Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 April 2018

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

Decision (including any steps ordered)

1. The complainant has requested information about the species of Borrelia used to create the VIsE antigen in the Lyme Immunoblot test used at RIPL Porton Down. Public Health England denied holding the requested information. It failed to conduct an internal review within the recommended time frame.

2. The Commissioner's decision is that on a balance of probabilities Public Health England do not hold the stated information.

3. The Commissioner does not require Public Health England to take any steps.

Request and response

4. On 2 July 2017, the complainant wrote to Public Health England and requested information in the following terms:

"Please could you tell me, or find out from the manufacturers (Viramed), What Borrelia species are used to create the VISE antigen in the Lyme Immunoblot you use at RIPL Porton Down? In the manual I believe it

just states its a mixture but I would like to know which species are included in it as I am reacting strongly to that particular band.'

5. On 24 July 2017 Public Health England responded. It stated that the complainant had previously contacted staff about the same information, that she was offered a meeting with [redacted] to discuss her concerns and respond to any questions she may have, and therefore her request was being considered as an enquiry. On 25 July 2017 the complainant responded. She stated that her request was a 'standalone' request and that she hoped to receive a response. On 31 July 2017 Public Health England responded to the request. It stated that it does not hold the requested information and that there is no obligation for it to approach third parties [in the way she suggests] to obtain it. The complainant responded on the same day and stated that as Public Health England provide the test she would expect it to have been properly evaluated, and as part of this it would hold information about its properties. She then requested:

"all information that you have on the IgG VISE antigens?"

6. On 9 October 2017 the complainant wrote to Public Health England and requested an internal review of its handling of her information request of 2 July 2017, she also made a further request for all information held about the antigens.

7. On 7 November 2017 the complainant contacted the Information Commissioner to specifically complain about Public Health England's failure to provide her with an internal review decision in relation to her information request of 2 July 2017.

8. On 17 November 2017 the Commissioner wrote to Public Health England. In relation to the request of 2 July 2017, she referred it to her section 45 Code of Practice guidance and recommended that it provide the complainant with its internal review decision as soon as practicable and in any event within 20 working days. In relation to the further information request of 31 July 2017, the Commissioner reminded Public Health England of its obligations under section 10 of the FOIA [to respond to requests within 20 working days] and asked it to respond to the complainant's request within 10 working days.

9. On 22 November 2017 Public Health England provided the complainant with its internal review decision in relation to the information request of 2 July 2017. It stated that it considers its previous offer of a meeting with [redacted] as a measure of goodwill that falls within its section 16 duty to provide advice and assistance to allow her to better understand 'the complexities of the subject matter'. In relation to the information

requests of 31 July 2017 and 9 October 2017, it stated that in order for it to supply the information it would need to create a list of the components of the particular test in question, and therefore it does not hold the information. It stated that whilst it has access to third party repositories [available to clinicians] which may contain the information, Public Health England does not itself hold this information. It stated that it had addressed a similar question which was uploaded onto whatdotheyknow.com [313568]. It also stated that in its email dated 12 October 2017 it informed the complainant that her repeated enquiries and requests to different parts of the organisation make unnecessary and excessive demands on the time and resources of its staff and it therefore considers these requests to be vexatious.

Scope of the case

10. On 7 December 2017 the complainant contacted the Commissioner again to complain about the way her information request dated 2 July 2017 had been handled.

11. The Commissioner considers the scope of her investigation to be to determine whether Public Health England holds the information specified in the information request dated 2 July 2017, and if it has complied with its obligations under the FOIA. During a conversation with the complainant on 11 January 2018 she stated that as the objective of all 3 requests was to determine the species of Borrelia used in the Lyme Immunoblot test the scope of the Commissioner's investigation is agreed.

Reasons for decision

Section 1 – general right of access

12. Section (1) of the FOIA says that an individual who asks for information from a public authority is entitled to (a) be informed whether the authority holds the information and (b) if the information is held, to have that information communicated to them.

13. In response to the Commissioner's questions Public Health England clarified that it does not hold the requested information. However, the complainant considers that the information is likely to be held.

