

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 March 2009

Public Authority: The Forestry Commission Scotland
Address: Silvan House
231 Corstorphine Road
Edinburgh
EH12 7AT

Summary

The complainant made two requests for information to the Forestry Commission Scotland (FCS). The FCS refused to disclose the information or to confirm or deny if the information is held citing section 14 of the Act 'vexatious requests' and 12 'costs limit'.. The Commissioner has investigated and found that sections 14(1) and 12(1) of the Act are not engaged. However he found that some of the information requested would, if held be environmental information and should have been considered under the Environmental Information Regulations. The FCS applied regulation 12(4) (b), 'manifestly unreasonable', to this request as an alternative. The Commissioner concluded that 12(4) (b) was not engaged. The Commissioner requires that the FCS now confirm or deny to the complainant if the information requested is held and if held disclose this information to the complainant or issue the complainant with a valid refusal notice under section 17(1) of the Act or regulation 14 of the EIR. The FCS must take these steps within 35 calendar days of this notice.

The Commissioner's Role

1. 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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

3. The complainant has advised that on 29 July 2007 he made the following request for information to the Forestry Commission Scotland (FCS)

“At the recent meeting you had with David Russell (CVDG), Cathy Craigie (MSP), Calum MacDonald and Alan Stevenson at Carron Valley you state to all the above PID documents had been approved. However, the FES Management Board Meeting Minutes for the meeting of 11 June 2007 (which appear on <http://www.foresrty.gov.uk/forestry/inrd-74slwg>) do not seem to directly confirm this. Can you please give written clarification as to whether MB 12/07 has been approved as it was submitted or has it not?

Also document MB 12/07 states that “the purpose of the PID is to seek approval to take the project onto planning stage”. On page 11 of the same document, bullet point 5, the following is stated “seek FESMB approval to go to implementation phase for Phase 1”. Can you please clarify that approval is a “certainty or not” and over what time period the decision and whether there is approval or not will be.

Please also can you forward me the PID document for the FCS newly announced ‘black route’ to be built by volunteers at Mabie Forest (as per FCS press release).

4. On 8 August 2007 the complainant wrote again to the FCS and stated:

“I wish to extend my Freedom of Information request below to include the following:-

What was the process that was followed that granted permission for the trail construction at the Kyle Of Sutherland Mountain Bike Trails Sutherland.”

5. On 24 August 2007 the FCS copied to the complainant a copy of a letter sent to the Chair of the Carron Valley Development Group (CVDG) on the same date. The letter explained that in the previous 3 weeks the FCS had received 13 information requests from members of the CVDG. The FCS stated that some of these requests were quite detailed and some overlapped and duplicated requests. The letter went on to say that the FCS were considering whether to treat the request and ‘vexatious or persistent’ under section 14 of the Act. The FCS stated that it was also considering aggregating the requests as they appeared to be from a group of individuals acting in concert and would therefore be exempt under section 12 of the Act.
6. The complainant responded to this letter on 3 September 2007. The complainant stated that he had made his request as an individual member of the public, that his request was straightforward and specific and relevant to his interest in mountain biking.

7. On 6 September 2007 the complainant was copied in to a letter sent again to the Chair of the CVDG. This letter stated that the FCS considers that under section 14 of the Act, the group's recent sudden stream of information requests would cause a disproportionate inconvenience or expense. The FCS also stated that under section 12 of the Act the staff time involved in dealing with the recent information requests from the CVDG would significantly exceed the cost limit. The letter invited the Chair of the CVDG to submit a single request from the CVDG outlining the key information required.

The Investigation

Scope of the case

8. On 4 September 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

9. The Commissioner began his investigation by writing to the FCS on 30 October 2008. The Commissioner asked the FCS for consideration as to whether any of the information requested could be defined as environmental and asked the FCS if it wished to provide the same arguments as advanced in case FS50187763.
10. The FCS responded on 14 November 2008, explaining that it wished to rely on the same arguments as those provided in FS50187763.

