

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 3 August 2017

Public Authority: Forestry Commission
Address: England National Office
620 Bristol Business Park
Coldharbour Lane
Bristol BS16 1EJ

Decision (including any steps ordered)

1. In a series of multi-part requests, the complainant, on behalf of a local Parish Council, has requested information about a restoration programme at Harvestslade Bottom, New Forest. The Forestry Commission has categorised the requests as 'manifestly unreasonable' under regulation 12(4)(b) of the EIR, by virtue of being vexatious requests, and has refused to comply with them. It considers the public interest favours maintaining this exception.
2. The Commissioner's decision is that the requests are manifestly unreasonable and the public interest favours maintaining the exception.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. Harvestslade Bottom (a Site of Special Scientific Interest - SSSI) was a wetland restoration project in the New Forest that the Forestry Commission (FC) undertook between July and October 2015.
5. On 3 February 2016, the complainant wrote to the Forestry Commission and submitted 13 requests for information about this project, with the majority of the requests being multi-part requests. Given the voluminous nature of the combined requests, they are reproduced in the Appendix to this notice.
6. FC responded on 29 March 2016. It provided information with regard to some of the requests, directed the complainant to other publicly available information, answered other queries and told the complainant that it did not hold some of the requested information.
7. Correspondence between the parties followed in which the complainant queried FC's response. This second round of questions, submitted on 29 April 2016, had been typed in red and FC responded to these on 11 May 2016. In correspondence dated 15 August 2016, the complainant submitted a third series of queries and requests with regard to FC's responses of 29 March 2016 and 11 May 2016. The resulting correspondence is again voluminous (running to 16 pages) and, for efficiency, is not reproduced in this notice. FC refers to this third round of questions as the 'purple questions' which is a reference to the colour in which they were typed.
8. On 9 September 2016, FC wrote to the complainant with regard to the purple questions and referred to the exception under regulation 12(4)(b) of the EIR.
9. Following further correspondence, FC provided an internal review to the complainant on 17 November 2016. It disclosed some additional information it holds but upheld its position that, at the point it was applied, FC was correct to apply regulation 12(4)(b) to the complainant's further correspondence of 15 August 2016.

Scope of the case

10. The complainant contacted the Commissioner on 26 January 2017 to complain about the way his requests for information had been handled.

11. The Commissioner's investigation has focussed on whether the complainant's requests of 15 August 2016 can be categorised as 'manifestly unreasonable' under regulation 12(4)(b) of the EIR.

Reasons for decision

12. Regulation 12(4)(b) of the EIR says that a public authority may refuse to disclose information if the request is 'manifestly unreasonable'. This exception can be used when a request is vexatious or when the cost of complying with a request would be too great. In this case, FC considers the complainant's requests to be vexatious.
13. The Commissioner considers that the inclusion of 'manifestly' in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under the exception, the information request must meet a more stringent test than simply being 'unreasonable'. 'Manifestly' means that there must be an obvious or tangible quality to the unreasonableness of complying with the request.
14. In line with her published guidance on vexatious requests, the Commissioner considers whether the request itself is manifestly unreasonable rather than the individual submitting it. Sometimes, it will be patently obvious that a request is manifestly unreasonable. In cases where it is not so clear cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually be a matter of objectively judging the evidence of the impact on the authority and weighing this against any evidence about the purpose and value of the request. Public authorities may also take into account the context and history of the request where relevant.
15. Where the exception is engaged it is subject to a public interest test under regulation 12(1)(b) to determine whether the information should be disclosed in spite of the exception applying.
16. FC has told the Commissioner that it did not take the decision to apply regulation 12(4)(b) lightly but says that complying with the 'purple questions' would create a significant burden on it and cause disruption and annoyance. FC says that these requests of 15 August 2016 appear to be obsessive and without purpose or value.
17. FC says that it holds over 3,000 pages of information that relate directly to the Harvestslade project and that it had already spent in excess of 150 hours dealing with the first two rounds of enquires from the complainant. It says its Head of Information Rights carried out a support visit to the New Forest when local staff were dealing with the

second round 'red' questions, and visited again as part of the internal review process when the Head of Information Rights was overseeing the assessment of the complaint. FC considers that, given what it has already done, it would, in its view, be totally disproportionate to continue to divert resources to answering increasingly obscure information requests from the complainant.

