new system would take in estimating the overall time and costs. I do not believe that it is correct to look merely at the time and costs involved in responding to the request after the design and implementation of the new system.

- 35 This would appear to be the approach adopted by APHA in the costs/time analysis appearing at Appendix A as a number of the lines in that breakdown refer to the creation of a new system or reporting tool.
- 36 The concerns that I have expressed about the Appellant's approach (design new systems and reporting tools and/or acquire new hardware etc and then calculate time and costs of the search he requires) are also echoed in APHA's submissions. At Para 18:

*'APHA submits that the Appellant's suggestions would not in any event enable the request to be responded to within the s. 12 limit. In particular:*

- a) *APHA does not have a second server that it could access in order to assist with responding to the request*

b) *APHA is not able to make direct queries in respect of the data on Sam in the manner suggested by the Appellant because it does not hold the data in the necessary format, only IBM (its third party IT services provider) [does]. Under the terms of its agreement with IBM, APHA would need to commission IBM to carry out the necessary work to respond to the request, which would be bound to exceed the costs limit.'*

37 I consider the analysis of time and costs provided by APHA and appearing at Appendix A to be clear and also 'Roberts' compliant. Conversely I consider the Appellant's analysis to be flawed for the reasons already given. For all these reasons I find that I am satisfied, on the balance of probabilities, that responding to the appellant's request would involve in excess of 24 hours work and thus I dismiss the appeal

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 11 October 2018

Promulgated: 18 October 2018

## Appendix A

Reason	Hours
Initial planning and design (2 Staff x 6 hours)	12
Create new County stats report	1
Movement data extract design and development (Report failures due to size of datasets – running time not included)	4
Re- scheduling and testing of report outputs	1.25
Discussions between data owners and FOIA team-> further decisions and developments	3.5
2016 data for identifying herds with movements – extract and manipulate – STEP A	3.5
2016 data for identifying herds without movements – extract and manipulate – STEP B	2
Movement data from another team	2.5
Animal testing data – extraction of 2 months – failures – identifying and correcting errors	2.75 3.5
Running single month 30 mins x 12 months for 2016 (STEP C and D)	6
TOTAL	42 hours