Findings of fact

11. The Carron Valley Development Group (CVDG) is a participating member of the Carron Valley Partnership comprising: CVDG; FCS; Stirling and North Lanarkshire Councils; Scottish Water; Central Scotland Forest Trust; and Clanranald Society. The FCS are signatory to a concordat with the organisations which states that the purpose of the partnership is to develop recreational facilities at Carron Valley. A major part of current development concerns the planning and construction of mountain bike trails.
12. The FCS is funded by the Scottish Parliament; however despite its separate funding it is part of the Forestry Commission of Great Britain and is not a devolved body. It is therefore covered by the scope of the Act and the EIR.
13. This case is linked with three others FS50187763, FS50190235 and FS50176942. All four cases were dealt with by the FCS as a group acting as part of a campaign and as such the letter sent to the Chair of the CVDG in FS50187763 was sent to all complainants as a refusal notice. The FCS have relied on the same arguments in each case to support its application of the

exemptions and in the circumstances of their handling of the four complaints the Commissioner accepts that this approach is appropriate.

14. Section 14(1) states that if section 1(1) does not apply if the request for information is vexatious. Therefore, if a public authority determines that a request is vexatious there is no requirement to confirm or deny if the requested information is held. The FCS have therefore not specifically confirmed or denied to the complainant if any information is held falling within the scope of this requests.

Analysis

Legislation

15. The FCS dealt with the requests under the Act. However, the Commissioner takes the view that information requests of the 28 July 2007 "*please can you forward me a copy of the PID document for the FCS newly announced 'black route'*" and the request of 8 August 2007 for "*What was the process that was followed that granted permission for the trail construction at the Kyle of Sutherland Mountain Bike Trails Sutherland*" are request for environmental information as defined by the Environmental Information Regulations (EIR).
16. The Commissioner considers that the type of information that has been requested falls within the regulation 2(1) (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 measure designed to protect those elements". The information requested is information about specific applications for development of mountain biking trails and project initiation documents (PID); the documents would contain analysis and background to the decisions taken, the process followed in the development of the projects and the details of the costs of the projects. The Commissioner considers that this is information which constitutes plans and programmes in relation to an activity which is likely to affect the state of the landscape and natural sites. The information requested relates to a plan on measures to introduce new trails to areas of FCS land; this measure is likely to affect the land and landscape of the area. Parts of the documents could also contain information within 2(1) (e) in that the information is on "a cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in 2(1) (c)".
17. The FCS were asked if they considered any of the information requested could fall within the definition of environmental information. The FCS acknowledged that these elements of the request could have been considered under the EIR and not under the Act and has explained that in light of this it would have relied on regulation 12 (4) (b) to withhold the information.
18. Regulation 12(6) states that a public authority may respond to a request by neither confirming or denying whether such information exists only where

confirming or denying would adversely effect any of the interest referred to in paragraph 12(5) (a). Where a public authority relies on 12 (4) (b) to withhold the information it must still confirm or deny if information is held. As the Commissioner has determined that the information requested, if held, would be environmental information he now requires the FCS to confirm or deny to the complainant if information is held falling within the scope of the requests which the Commissioner has found are requests for environmental information (as detailed above).

Procedural matters: Section 17 'Refusal of a Request'

19. Section 17(1) provides that a public authority which is relying on a claim that the information is exempt information must, within the time for compliance with section 1(1) give the applicant a notice which (a) states the fact; (b) specifies the exemption in questions; and (c) states why the exemption applies.
20. The complainant made his information requests to the FCS on 29 July 2007, and 8 August 2008. The FCS did not issue the complainant with a refusal notice but instead issued a notice to the head of the CVDG on 24 August 2007 copying in the other members of the group who had made information requests, including the complainant. This notice explained that all requests being received from members of the CVDG were being considered on the basis of section 14 of the Act and explained why. This was the only notice sent to the complainant regarding this information request.
21. The FCS explained in a response received in case FS50187763 that from its experience of dealing with the CVDG it felt that dealing with each member of the group on an individual basis would be impractical and costly and so had issued a refusal notice to the CVDG Chairman and copied the other members into the notice. The FCS stated that it was trying to apply some "common-sense and cost-awareness" to the case.
22. The Commissioner notes that the requirements of section 17(1) are clear in that the applicant must receive a refusal notice when a public authority is relying on a claim that the information is exempt. The Commissioner considers that this requirement relates to each individual applicant and the requirement is not removed even when the public authority believes the applicant is acting as part of a group. He therefore finds that the FCS breached the requirement of section 17(1) in failing to issue the applicant with a refusal notice. The Commissioner notes that section 17(6) is not relevant here as the FCS had not previously issued the complainant with a refusal notice.

