



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. GIA/938/2020

On appeal from the First-tier Tribunal (Information Rights)

Between:

Mr David Hendy

Appellant

- v -

The Information Commissioner

First Respondent

**The Animal & Plant Health Agency (an executive agency of the Department for
Environment, Food and Rural Affairs)**

Second Respondent

Before: Upper Tribunal Judge Mitchell

Decided on consideration of the papers.

Representation:

- The Appellant in person.
- For the First Respondent, the Information Commissioner's Legal Department.
- For the Second Respondent, Holly Stout, of counsel, instructed by the Government Legal Department.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal, taken on 14 May 2020 (case no. EA/2019/0295P) involved an error on a point of law. Under section 12(1) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal sets aside the First-tier Tribunal's decision. Under section 12(2) of the 2007 Act, the Upper Tribunal remits to the First-tier Tribunal for re-determination Mr Hendy's appeal against the Information Commissioner's decision notice of 22 July 2019, which found that the Appellant's request for information was vexatious, in accordance with the following directions:

1. The appeal is to be determined by a differently constituted First-tier Tribunal.
2. If any party wishes to request that the First-tier Tribunal conducts a hearing before determining the Appellant Mr Hendy's appeal, the party's written request is to be received by the First-tier Tribunal within **one month** of the date on which this decision is issued.

Direction 2 may be varied by direction of the First-tier Tribunal.

REASONS FOR DECISION

Definitions

1. In these reasons:

- "APHA" means the Animal and Plant Health Agency, an executive agency of DEFRA. Generally, these reasons refer to the second Respondent as APHA but this should be read as including DEFRA since, technically, DEFRA is the relevant public authority under FOIA;
- "DEFRA" means the Department for Environment, Food and Rural Affairs;

- “FOIA” means the Freedom of Information Act 2000;
- “OTF” means ‘officially TB-free’, that is a herd of cattle considered by the relevant public authority to be free of TB;
- “OTFW” means ‘officially TB-free withdrawn’, that is a herd of cattle whose OTF status has been withdrawn;
- “TB” means bovine tuberculosis.

Background

Mr Hendy’s September 2017 request for information

2. The present case cannot be properly without describing in some detail an earlier request for information made to APHA by the Appellant Mr Hendy.

3. On 11 September 2017, Mr Hendy requested disclosure of certain information held by APHA. Mr Hendy’s clarified request sought “3 quantities” of information relating to 2003 to 2016 namely (a) “cattle herds registered on SAM” (as I understand it, SAM is APHA’s computerised administration system); (b) “disease restricted herds – during (Only OTF withdrawn)”; and (c) “incidents OTF withdrawn”.

4. Mr Hendy’s request went on to define those three ‘quantities’ of information sought:

(a) this referred to the number of herds registered as active on SAM;

(b) this referred to herds that were not OTF due to that status having been withdrawn at some point “during the periods shown” due to a TB incident;

(c) referred to “new herd incidents” where OTF status had been withdrawn due to 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)”.

5. Mr Hendy's request for information incorporated certain 'conditions', set out using an 'either/or' formulation. Mr Hendy argues that these conditions were intended to limit the scope of his request. While I need not set out the conditions in full, I observe that the 'either' part of the conditions identified cattle herds by reference to animal movements and TB tests, and the 'or' part by reference simply by reference to movement of animals onto a herd.

6. APHA's response to Mr Hendy's request, dated 2 October 2017, was that certain information could be provided namely the number of herds registered on SAM on the last day of years 2011 to 2016; the number of herds that had an OTFW TB incident during the year "as these would also be disease restricted herds"; and the number of OTFW incidents during the year.

7. APHA's response went on to inform Mr Hendy that, while the information sought was held "in so far that we hold the building blocks required to generate what you have specifically asked for", supplying the information to him would exceed the appropriate cost limit provided for under section 12 of FOIA (£600 / 24 hours of staff time). Furthermore, while pre-2011 data might be accessible from a decommissioned administrative system called VetNet, this would require further investigation, manipulation and extraction and, for this reason, APHA discounted pre-2011 data in estimating cost. Apparently, APHA considered that the cost of extracting etc. the pre-2011 data from VetNet was bound to exceed the appropriate cost limit. In any event, pre-2011 information was not sought in the present request for information.

8. For the purpose of estimating the cost of providing the information relating to 2011 to 2016, APHA undertook a sampling exercise limited to 2016 information. While APHA did not complete that exercise, their creation of an incomplete data set for 2016 took up 42 hours of staff time. APHA concluded that providing the information sought would exceed the appropriate cost limit under section 12 of FOIA. According to an APHA witness statement supplied to the First-tier Tribunal, "of the 42 hours spent to date [sampling only 2016 data], 12 hours 15 minutes were spent exploring the 'either' option...which specifically requires individual animal test data as opposed to herd test data" (page 583 of the First-tier Tribunal bundle for the present appeal).