18. In its submission to the Commissioner, FC has first discussed the burden of the requests; the disruption and annoyance caused. It has provided the Commissioner with examples of its handling and approach to four of the questions the complainant submitted on 15 August 2016.
19. Question 2a – submitted on 3 February 2016 – concerned the volume of material delivered to the site. FC says that this started out as a straightforward question and was answered in full from records that it holds (delivery notes, invoices etc). The complainant then questioned the disclosed information and asked additional questions about where the material had been stockpiled. FC says it again answered this question from information it holds. It says that by the time the third round 'purple' questions had been reached, on 15 August 2016, the question had moved on to being about where specifically the material had been used. The Commissioner notes that the request on 15 August 2016 regarding FC's response to question 2a is as follows:

"Do your records not then differentiate between materials actually used for stream engineering works & those required for forest track repairs or similar ancillary works? Would these not show up on your contractor's accounts or LUC's reports on work in progress, which are presumably still accessible to you?"

20. FC says that it does not hold a report on the specific use of the material, but that some information about the use of the material may have been recorded in the notes of site visits or in some other ad-hoc manner. In order to discover conclusively whether or not any information was held on material use, FC says somebody would need to review much of the project documentation, which as previously noted amounts to over 3,000 pages. This is before any consideration is given to information that may be held by the contractors who were working for it at that time, for example machine logs or some other record which may make reference to materials.
21. Question 3a concerned the total cost of all the works. FC again says that this started out as a straightforward question on 3 February 2016, which received a straightforward answer based on recorded information FC holds. It says that by the time of the purple questions, the question had moved on to being about FC's general procedures for recording staff

time. The Commissioner notes that the request on 15 August 2016 regarding FC's response to question 3a is as follows:

"Please confirm that it is recorded that your organisational procedures do not require the FC's employees to register all relevant time & costs they incur and could otherwise be charged out. Or, alternatively, that it was agreed & noted that this would not be the case for work such as this that has been said to be within the definition of 'Forestry Management' work for Planning purposes."

22. FC says it is likely that some information is held somewhere in its HR policy and procedures or its financial management instructions, which are separate to the Harvestslade project documentation. To assess this someone would need to review the HR or finance documentation in order to see if there are procedures for recording staff time (or not) actually held as recorded information. FC says that it is not something readily to hand as current operating procedures have been in place for a considerable time and are established by custom and practice.

23. Question 8c concerned how the [favourable condition] will be judged. FC says it had explained in its first and second answers that Natural England would assess the condition of an SSSI. However, the third round 'purple' question concerned the record of results achieved. The Commissioner notes that the request on 15 August 2016 regarding FC's response to question 8c is as follows:

"Are there then still no records yet of the results achieved? Or is it recorded that you are entirely reliant upon NE for their findings at some yet to be determined time in the future?"

24. FC has told the Commissioner that it is sure that somewhere amongst the project documentation there will be something which could be considered to be a record of a 'result' but that, again, this would require much of the project documentation to be reviewed. It says this information (if it exists) in an unstructured format would be of very little value to anyone. FC considers that reviewing all recorded information for Harvestslade in order to look for a 'result' is clearly an unreasonable burden and distraction.