Regulation 14

23. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.

24. Regulation 14(1) 'Refusal to disclose information' states that if a request for environmental information is refused, this refusal should be made in writing in no later than 20 working days after the date of the request. The refusal must specify any exception being relied upon under regulations 12(4), 12(5) or 13; and the matters considered in reaching a decision with respect to the public interest under regulation 12(1) (b).
25. The complainant made his requests on 29 July 2007 and 8 August 2007. As noted in paragraphs 21-23 the FCS did not issue a notice to the complainant but issued a notice to the chairman of the CVDG, copying in the complainant. The Commissioner considers that by failing to issue a notice to the complainant the FCS breached the requirements of regulation 14(1). The Commissioner also considers that in failing to deal with parts of the request under the correct legislation and therefore failing to issue a refusal notice which meets the requirements above FCS breached the requirements of regulation 14(3). This approach is supported by the Information Tribunal in *Archer v IC and Salisbury District Council*:

"The fact that the Council considered and refused the Appellant's request under the FOIA rather than the EIR means, inevitably, that where the requirements of the FOIA and EIR differ, the Council will not have complied with the provision of the EIR.... It is appropriate that we record a finding that the Council did not comply with all the applicable requirements. In particular they did not comply with regulation 14(3) which requires a public authority that refuses a request for environmental information, to specify the EIR exceptions relied on."

Exemptions

Section 14 'Vexatious or repeated requests'

26. Section 14(1) of the Act provides that a public authority is not obliged to deal with a request for information if the request is vexatious.
27. In reaching a decision as to whether a request is vexatious the Commissioner will consider the context and history of the request. He will also consider the strengths and weaknesses of both parties' arguments in relation to one or a combination of the following factors to reach a reasoned conclusion as to whether a reasonable public authority could refuse to comply with the request on the grounds that it is vexatious:
- Whether compliance would create a significant burden in terms of expense **and** distraction
 - It is designed to cause disruption or annoyance
 - It has the effect of harassing the public authority
 - It can otherwise fairly be characterised as obsessive or manifestly unreasonable
 - It does not have any serious purpose or value

The Commissioner acknowledges that his guidance on vexatious requests has recently changed with the new guidance is expected to be published shortly and at the time of the request he would have expected the FCS to have applied the two-stage test in his Awareness Guidance 22. This guidance stated that a request can be treated as vexatious where it would impose a significant burden in terms of expense or distraction and meet at least one of the other criteria listed above.

28. The FCS explained that in addition to the complainant's requests dated 29 July 2007 8 August 2007 it also received a number of requests from other members of the CVDG on the following dates:

- 31 July 2007
- 1 June 2007
- 17 June 2007
- 1 July 2007
- 9 July 2007
- 16 July 2007
- 25 July 2007
- 2 August 2007
- 9 August 2007
- 10 August 2007
- 13 August 2007
- 14 August 2007
- 15 August 2007
- 16 August 2007
- 17 August 2007
- 19 August 2007

29. The Commissioner has had sight of the detail of these requests and is currently investigating three other complaints in relation to a number of these requests. The Commissioner notes that all of these requests relate, in some way, to mountain biking in Scotland and associated projects.

30. The requests between 1 June 2007 and 25 July 2007 were all made by the secretary of the CVDG, in response to these request FCS provided the information requested. However, following receipt of the information the individual became frustrated that this request were not being dealt with to his satisfaction despite the information requested having been provided. (Attached at annex A is a table listing all the information requests received from the group and the responses).

31. The FCS provided more background to its relationship with the CVDG and the subsequent FOI requests. Prior to the influx of information requests its involvement with the group had been solely with the secretary of the group, in the few weeks leading up to what the FCS term the 'FOI campaign' from the CVDG he submitted to information requests, repeatedly challenging its response, raised three formal complaints against members of staff, including the FCS Director, and had requested internal investigations. For example he demanded an explanation as to what action the FCS had taken on a civil engineering report he had