9. APHA's response also addressed their duty to provide Mr Hendy with advice and assistance under section 16 of FOIA. APHA considered whether Mr Hendy's request could be 'narrowed down' to bring it within the cost limit. This would be difficult,

according to APHA, given the 'conditions' of Mr Hendy's request, although APHA did go on to discuss how a refined request might avoid exceeding the costs limit:

"you could, for example ask for just:

- the number of herds registered on SAM on the last day of each year for 2011-2016, or
- the number of herds which had an OTFW TB incident during the year as these would also be disease restricted herds, or
- the number of OFT10. W incidents during the year for example the herd had an open OTFW incident at some point during that year.

If you were to make a new request for a narrower category of information, it may be that we could comply with that request within the appropriate limit, although we cannot guarantee that that will be the case."

10. Mr Hendy complained to the Information Commissioner. The Commissioner sought APHA's comments, and APHA estimated that complying with Mr Hendy's request for information in relation to 2011 to 2016 would involve over 100 hours of staff time. The Commissioner accepted APHA's submissions and her decision notice of 23 March 2018 found that, were APHA to provide the information requested, the appropriate cost limit would be exceeded so that APHA were not required to provide the information. The Commissioner also found that, in addressing how a refined request might avoid the cost limit, APHA complied with their duty to provide advice and assistance under section 16 of FOIA.

11. Mr Hendy appealed to the First-tier Tribunal against the Commissioner's decision notice, and APHA were made a party to the proceedings. A Ross Akehurst gave witness statement evidence for APHA which responded with Mr Hendy's point that his 'conditions' provided alternative means of providing the information sought. As I understand it, Mr Hendy's point was that APHA's cost estimate had been inflated by their misreading of his 'conditions'; they overlooked that the conditions set out alternative means of satisfying his request. Mr Akehurst stated that Mr Hendy "did not make this clear previously" but that, if his request for information did set out alternative data sets, "that would have reduced the time spent slightly".

12. On 11 October 2018, the First-tier Tribunal dismissed Mr Hendy's appeal. The tribunal described Mr Hendy's argument as being 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”. The tribunal rejected this argument and held that section 12 of FOIA did not require a public authority to upgrade its staff, equipment and systems in order to reduce the cost of complying with a request for information. The tribunal also found that APHA had complied with their duty under section 16(1) of FOIA.

The present request for information

13. On 22 November 2018, Mr Hendy made the present request for information. Henceforth, I shall refer to this as Request 2 and to the September 2017 request as Request 1. Request 2 read as follows:

“Please provide the following 3 quantities for each of years 2015 and 2016.

- 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

Please provide the quantities...for holdings (CPH's) which have satisfied all of the following conditions, for 5 years prior to the report year.

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

In addition to this, please also provide the quantities shown...for holdings (CPH's) which have satisfied all of the following conditions, for 5 years prior to the report year.

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

14. Given the role played by Request 1 in APHA's response to Request 2, and in subsequent proceedings, I shall identify similarities and differences between the two requests:

(a) Request 1 related to the 2003 to 2016 whereas Request 2 related to 2015 and 2016;

(b) both requests described the three 'quantities' of information identically, and included identical definitions of those quantities;

(c) both requests included 'Conditions'. Request 1 stated that “the quantities above will be provided under the following conditions”. Request 2 stated “please provide the quantities...for holdings (CPH's) which have satisfied all of the following conditions, for 5 years prior to the report year”;

(d) on my reading, Request 2's conditions qualified the 'quantities' of information requested: those quantities were sought only to the extent that they related to the two herd-types described in the conditions. The herd types were themselves identified by reference to four characteristics. The first three were identical for both herd types namely herds that (1) existed in Devon; (2) had undergone annual whole herd tests; and (3) had only ever consisted of one herd. The herd-types were differentiated by the fourth characteristic which, in one case, referred to herds onto which animals had been moved and, in the other, herds which "have not had animals moved onto it";

(e) Request 1's 'conditions' were structured differently and, as I have said, were presented using an 'either/or' formulation. The second set of conditions (the 'or' set) was identical to the conditions of Request 2. The first set of conditions (the 'either' set) was not replicated in Request 2. This first set consisted of two descriptions of herd-type again framed by reference to four characteristics. The first three were identical to characteristics (1) to (3) as just described but characteristic (4) was not, and it was this that differentiated the herd-types. For one herd-type, it was "have had an animal tested which has been moved into the herd from another herd" and, for the other, "have never had an animal tested which has been moved into the herd from another herd".

15. On my reading of both requests for information, it is tolerably clear that Mr Hendy's 'conditions' were intended to qualify, in a herd-specific manner, the headline request for information (i.e. Mr Hendy's 3 'quantities' of information). This intention was expressed far more clearly in Request 2 but, if Request 1 is read as a whole, I think the conditions were intended to serve the same purpose that is to qualify, or 'condition', the headline request for information. However, this intention did not really leap from the page.