14. The complainant stated that as the VIsE IgG antigen has been specifically created to target Borrelia antibodies in a patient's blood it

would have the same DNA sequence as a particular Borrelia species. Although the recombinant antigen is man-made [combining parts of different species] the final sequence would still have been made up using DNA sequencing from the original species. The complainant stated that the tests at Porton Down are accepted by GP's and clinicians in England for diagnosing Lyme disease, and for Public Health England not to know what the tests are targeting would prove failure to properly test the system that all England rely on. The complainant therefore does not believe that the requested information is not held or that it has not been requested by GP's or clinicians. She stated that if the information is held in the manufacturer's repositories Public Health England should 'out of courtesy' obtain this information in respect of patient welfare. The complainant further stated that Public Health England initially offered her a meeting in response to her request and that this suggests that it holds the information.

15. In scenarios where there is some dispute between a public authority stating that recorded information was not held at the time of the request and the amount of information that a complainant believes might be held, the Commissioner – in accordance with a number of First – Tier Tribunal decisions, e.g., *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* – applies the civil standard of the balance of probabilities. The Commissioner will consider the complainant's evidence and argument(s) and also the actions taken by the public authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held.

16. In its submission to the Commissioner, Public Health England explained that the complainant had previously asked the same question and had been offered a meeting with [redacted] to discuss her concerns and ask questions, after this offer was declined by the complainant it then responded to the request and confirmed that it did not hold the requested information.

17. As is her usual practice, the Commissioner asked Public Health England a number of questions relating to how it had established that it did not hold the requested information.

18. Public Heath England explained that the antigen used in the immunoblot test is a recombinant [formed by recombination] VIsE and that it does not hold information about the species it was extracted from / its sequence. It stated that Public Health England provides references to recombinant VIsE and its properties across manufacturing batches but that it does not hold the requested information about the specific recombinant VIsE used in the immunoblot.

19. The Commissioner notes that Public Health England stated that all tests have been appropriately validated through the relevant accreditation standards and that the IgG VIsE antigen test is the most appropriate test to diagnose Lyme disease. Also, in response to the complainant's further requests for *all* information about the IgG VIsE antigen, the Commissioner notes that Public Health England stated that it does have access to third party repositories which contain information available to clinicians, but that this information is not held by it.

20. Public Health England provided a copy of its retention schedule. The Commissioner notes that there is no requirement in the schedule for it to retain information about the components of immunoblot tests. Public Health England further explained that there was no business reason or statutory requirement for it to hold the information.

21. Public Health England explained that if the information were held it could be held in either manual or electronic form and although a senior manager and his team conducted searches for information in both formats, including searches of information held locally and on networked resources and emails that no information was found to be held.

22. The Commissioner further notes that although Public Health England offered the complainant a meeting in response to her request, it stated that the purpose of the meeting was to allow her to better understand the complexities of the subject matter, the opportunity to be retested, and the opportunity to further explain laboratory testing processes and its role in providing Lyme disease test results, and therefore there is no evidence that the requested information is held or that it would have been provided at the meeting.

23. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The FOIA is to do with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

24. While appreciating the complainant's frustration that Public Health England states it does not hold the specific information she has asked for, the Commissioner is mindful of the comments made by the Information Tribunal in the case of *Johnson / MoJ (EA2006/0085)*[1] that the FOIA:

"…does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

25. Having considered Public Health England's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that on the balance of probabilities Public Health England does not hold the requested information.

26. The Commissioner therefore considers that Public Health England complied with its obligations under section 1(1) of the FOIA.

Other matters

27. As noted above, Public Health England failed to conduct an internal review in this case within the recommended timeframe.

28. Part VI of the section 45 Code of Practice makes it desirable practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint.

29. As the Commissioner has made clear in her *'Good Practice Guidance No 5', s*he considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

30. In this case, the request for an internal review was made on 9 October 2017, however, the internal review was not completed until after the complainant contacted the Commissioner about the matter.

31. The Commissioner finds that this failure to be unacceptable and asks Public Health England to ensure that future requests for internal reviews are handled appropriately and in accordance with her guidance.

Right of appeal

14. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

15. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

16. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed .....

Pamela Clements
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