- submitted regarding remedial work to a mountain bike trail. The FCS had not asked him to submit such a report and has its own long established and fully qualified civil engineering unit to deal with road and trail repairs. The FCS thanked him for his report informing him that it had taken account of its content. He did not accept this and was insistent that the FCS tell him exactly what parts of his report the FCS has followed.
32. The FCS informed the Commissioner that it was aware that the CVDG were becoming increasingly aggrieved that the mountain biking developments on FCS land at Carron Valley were not, in their view, moving quickly enough, or in the direction they wanted and in addition the secretary of the group was becoming increasingly annoyed that his information request were not being dealt with to his satisfaction.
 33. The FCS state that the handful of CVDG members that make up the core of the group have been very difficult to deal with and they have become demanding to the point of becoming obsessive. FCS states that they expect its full attention at all times and never accept the outcomes from its planning and decision making process. Their responses often finish with “this will not be tolerated by the CVDG” and its staff are constantly having to justify their actions in detail to the group. It states they have been a significant and disproportionate drain on staff time and it has had an adverse effect on many other access and recreational activities in the Carron Valley area. The FCS state that it works closely and in harmony with many other mountain biking groups in all parts of the country.
 34. The FCS also point out that despite taking the position they have regarding the CVDG information request it has continued to try its best to address their concerns and have drawn on very senior staff to hear their views. In a series of formal meetings with the CVDG it has fielded its Head of Recreation and Tourism, Chief Executive of Forest Enterprise Scotland, Director of FCS and the Scottish Government Minister for the Environment. However, the FCS claim that the CVDG Chairman has recently written a letter to the Minister, challenging everything the Minister and the FCS explained to them
 35. In addition the FCS argues that its local staff have been spending a disproportionate amount of effort trying to meet the constant demands of time which were being made by the members of the CVDG. It also explained that as the relationship between the FCS and the CVDG has become more difficult the information requests began to increase. The FCS state that they now have six full files of FOI related correspondence on the CVDG. The emails from the CVDG include the requests, the reminders from the CVDG of the time-scales and rules of the Act, chasers for acknowledgments and answers, ad hoc enquiries, follow up queries on its replies and complaints against FCS staff.
 36. The FCS states that it has only ever considered the ‘effect’ of the request from the CVDG; it has not made any assumptions about the ‘intention’ of the requests. The FCS feel that a surge of related requests, some of which are complex, over a short period of time, from a number of people who are in close contact with each

other, was having the effect of disrupting the work of the FCS to a disproportionate extent.

37. The FCS basis for refusing the request under section 14 (1) stems from its perception that the requests are from a group of individuals acting in concert. The FCS explained that all the requests are from CVDG members and whilst they assert that they are all acting as individuals, the chair of the group in a newspaper article in the Sunday Herald claims to have filed 16 requests for information with the FCS. The FCS point out that the chair of the group, in his own name, has only submitted the one request but 16 requests were the total number of requests received from CVDG members including the complainant's requests. The FCS state that because they believed the requests to be from a group it tried to encourage the group to submit a single request detailing the key information they were looking for. This suggestion was turned down by the group who insisted that the requests were coming from individual members of the public and should be treated individually. The Commissioner has seen the letter sent from the FCS to the chair of the group suggesting this approach.
38. In summary the FCS concluded that the request was vexatious on the basis that it:
- arose 'in connection with a past or current grievance or complaint involving the individual and the authority'
 - would impact on the ICO's 'desire to keep compliance costs to a minimum'
 - would impose a significant burden (relatively) 'in terms of expense and distraction'
 - was designed, to a certain degree, 'to cause disruption or annoyance'
 - had the 'effect of harassing the public authority'
 - was in some cases lacking true 'serious purpose or value' in relation to the key concerns at the Carron Valley. Some of the requests appeared to be relatively ad hoc, and seem to have been submitted to keep us fully occupied dealing with the CVDG. Previous and continuing experience indicates that any answers supplied would have instigated a protracted bout of follow-up questions and / or challenges.
 - was certainly submitted as a concerted campaign by the Group.
39. To back up the final bullet point, FCS stated that the CVDG mounted a media campaign accusing the FCS of 'sabotaging' the future of mountain biking, stating that the FCS was acting as a 'secret society' and demanding that FCS officials be sacked. To support this FCS provided links to web postings which demonstrate the campaign that the CVDG is launching. These postings demonstrate the CVDG's frustration with the FCS and the development of mountain biking trails, however the postings all occurred after the requests were made. The language in the posts is derogatory and there is a link to the Forestry Commission which when accessed does not lead to the Forestry Commission website but to a picture of snakes.
40. The Commissioner considers that it is reasonable in the circumstances of this case for the public authority to have taken the view that the request received from the complainant was part of a series of requests from the CVDG who were acting

as part of a campaign. This position is supported by the statement the chair of the group made in the Sunday Herald article “Forestry Commissioner Accused of ‘sabotaging’ mountain biking boom” dated 9 September 2007 in which the chair of the group states that he became so frustrated at the lack of communication from the FCS that he had filed 16 requests under freedom of information legislation.