16. It seems to me clear that, on both requests, Mr Hendy did not seek information about every cattle herd registered on SAM, every disease restricted herd and every incident of OTF status being withdrawn. That information was sought only for herds caught by his 'conditions'. Both requests related to herds with certain common characteristics namely they 'existed' in Devon, had undergone annual whole herd tests and had only ever consisted of one herd. The herd-types were differentiated by the fourth characteristic. In Request 2, this identified herds that had had animals moved onto the herds and those which had not (i.e. animal movements). Since Request 2 was replicated in one of Request 1's two sets of conditions (the 'or' set), Request 1 could have been satisfied by providing, in relation to a particular year, the

same information as Mr Hendy subsequently sought in Request 2. Alternatively, Request 1 could have been satisfied by providing information about two other herd-types differentiated according to whether a *tested* animal had or had not been moved into the herd. Request 2 omitted herd-types differentiated according to animal testing. I am labouring this point because (a) Mr Hendy's case relies, to a significant extent, on an argument that Request 2 was less onerous to satisfy than Request 1; but (b) the differences between the two requests only become apparent, in my view, upon close analysis.

17. APHA responded to Request 2 on 19 December 2018. APHA refused the request for information on the ground that it was vexatious within the meaning of section 14(1) of FOIA. APHA viewed Request 2 as identical to Request 1 save that it related to 2015 and 2016 rather than 2003 to 2016. In responding to Request 1, APHA had explained to Mr Hendy how he might 'narrow down' his request to remain within the appropriate cost limit, but that explanation "did not involve reducing the years due to the sampling exercise conducted".

18. APHA considered that Mr Hendy had ignored their Request 1 attempts to "engage, assist and advise", and Request 2 sought to "re-open a matter substantially similar to that which had already been fully addressed". Moreover, earlier correspondence had outlined resource pressures caused by Mr Hendy's "TB statistical data requests". In the last three years, Mr Hendy had made 12 TB-related requests for information and, in two of those, requested internal reviews before making unsuccessful complaints to the Information Commissioner. APHA had also had to defend two unsuccessful appeals brought by Mr Hendy to the First-tier Tribunal. Taking these matters into account, APHA decided that Request 2 was vexatious.

19. On 16 January 2019, Mr Hendy requested an internal review of APHA's decision. He argued that "the current request...clearly asks for data covering two years of data for cattle herds with and without cattle moved in" and "unlike my previous request, no reference is made to animal tests in order to supply those results". On 25 March 2019, APHA refused to review their decision. APHA's review decision letter:

(a) stated that Mr Hendy's reliance on evidence produced for the Request 1 tribunal proceedings indicated that "you are substantially requesting the same information as before";

(b) concluded that Request 2 ‘fell within’ Request 1;

(c) concluded that Request 2 contravened those parts of the Information Commissioner’s guidance about vexatious requests concerned with “burden on the authority” and “unreasonable persistence” (in seeking to re-open an issue already comprehensively addressed by a public authority);

(d) expressed APHA’s review decision in the following terms:

“our final decision is that your past pattern of behaviour is of relevant consideration as is the burden on the business of APHA. The decision to make this request vexatious is upheld.”

The Information Commissioner’s decision: Request 2

20. Mr Hendy complained to the Information Commissioner who decided on 22 July 2019 that APHA had mistakenly dealt with Request 2 as a FOIA request. Request 2 should have been dealt with under the Environmental Information Regulations 2004 although the practical outcome was the same. Request 2 was “manifestly unreasonable” under regulation 12(4)(b) of the 2004 Regulations so that APHA were not required to provide the information. While Request 2 could not, on its own, be considered intended to cause “annoyance”, Mr Hendy’s pattern of information requests meant that APHA were “unable to sustain this level of disruption and burden” so that the Request 2 was manifestly unreasonable. Alternatively, if FOIA applied, Request 2 was vexatious within the meaning of section 14 of FOIA.

Proceedings before the First-tier Tribunal

21. The First-tier Tribunal made APHA a party to the proceedings on Mr Hendy’s appeal against the Information Commissioner’s Request 2 decision notice.

22. Briefly, Mr Hendy’s notice of appeal to the First-tier Tribunal argued:

(a) the “burden, distress, disruption and irritation” reported by APHA was largely of their own making and flowed from their misinterpretation of Request 1: APHA failed to appreciate that, by using ‘either/or’ in his Request 1 conditions, he provided alternative means of meeting the request;

(b) Request 2 related to information for only two years rather than the 13 years within Request 1. On APHA's own cost evidence, they should have been able to comply with Request 2 without exceeding the cost limit, yet they did not even address the limit;

(c) the way in which Mr Hendy framed Request 2 was informed by APHA's Request 1 cost estimate even though that estimate was flawed by APHA's misreading of Request 1;

(d) insofar as APHA relied on advice and assistance given on Request 1, the Commissioner's finding, in that case, that APHA had discharged their section 16(1) FOIA duty was probably based on the same misreading of Request 1 as APHA's;

(e) the public interest would be served by disclosure of the Request 2 information. Segregating herd data by reference to cattle movements (or the absence of such movements) would help understanding of the role played by movements in the spread of TB. Despite this, APHA refused disclosure even though, on their own estimates, providing the Request 2 information would expend only 23 hours of staff time;

(f) Mr Hendy's public interest arguments were supported by correspondence he supplied with various individuals and organisations involved in cattle farming who, in his words, "consider such information to be important". These included a letters from the Senior Policy Officer for Farmers' Union of Wales ("a valuable source of information"); a breeder of pedigree cattle in Germany ("extremely valuable information"); a veterinary surgeon with a farm animal practice ("extremely valuable and relevant"); and a fellow of the Royal College of Veterinary Surgeons and author of a textbook on diseases in cattle ("could be very useful");

(g) the frequency of recent requests for information was more relevant to the question whether Request 2 was vexatious than "requests made in earlier years". Between 1 May 2016 and 1 August 2019, Mr Hendy made 11 requests for information, about one every four months. With one exception, these requests were not refused "on cost grounds which APHA has not later withdrawn". Three requests were followed by complaints to the Information Commissioner. The first concerned information about "reactors for different herd sizes" and the subsequent tribunal appeal was withdrawn by consent after APHA agreed "not to apply" section 12 of FOIA; APHA then complied with Mr Hendy's resubmitted request for information (see

the letter written on APHA's behalf at page 27 of the First-tier Tribunal bundle). The other two complaints related to Request 1 and Request 2;

(h) the information sought was not complex. It simply concerned two types of cattle herd. One consisted of herds onto which cattle had been moved, and the other herds onto which they had not. The public should not find it difficult to understand the difference between these. Request 1 was drafted to provide APHA with two alternative means of meeting the request, drawing on either TB test records or movement records. APHA's own evidence demonstrated that the Rural Payments Agency (who hold movement records) were able to supply data with substantially less effort than APHA (who held TB test record data). Request 2 allowed APHA to supply the information sought without having to draw on TB test record data.

23. The First-tier Tribunal made arrangements for a hearing of Mr Hendy's appeal and a hearing date was fixed for 6 March 2020. On 29 January 2020, however, Mr Hendy wrote to the First-tier Tribunal as follows:

"Please note that I may not attend [the hearing listed for 6 March 2020] and I intend to send to the GRC [General Regulatory Chamber of the First-tier Tribunal] confirmation of this....

Please note that regardless of my decision, I still plan to submit a final submission so would be grateful if the GRC could confirm to me the day and time on that day at which the deadline for this submission expires. In view of the hearing date which the GRC have informed me of today, I suspect this deadline may prove tight for me so I would appreciate a time on the day as well as the actual date.

I would also like to suggest that although the second respondent (APHA) may be able to base their final submission on the final submission of the appellant (me) should the second respondent submit after the appellant. It may be helpful to resolving this case if the appellant had time to reflect on the second respondent's filed witness statement before the appellant submits his final submission."

24. On 29 January 2020, APHA's legal representative emailed the tribunal as follows:

“[APHA] would like to file a witness statement and skeleton argument in this matter. Would 14 days before the hearing (by 21 February 2020) be suitable?”

I will update the tribunal on who will attend the hearing shortly.”

25. On 31 January 2020, Mr Hendy wrote to the First-tier Tribunal and the other parties’ legal representatives to “confirm to all parties involved that I will not be attending”. He explained why:

“I suspect that I will need...experience [*of oral hearings, which he did not have*] in view of what events have unfolded based on arguments presented and practices adopted evident by responses submitted so far.

In an oral hearing I will need to react to situations in real time so there is a greater risk of making bad decisions. I make better decisions when I am not rushed and given time to reflect in my own time.”

26. The First-tier Tribunal gave case management directions on 31 January 2020, under which:

(a) by 14 February 2020, Mr Hendy and the Commissioner were to provide APHA with a copy of each document relied on including any witness evidence;

(b) by 21 February 2020, APHA were to provide Mr Hendy and the Commissioner with a written statement from any witness on whose evidence they intended to rely;

(c) by 28 February 2020, Mr Hendy was to deliver to the other parties and the tribunal any final written submissions.

27. On 11 February 2020, APHA’s legal representative wrote to the First-tier Tribunal. The representative noted that neither Mr Hendy nor the Commissioner intended to attend a hearing and informed the tribunal that APHA now considered a hearing unnecessary. APHA requested a determination on the papers. The representative informed the tribunal that APHA would comply with the tribunal’s directions, given on 31 January 2020, for provision of, amongst other things, written witness evidence.