41. However, being part of a campaign does not necessarily make a request vexatious but the previous behaviour of the individual or individuals can do so. The Commissioner’s (current published) Awareness Guidance No 22 on vexatious requests states that:

“..even if a request appears reasonable in isolation, the previous behaviour of the requestor can be taken into account if placing the request in context will allow it to be justifiably judged as unreasonable. A public authority may therefore take account of correspondence between the request and itself (even if on other matters) to demonstrate ‘previous behaviour’ to support the claim of vexatious-ness. The purpose of this would be to make the case that the request itself meets the criteria of vexatious request.”

42. The FCS provided the Commissioner with a table showing the requests received from the group to date along with details of the request. As noted above the FCS received 11 separate complaints from members of the group between 29 July 2007 and 19 August 2007, some of which involve multiple requests for information. The FCS also provided details of the types of correspondence it was receiving from the group including:

- demands to justify / prove / clarify its responses to original FOI request (ones prior to this campaign)
- comments seeking confirmation that it was ‘familiar with’ the rules of protocol involving the Act
- early reminders for acknowledgments for routine emails, and for answers to emails
- Requests for investigations into its procedures e.g. acknowledgement system
- formal complaints against staff
- complaints about its responses and investigations into the complaints about the staff
- calls for staff to be sacked
- refusal to accept that it was dealing with their information requests directed to the Scottish Government, despite an explanation that FCS is answerable to the Scottish Parliament despite being part of the Forestry Commission of Great Britain.
- resubmission of information requests, although investigations already ongoing by the ICO
- request to the Minister to ensure that information requested is released
- regular criticism of its decisions and practices which it was often told ‘would not be tolerated by the CVDG’.

43. The Commissioner has considered carefully all the circumstances of the case. Whilst he accepts that the FCS was correct to view the requestors as a group acting in concert, he does not consider that the burden and distraction of complying with the request would be excessive, this is supported by his finding on section 12 below. In all cases the group made focused and specific requests and there appears to be a legitimate purpose behind the requests. The Commissioner also notes that 'persistence' is not a valid reason for determining that a request or group of requests is vexatious.
44. Although the Commissioner also notes that prior to these FOI requests the FCS has made the following information available:
- Document entitled "Carron Valley Forest Cycle Trails Construction Methodology
 - Document on the use of Bike Counters
 - Graphs on trail use since launch and trail use by section
 - Visitor Research document
 - Document MB 12/07 Project Initiation Document on the Carron Valley Recreation Project
 - FES Management Board Meeting 11 June 2007 minutes

There is no evidence that the requestors in pursuing the information requested had previously been supplied with the specific information requested or that the issues relevant to the requests had been through many other levels of scrutiny.

45. The Commissioner does not consider that the public authority have demonstrated a pattern of behaviour that could be said to be obsessive and the language used by the complainants could be not characterised as significant harassment. The Commissioner takes the view that the FCS have not provided enough information in response to previous requests to justify that the request have not purpose. Whilst he accepts that the pattern of request, quickly followed by correspondence with very short gaps is evident to some extent of obsessive behaviour, but he considers that the situation at the time of the request is only to a level of persistence.
46. The Commissioner accepts that at times there is a thin line between obsession and persistence and each case should be determined on its own facts. The Commissioner considers that an obsessive request can most easily be identified where a complainant continues with a request despite being in possession of other independent advice or adjudication on the same issue. In this case the Commissioner does not consider that the nature of the requests falls within this definition of obsession, there is no evidence that the matters related to the information requested by the complainant have been resolved by due process under other mechanisms. The matters the complainant is concerned about remain resolved and there is a possibility that more information could made available to assist understanding of the issue..
47. The Commissioner also notes that even if a request could be classed as obsessive, if there is a serious purpose of value behind the request then despite the other findings it may not be deemed as vexatious, this depends on the

circumstances of each case. In this case the Commissioner considers that the requests did have legitimate purpose and value.