28. On 14 February 2020, the First-tier Tribunal gave case management directions which:

(a) disapplied the directions given on 31 January 2020 insofar as they required Mr Hendy to provide any final written submissions by 28 February 2020;

(b) required APHA, by 28 February 2020, to “send paginated additional documents” to Mr Hendy, the Commissioner and the tribunal;

(c) gave all parties, by 3 March 2020, the opportunity to make final written submissions;

(d) stated that the parties would not be told of the date on which the tribunal proposed to determine Mr Hendy’s appeal the clear implication being that the tribunal would determine the appeal without holding a hearing.

29. The earlier direction for APHA to supply witness statement evidence by 21 February 2020 continued to apply, and APHA subsequently supplied a detailed witness statement given by Allison White, its records manager, dated 20 February 2020.

30. Both Mr Hendy’s and APHA’s final written submissions were dated 9 March 2020 (i.e. both appear to have breached the 3 March 2020 deadline for final written submissions). Mr Hendy’s submissions included a section headed ‘How my current request is different’ in which he again argued that APHA misinterpreted Request 1 by overlooking its alternative means of meeting his request. He also submitted:

(a) APHA probably breached section 16(1) of FOIA on Request 1 by offering inappropriate advice about how he might refine his request without exceeding the cost limit;

(b) his attempts to refine Request 2, as compared with his Request 1, supported his argument that Request 2 was proportionate, and weakened the case that it was vexatious;

(c) had APHA offered correct advice on Request 1, any request made in accordance with such advice could not be considered vexatious. Accordingly, the Request 1 advice was relevant to the Request 2 appeal. Not only was the advice based on a misreading of Request 1, it suggested that Mr Hendy seek data “which satisfied none of the conditions which I had stated in [Request 1]”.

The First-tier Tribunal's decision

31. The First-tier Tribunal, comprised of the then President of that tribunal's General Regulatory Chamber, determined Mr Hendy's appeal on paper.

32. The First-tier Tribunal's statement of reasons records that Mr Hendy "did not ask to challenge any evidence at an oral hearing" (paragraph 39 of the tribunal's statement of reasons) but, had he done so, "I would have refused it" (paragraph 40). Since any request to challenge APHA's witness statement evidence would have been rejected, it is hardly surprising that the tribunal refused to consider the 'written challenge' submitted, in the tribunal's opinion, without permission. The tribunal noted that APHA had initially sought a hearing and were prepared for their witness (Allison White) to attend for cross-examination, but Mr Hendy "chose not to avail himself of this opportunity" (paragraph 41). "In these unusual circumstances" it would not be fair and just to take into account Mr Hendy's written challenge to Allison's White's witness statement evidence "when she has not herself been able to answer these challenges" (paragraph 42) nor was there any point in directing an oral hearing that Mr Hendy would be unlikely to attend.

33. According to the First-tier Tribunal, it followed from its refusal to consider Mr Hendy's written challenge that Allison White's evidence "should be accepted by the Tribunal on the basis that it is unchallenged, as she has signed a Statement of Truth and has not been required to attend for cross-examination" (paragraph 42 of the tribunal's statement of reasons).

34. The First-tier Tribunal found that the Information Commissioner had mistakenly dealt with Request 2 under the Environmental Information Regulations 2004 rather than FOIA. However, that mistake was immaterial. Request 2 was vexatious within the meaning of section 14 of FOIA so that APHA were not required to comply with it. The tribunal's finding that FOIA applied to Request 2, rather than the 2004 Regulations, is not challenged in the present proceedings.

35. While paragraph 11 of the tribunal's statement of reasons recorded that Mr Hendy "had not followed the advice given by APHA about the best way to request the statistical information he required", that paragraph was contained within a 'background' section of the statement of reasons. Findings of fact clearly presented as such are found in subsequent parts of the statement.

36. In determining whether Request 2 was vexatious within the meaning of section 14 of FOIA, the tribunal directed itself to the leading case law namely the decision of the Upper Tribunal in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC), as approved on appeal by the Court of Appeal (Court of Appeal reference: [2015] EWCA Civ 454).

37. The First-tier Tribunal noted Mr Hendy's argument that, had Request 1 been correctly interpreted, the cost limit would not have been exceeded, that "he disputes the similarity between his 2017 and 2018 requests" and "refers to witness evidence given in his previous appeal about the estimated time to comply with his previous request and to his belief that APHA has breached s.16 FOIA in its dealings with him" (paragraph 13 of the tribunal's statement of reasons). The tribunal did not make a finding as to the correct interpretation of Request 1.

38. Allison's White's evidence was that Mr Hendy had made 31 requests for disclosure of information over several years and that dealing with the present request would take "two or three data scientists" approximately 50 hours. Of course, the First-tier Tribunal accepted that evidence because it treated it as unchallenged. Allison White's evidence raised an issue as to whether APHA's resources were being squandered by Mr Hendy's disproportionate use of FOIA (paragraph 50 of the statement of reasons). The tribunal proceeded to make the following findings:

(a) Mr Hendy's "requests are detailed and technical" which "should be considered as adding context to the burden on APHA, unless the value of this request is considered to be high" (paragraph 51);

(b) Mr Hendy had an "intense interest" in the issue of bovine TB and genuinely wished to obtain more information on that topic and to publish his own discussion papers although "as those papers have not been peer-reviewed, it is difficult to conclude that they have value when applying an objective standard" (paragraph 52). It does not matter for present purposes, but I have struggled to understand this finding. If Mr Hendy's argument was that he would use the information sought as the basis for a discussion paper then, without the information, evidently there would be no discussion paper and nothing to peer-review;

(c) the value of the information sought was not self-evident, but it remained necessary to consider whether “it would add to knowledge about bovine TB testing in a way which would be valuable to the public” (paragraph 53);

(d) Allison White’s unchallenged evidence was that inaccurate or misleading conclusions could be drawn from the raw data sought by Mr Hendy’s request. This risk detracted from the information’s value. Viewed objectively, the value of the requested information was low (paragraph 53) and Mr Hendy had not shown that its value was sufficiently high to justify the significant resource implications for APHA were they to satisfy Request 2 (paragraph 55).

39. The First-tier Tribunal decided that section 14(1) FOIA was “engaged” and APHA had correctly refused to comply with Request 2 because it was vexatious within the meaning of section 14 FOIA. Mr Hendy’s appeal was dismissed.

Legal framework

40. Section 1(1) of FOIA provides that any person who makes a request for information to a public body is entitled to be informed in writing whether the information requested is held and, if so, to have the information communicated to the person. The definition of a “request for information” in section 8(1) of FOIA provides that a request is to describe the information requested.

41. Rights conferred by section 1(1) of FOIA are subject to section 12, which 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 is prescribed in regulations (section 12(3)). Regulation 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, provides that, in the case of a public authority listed in Part 1 of Schedule 1 to FOIA, the appropriate limit is £600. It is not disputed that, in this case, the appropriate limit was £600. For this purpose, staff time is valued at £25 per person per hour (regulation 4(4)). In other words, 24 hours of staff time.

42. Section 14(1) of FOIA provides that “section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”. For the purposes of this appeal, I need not describe any case law about the meaning of a vexatious request.

43. Section 16(1) of FOIA provides as follows:

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.”

44. A complainant may apply to the Information Commissioner for “a decision whether, in any specified respect, a request for information has been dealt with in accordance with the requirements of Part I [*sections 1 to 20 of FOIA*]”: section 50(1).

45. Section 57(1) of FOIA confers on a complainant a right of appeal to the First-tier Tribunal against a decision notice given by the Information Commissioner. The tribunal must allow an appeal if it considers that the decision notice is not in accordance with the law or, to the extent that the notice involved the exercise of a discretion, the Commissioner ought to have exercised her discretion differently (section 58(1)).

46. Proceedings on an appeal under section 57(1) are governed by the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. Rule 2(1) provides that the overriding objective of the Rules is “to enable the Tribunal to deal with cases fairly and justly”, which includes “avoiding unnecessary formality and seeking flexibility in the proceedings” and “ensuring, so far as practicable, that the parties are able to participate fully in the proceedings” (rule 2(2)(b),(c)).

47. Rule 15(2)(b) provides as follows:

“(2) The Tribunal may –

...(b) exclude evidence that would otherwise be admissible where—

(i) the evidence was not provided within the time allowed by a direction or a practice direction;

(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or

(iii) it would otherwise be unfair to admit the evidence.”

Grounds of appeal

48. I granted Mr Hendy permission to appeal against the First-tier Tribunal's decision on one of the two grounds that he advanced, which my permission determination described as follows:

“the First-tier Tribunal [arguably] erred in law by failing to deal with [Mr Hendy's] argument that the present request for information was framed in accordance with APHA's earlier advice and assistance and could not, therefore, be vexatious or, at least, his compliance with that advice and assistance was material to whether the present request was vexatious”.

49. In my permission determination, I also expressed certain reservations, which I still hold and consider it appropriate to set out here, about the First-tier Tribunal's refusal to consider Mr Hendy's written challenge to Allison White's witness statement given in support of APHA's case:

“14...The tribunal's case management directions provided for each party to supply final written submissions and gave a date for compliance that fell shortly after the date by which witness statements were to be supplied. While Mr Hendy's final written submissions might have been supplied late, they appear to have been supplied on the same date as APHA's. Under the tribunal's revised case management timetable, it seems that Mr Hendy's only opportunity to challenge the witness statement of APHA's records manager was in his final written submissions.”

50. Mr Hendy's application for permission to appeal did not argue that proceedings before the First-tier Tribunal were procedurally unfair nor has he sought to rely on any additional ground of appeal in the light of the observations made in my grant of permission to appeal. While my comments on this aspect of the case have no bearing on my ultimate decision, I feel I should express my reservations about the tribunal's refusal to consider Mr Hendy's written challenge to Allison White's witness statement evidence.