48. The Commissioner considers that this is a borderline case and that the request(s) are to be regarded as persistent rather than vexatious. In light of the above the Commissioner therefore finds that section 14(1) is not engaged in respect of the information requested in part 2 and 4 of the request.
49. In reaching this decision the Commissioner notes that the findings are made on the circumstances at the time of the request and that this finding does not preclude the FCS from using these provisions again in respect of requests from the same applicants if the FCS objectively find that the provisions apply. He notes that if the CVDG campaign was to use further FOI/EIR requests combined with significantly harassing language over a longer period of time he may reach a different conclusion to this decision. He therefore suggests that the complainant should think carefully about his future use of the legislation and language used in correspondence.
50. The Commissioner would also like to remind the complainant about responsible freedom of information requests and specially refers the complainant to the Commissioner guidance entitled "The ICO charter for making responsible freedom of information requests" available at www.ico.gov.uk. This guidance states the factors a request should consider before making a request and specifically refers to request which are the latest in a series of requests or could be regarded as part of campaign that a requestor should consider:
- Will another request serve any further purpose
 - If the request is about a changing situation, would it better to allow a reasonable period of time to pass before making a further request
 - Could you refocus the request for information that you genuinely require.

Section 12 'Costs limit'

51. Section 12(1) provides that 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. Section 12(2) provides that a public authority does not have to comply with 1(1) (a) and confirm or deny if the information is held if the cost of doing so would in itself exceed the appropriate limit.
52. The Appropriate Limit and Fees Regulations 2004 set a limit of £600, the equivalent to 24 hours at a rate of £25 per person per hour, to the cost of complying with a request for all public authorities subject to the Act and listed in Schedule 1, Part I. In estimating the cost of complying a public authority can take the following into account:
- determining whether it holds the information requested,
 - locating the information or documents containing the information,
 - retrieving such information or documents, and

- extracting the information from the document containing it.

The Regulations state: *'any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour'*.

53. Section 12(4)(a) states that where two or more requests for information are made to the public authority by one person the estimated cost of complying with any of the requests is taken to be the estimated total cost of complying with all of them. The Fees Regulations expand on this and state that requests can only be aggregated in the following circumstances:

- two or more requests for information must have been made to the same public authority;
- they must be either from the same person, or from 'different persons who appear to the public authority to be acting in concert or in pursuance of a campaign' (section 12(4)(b) of the FOI Act);
- the requests must relate to the same or similar information; and
- they must have been received by the public authority within a space of 60 consecutive working days

54. The FCS, as discussed previously, has treated this request as one from part of a group acting in concert. The Commissioner accepts that for the purpose of this request it would be reasonable for the FCS to apply section 12(4)(a) and aggregate the cost of complying as it would appear to them that the requests were from different persons who were acting in concert or in pursuance of a campaign. Further the requests relate to similar information, mountain biking, and were received from the persons within a space of 60 consecutive working days.

55. The FCS state that it is clear from the information requested that the staff cost involved in processing even just two or three of the more detailed requests submitted could significantly exceed the £600 limit. They state the by 'processing' the requests they mean the work involved in:

- Determining whether or not the information is held
- Finding the information
- Retrieving the information
- Extracting or editing material which is exempt from disclosure.

56. The Commissioner wrote to FCS on 16 December 2008 and requested further detail from the FCS to support its reliance on section 12. The Commissioner explained that in his view the issue is whether the words "extracting the information from a document containing it" include the redaction of exempt information containing it. In this context "information" is the information requested, not the information to be disclosed. Therefore the time taken to redact a document when the process of redaction is to blank out exempt information, leaving only the information which is to be disclosed, cannot be taken into account as it does not fall within regulations. Redacting involves removing or

blanking out from document information which is not to be disclosed rather than the task of extracting the requested information from a document which contains other information which has not been requested. The latter is the activity which the Commissioner considers falls within the appropriate limit calculations, not the former. The Commissioner's view on this matter has been supported by the Information Tribunal in the cases of *Jenkins vs Information Commissioner and Defra (EA/2006/0067)* and *DBERR vs Information Commissioner and Friends of the Earth (EA.2007/0072)*.