51. The procedural history suggests that the First-tier Tribunal anticipated that Mr Hendy might advance a written challenge to APHA's witness statement evidence. That is the most obvious explanation for case management directions which set a

date for APHA to supply written witness evidence and set a later date for Mr Hendy to supply final written submissions. While the tribunal's directions were revised once it became known that no hearing would be held, the revisions did not alter this basic sequence of events. It is not clear to me why the tribunal judge who decided the appeal, who was not responsible for the appeal's earlier case management, took such a dim view of Mr Hendy's actions which were, arguably, simply an attempt to comply with the tribunal's directions. In particular, I have struggled to understand why the tribunal considered that Mr Hendy required express permission to advance a written challenge to Allison White's witness statement evidence. The tribunal did not rely on Mr Hendy's final written submissions having apparently been supplied about a week late (as were APHA's), and the tribunal's statement of reasons does not address whether Mr Hendy's conduct through the prism of its own case management directions. I also observe that, while rule 15(2)(b) of the tribunal's procedural rules identifies cases in which the tribunal may exclude evidence that would otherwise be admissible, it is not referred to in the tribunal's statement of reasons as the basis for excluding Mr Hendy's written challenge to Allison White's witness statement evidence nor is there any discussion of the need to promote Mr Hendy's participation in the proceedings in accordance with the overriding objective of the tribunal's procedure rules.

The arguments

52. No party requests a hearing of this appeal and I am satisfied that it may fairly be determined without oral argument.

APHA & the Information Commissioner

53. APHA argue that, while Mr Hendy narrowed Request 2, as compared with Request 1, he did not narrow it "in compliance with" the advice and assistance provided by APHA. In fact, the issue whether Mr Hendy framed Request 2 in compliance with the advice given by APHA in refusing Request 1 did not arise before the First-tier Tribunal. The tribunal could not therefore have erred by failing to deal with the issue. Mr Hendy's argument was that APHA could, and should, have given him different advice on Request 1 but that is not an issue in the present proceedings.

54. The advice given to Mr Hendy in connection with Request 1 was that he might request information relating to the number of herds registered on SAM at the last day of a year, the number of herds with an OTFW TB incident during a year or the

number of OTFW incidents within a year. That advice broadly correlated with Mr Hendy's 'quantities' but without his 'conditions' but was not followed.

55. The Information Commissioner agrees with APHA's response and wishes to make only two further observations. Firstly, both the Commissioner and the First-tier Tribunal were satisfied that, on Request 1, APHA complied with its duty under section 16(1) of FOIA. Secondly, the Commissioner and the First-tier Tribunal "upheld [Request 2] as vexatious" (I was already aware of that fact).

Mr Hendy

56. Mr Hendy draws attention to that part of APHA's advice, given in connection with Request 1, that informed him that, given his conditions, it would be difficult to supply even a single year's data without exceeding the cost limit. However, APHA interpreted Request 1 to mean that Mr Hendy sought information about every herd type described in the Request 1 conditions and failed to appreciate that the Request 1 conditions set out two different ways in which his request could be satisfied. Request 2 sought information relating to only two years' and, importantly, omitted the 'either/or' aspect of Request 1's conditions. Mr Hendy refers to APHA's evidence in the Request 1 tribunal proceedings that "our interpretation of the request at the time was...that both the either/or options were required" (see page 30 of the First-tier Tribunal bundle).

57. Request 2's conditions omitted Request 1's 'either/or' formulation so that Request 2 was not concerned with animal testing data but only with animal movement data. Supplying animal movement information appears to be less demanding for APHA than supplying animal testing data. Request 1's inclusion of animal testing data caused the "extreme disruption" reported by APHA. His reformulation of 'conditions' in Request 2 was important because the 'disruptive' element was omitted and, in any event, had Request 1 been properly construed, APHA would have known from the outset that the information he sought could be provided without recourse to animal testing data. The three specific suggestions made by APHA on Request 1, with a view to narrowing his request, would, if adopted, have served no useful purpose for Mr Hendy because they did not distinguish between herds with and without cattle movements.

58. Before the First-tier Tribunal, Mr Hendy argued that in Request 2 he "was not asking for both options". His notice of appeal to the First-tier Tribunal against the

Commissioner's decision notice clearly argued that APHA misinterpreted Request 1 and, as a result, arrived at a cost estimate that was unrealistically high. Mr Hendy concedes that he did not follow the "actual terms" of APHA's Request 1 advice but he did not "ask for data to be provided using both options" on Request 1 so any approval of the Request 1 advice was based on a "false argument". What he made very clear during the tribunal proceedings on Request 2 was that he had never asked APHA to provide "data through both options" and in failing to deal with this argument the First-tier Tribunal erred in law. Request 2 amounted to a validly refined request for information which should not have been refused on a flawed basis.