57. In response the FCS stated that it remains of the view that the individuals were acting in concert in submitting their requests within a short period of time, and that it was justified in aggregating the requests for cost purposes. It estimated that it would take around 90 man hours to produce responses for the requests and that this estimate does not include the time taken to redact as it did not anticipate any need to do so.
58. The FCS explained that the request of complying with some of the requests alone would require searching in many out stationed locations and the information would not necessarily have been in a readily available, accessible, standard format. Files would have had to be identified and located then trawled through for relevant papers which would then have had to be checked for completeness and then copied.
59. However in considering the reasonableness of the estimate, the Commissioner can challenge the public authority's process of investigation, assessment and calculation which led to their estimation that it would exceed the costs limit to comply with the request. In the case of *Mr William Urmenyi & the London Borough of Sutton v Information Commissioner* the Tribunal said that it was clear from the wording of section 12 that it was up to the public authority to estimate whether the appropriate limit would be exceeded in carrying out the activities described in Regulation 4 but that:
- “...the Commission[er] and the Tribunal can enquire into whether the facts or assumptions underlying this estimation exist and have been taken into account by the public authority. The Commission[er] and the Tribunal can also enquire about whether the estimation has been made upon other facts or assumptions which ought not to have been taken into account. Furthermore the public authority's expectation of the time it would take to carry out the activities set out in regulation 4(3) a-d must be reasonable”.
(para 16).
60. The issue of what constitutes a reasonable estimate was also considered in the case of *Alasdair Roberts v Information Commissioner*, the Tribunal endorses the following points made by the Tribunal at paragraphs 9 -13 of the decision:
- “Only an estimate is required” (i.e. not a precise calculation)
 - The costs estimate must be reasonable and only based on those activities described in Regulation 4(3)
 - Time spent considering exemptions or redactions cannot be taken into account (reaffirming the position in *Jenkins (EA/2006/0067)*)

- Estimates cannot take into account the costs relating to data validation or communication
 - The determination of a reasonable estimate can only be considered on a case-by-case basis and
 - Any estimate should be “sensible, realistic and supported by cogent evidence” (reaffirming the position in Randall (EA/2007/0004)).
61. The Commissioner does not consider the public authority’s estimate that it would take 90 man hours to comply with the requests is reasonable. The requests are focused and specific and not general or broadly made. The FCS have provided a breakdown of the time taken to deal with the requests it has refused from the group and this adds up to 90 hours. However, having looked at the requests and the time estimated, the Commissioner does not believe this is reasonable on the basis of the evidence supplied. For example FCS estimates that it would take 6 hours to comply with the request for a PID document on Ae Forest Development. This is a request for a single document in full, on a recent development and it is unreasonable to estimate that it would take 6 hours to locate and retrieve this information, unless particular justification could be provided. Another example is in relation to this complainant’s request, which they estimate would take 15 hours to comply with. This request is also focused and asks for details on a specific project. From the evidence before him the Commissioner finds that 15 hours to comply with this one request is not a reasonable estimate.
62. For these reasons the Commissioner considers that section 12(1) is not engaged as he does not consider that the FCS assertions regarding the cost limit are reasonable and he does not consider that the cost of complying with the requests or determining if the information is held would exceed the appropriate limit.

Regulation 12(4)(b) ‘Manifestly Unreasonable’

63. Regulation 12(4) (b) states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
64. The exception at 12(4) (b) is similar to that at section 14(1) of the Act. It is the Commissioner’s view that the regulation at 12(4) (b) provides an exception to the duty to comply with a request for environmental information in two circumstances: 1) where it is vexatious and 2) where it would incur unreasonable costs for the public authority or an unreasonable diversion of resources.
65. In relation to 1) whilst the Commissioner has issued no specific guidance on 12(4) (b) he does consider that in some cases the same test in relation to ‘vexatious’ can be applied as that laid out above in paragraphs 27 to reach a determination on its application.
66. In the circumstances of this case the Commissioner considers that the arguments provided by the FCS supporting the application of section 14(1) also do not engage the exception at 12 (4) (b) in relation to the first circumstance for the reasons outlined above in paragraphs 26-50.