Conclusions

59. The ground on which Mr Hendy was granted permission to appeal has two aspects. The first assumes that, before the First-tier Tribunal, Mr Hendy argued that Request 2 was framed in accordance with APHA's Request 1 advice and assistance. Mr Hendy accepts that Request 2 did not incorporate any of the three specific suggestions within APHA's advice. If, however, the Request 1 advice is read as a whole, it arguably extended beyond advising Mr Hendy to limit a future request for information as described in the three suggestions. The advice also made the general point that Mr Hendy should seek a "narrower category of information" and that the conditions attached to Request 1 would make it difficult to refine a request for information so that it fell within the costs limit.

60. It may properly be said that Request 2's omission of certain of the features of Request 1 reflected the more general aspects of APHA's Request 1 advice and assistance. By reducing the years to which the request related from thirteen to two, the request was undoubtedly narrowed. The 'conditions' attached to Request 2 were a good deal easier to understand than those of Request 1 and abandoned the either/or formulation used in Request 1 which can only be considered as a simplification (whether or not Mr Hendy is right that ALPHA should have interpreted Request 1 differently). However, Request 2's omission of certain features of Request 1, in a manner that was not inconsistent with the general aspects of APHA's Request 1 advice, does not establish that the First-tier Tribunal erred by failing to deal with an argument that Request 2 was framed in accordance with the Request 1 advice. Mr Hendy's submissions on this appeal are quite clear. Request 2 did not attempt to implement the Request 1 advice. Had he incorporated the three specific suggestions made by APHA, he would have received information for which he had no use.

61. The second aspect of the ground of appeal is that the First-tier Tribunal erred in law by failing to deal with Mr Hendy's argument that his compliance with the Request 1 advice was material to whether Request 2 was vexatious. Mr Hendy did not argue before the First-tier Tribunal that he had fully complied with the Request 1 advice. As I have said, he discounted the three specific suggestions made by APHA because that would not give him the right information. However, he clearly did argue that Request 2 was narrower than Request 1 because it only related to two years, rather than thirteen, and that his redrawn conditions omitted that part of Request 1 which he thought APHA had found most burdensome namely TB test record data. To that extent, Mr Hendy mounted a case that, in certain respects, he had sought to narrow his request for information, as APHA's Request 1 advice had said he should. In my judgment, the First-tier Tribunal erred in law by failing to deal with this aspect of Mr Hendy's case.

62. Paragraphs 50 to 54 of the First-tier Tribunal's statement of reasons include certain statements that were obviously intended to rank as findings of fact. However, there is no mention here of the advice given by APHA on Request 1. Paragraph 11 of the statement, which is part of the 'Background to Appeal', states "it is also noted that, in refining the request, the Appellant had not followed the advice given by APHA about the best way to request the statistical information he required". I consider this part of the statement to be purely descriptive and not a finding of fact that Mr Hendy failed to follow the Request 1 advice. I am therefore satisfied that the First-tier Tribunal erred in law by failing to consider Mr Hendy's argument that Request 2 was modified, at least in part, in response to APHA's Request 1 advice. If I were wrong that paragraph 11 of the statement is purely descriptive, I would still find that the First-tier Tribunal erred in law. If the First-tier Tribunal found that Mr Hendy failed to follow the Request 1 advice, it gave inadequate reasons for that finding. Request 2 related to only two years rather than thirteen and undoubtedly simplified the conditions of his request (a feature of Request 1 that was identified as problematic in APHA's advice). In those circumstances, the duty to give adequate reasons required the First-tier Tribunal to explain why, despite Request 2 having been narrowed in a manner that was not inconsistent with the general aspects of the Request 1 advice, it was satisfied that Mr Hendy failed to follow the Request 1 advice.

63. I have considered whether the First-tier Tribunal's error should be considered immaterial. I am not satisfied that, absent the error, the tribunal would have reached the same result. The tribunal's analysis of whether Request 2 was vexatious did not factor in any considerations related to the Request 1 advice and the extent to which

Case no: GIA/938/2020

Mr Hendy may or may not have narrowed the breadth of his request in a manner consistent with the general or specific aspects of that advice. I cannot be satisfied that, had the matter been considered, the outcome would have been the same. I make that finding without taking into account the concerns expressed above about the fairness of the proceedings before the First-tier Tribunal. Those concerns, however, while not amounting to findings I should add, cannot in my judgment be considered fanciful. If the question of materiality were more finely balanced, I may have taken into account in Mr Hendy's favour that, before the First-tier Tribunal, Mr Hendy did not have the opportunity to challenge the main evidential plank of APHA's case namely the witness statement evidence of Allison White.

64. For the above reasons, I decide that the First-tier Tribunal's decision involved an error on a point of law. The tribunal's decision is set aside and Mr Hendy's appeal against the Information Commissioner's decision notice of 22 July 2019 is remitted to the First-tier Tribunal for redetermination in accordance with the directions given above.

Mr E Mitchell,

Judge of the Upper Tribunal.

Signed on original on 19 November 2021