67. In determining whether the cost of complying with a request for environmental information would be 'manifestly unreasonable' under regulation 12(4)(b), the Commissioner considers it is also reasonable to use the FOI and Data Protection (Appropriate Limit and Fees) Regulations 2004 as a starting point. The Commissioner has considered these provisions in paragraphs 51-60 and concluded that the cost of complying with the requests would not exceed the appropriate limit. The Commissioner is clear that in relation to 12(4) (b) the inclusion of the word 'manifestly' indicates that for the information to be withheld under this exception that information request must meet a more stringent test than simply being unreasonable.
68. The Commissioner therefore finds that for the reasons outlined in paragraphs 26-50 and 51-60 that the request is not manifestly unreasonable and exception 12(4) (b) is not engaged.

The Decision

69. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the requirements of the Act:
- (i) The application of the exemptions at section 14(1) and 12(1) of the Act
 - (ii) The application of the exception 12(4)(b)
 - (iii) Breached the requirements of regulation 5
 - (iv) Breached the requirements of regulation 14(1) and (3) under the EIR by failing to issue a refusal notice under the EIR; and
 - (v) Breached the requirements of section 17(1) of the Act by failing to issue a refusal notice.

Steps Required

70. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Confirm or deny to the complainant if the information requested is held and either disclose this information to the complainant or provide him with a valid refusal notice in accordance with the requirements of section 17(1) of the Act or regulation 14 of the EIR.

71. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

72. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

73. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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

Dated *the 30th* day of March 2009

Signed

Steve Wood
Assistant Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A

Date	Information Requested	Outcome
1 June 2007	Request for PID referred to at FEMB 31 May 2007	Information provided 29 June 2007
17 June 2007	FOI request extended to include very latest version of PID	Information provided 29 June 2006
1 July 2007	Pointing out no response to two questions asked re remedial works to trails following Dec 06 and Jan 07 Harvesting works	Information provided 9 July 2007
9 July 2007	Follow up request seeking clarification on points in reply of 9 July 2007	Information provided 16 July 2007
16 July 2007	Dissatisfied with reply of 16 July 2007, asked for 'direct' answers to points raised and for further information on contract	Information provided 20 July 2007
25 July 2007	Requested copy of June DEMB minutes as promised in reply of 29 June 2007	Published on FCS website
29 July 2007	Sought clarification on various points on PID document 12/07 mentioned in FEMB June board minutes and sought PID for Mabie 'black trail'. Also referred back to earlier request for information dated 1 July 2007 and asked for further clarification	Refused
31 July 2007	Request for spreadsheet mentioned in May FEMB minutes	Refused
2 August 2007	Requested PID for Ae Forest development	Refused
8 August 2007	Extension of FOI request for information on process followed that granted permission for trail construction at Kyle of Sutherland	Refused
8 August 2007	Information on Woods in and Around Towns challenge fund projects. In discussions to clarify request it transpired that the request was related to Carron Valley.	Information provided
9 August 2007	Copies of business cases for mountain bike related business to use buildings	Refused
10 August 2007	Various items relating to PID version 3 dated 4 June 2007 – sundry various details on each consultants brief for West and Scotland Forest, toilet block, evidence that two local authorities had sight of project detail, Cycling and Mountain Biking – towards a national strategy	Refused
13 August 2007	Details of SFGS award to part fund Golspie Wild Cat Trails	Refused
13	Various details of job role of Special projects	Refused

August 2007	manager at Scottish Lowland Forest District	
15 August 2007	Full details of PID process (and any previous revision) used for assessment of recreation projects on FCS land	Refused
16 August 2007	Any Scottish Executive departments invited to comment on submitted feedback on Cycling and Mountain Biking – Towards a National Strategy and if so copies of documents. Also what work Scottish Executive involved in with regards to development of mountain biking trails on FCS managed land	Refused
17 August 2007	Mountain bike centre usage numbers in FCS or related to FCS and methodology used to collect	Refused.

Legal Annex

Freedom of Information Act 2000

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“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.”

Section 12(2) provides that –

“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.”

Section 12(3) provides that –

“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.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated

Vexatious or Repeated Requests

Section 14(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”

Section 14(2) provides that –

“Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable

interval has elapsed between compliance with a previous request and the making of the current request.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

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

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Environmental Information Regulations 2004

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (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 elements of the environment referred to in (b) and (c);

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 12 – Exceptions to the duty to disclose environmental information

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

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.