25. Question 11 concerned brown trout. FC says that the complainant's assumption appeared to be that FC reintroduced brown trout to the site but that as it had explained in its response of 29 March 2016, this was not the case. FC says that the complainant did not accept this fact and accused FC of having been party to the reintroduction of fish. By the time the round of 'purple' questions had been reached, FC says that the complainant's approach had changed to what FC was doing to maintain

the trout's wellbeing. The Commissioner notes that the request on 15 August 2016 regarding FC's response to question 11 is as follows:

"Is there no record then of your responsibility for the habitats & species during the works and of the steps taken to ensure their continued well-being in accordance with your legal duties in these respects? What actions were noted to have been performed by the Environmental Agency during this period?"

26. FC says that other than a fish survey, which it provided to the complainant, it has done nothing specific to benefit the trout but that there may be some information on activities in the area that may affect the trout. It cannot be sure of this but, in order to conclusively check whether or not it holds relevant recorded information, it would need to review much of the project documentation. Again, FC says this is clearly an unreasonable burden and distraction.
27. FC has gone on to discuss the obsessive nature, purpose and value of the requests. These are also criteria for considering whether a request can be categorised as 'vexatious' under regulation 12(4)(b).
28. It has told the Commissioner that the Parish Council in question was, and still is, strongly opposed to the Harvestslade wetland restoration project. The Parish Council is opposing other wetland restoration activities that FC is progressing in the New Forest on behalf of the New Forest Verderers. FC says that the Parish Council is doing everything in its power to disrupt and discredit FC's work, particularly at the time that its information requests were being progressed. This was because this was in the period leading up to the planning authority's consideration of the largest wetland restoration scheme to date.
29. FC says that it is also abundantly clear by the way the enquiries have expanded, that the complainant, on behalf of the Parish Council, is obsessively pursuing information and is not willing to accept the fact that FC does not hold some of the information he has requested. The complainant appears to have his own expectations on what information FC should hold. Where FC does not hold this information, and this has been explained to the complainant, the complainant's approach has been that FC should create information and express opinions in order to answer his questions. FC says that it is not prepared to respond to the complainant's pursuit of information under the EIR in this way and does not consider that there is any requirement in the regulations to do so. This is discussed in 'Other Matters'.
30. FC fully accepts that it has to be accountable for its actions when managing the New Forest but says it does not see how continuing to respond to the complainant's requests will provide any additional

accountability. Work FC is doing in the New Forest is assessed by the planning authority as the work is carried out under planning permission. Furthermore, the impacts of FC's work are assessed by Natural England as the authority responsible for assessing the condition of the SSSI affected by the works. In addition the Verderers Higher Level Stewardship Scheme, under which FC carried out the Harvestslade works, is currently subject to an investigation by the National Audit Office at the request of the local MP, Sir Desmond Swayne.

31. FC has told the Commissioner that it knows that Sir Desmond Swayne has been out on other work sites with members of the Parish Council and he has also asked a number of questions in Parliament about wetland restoration in the New Forest, as well as writing to Ministers about the FC's activities. FC argues that this is evidence of the levels of accountability that are already in place without the need for continued response to the complainant's ongoing requests, which themselves are for more and more obscure and disconnected information.
32. The Commissioner has considered all the circumstances of this case: the correspondence between the complainant and FC, including the complainant's requests; the background and FC's submission to her. The complainant's correspondence to the Commissioner is considered as part of the public interest test considerations.
33. FC had responded to the complainant's initial 13 requests, the majority of which were comprised of multiple parts. At the point of the requests of 15 August 2016, the focus of many of the requests had drifted away on to new areas, albeit obliquely related to the original requests. Based on the correspondence she has seen, the Commissioner considers that there is a good likelihood that, if FC had responded to these requests, the complainant would have submitted a further set of queries and requests about those responses, and the situation would have ground on.
34. The Commissioner is satisfied that FC was correct to draw a line under the correspondence when it did. She has noted the amount of time FC says was consumed dealing with the complainant's first two rounds of questions: 150 hours. Even if it had only taken a quarter of that time, this is still the equivalent of one working week. The Commissioner considers that responding to the third round of questions would have been a continuance of the burden that responding to the complainant's requests placed on FC, and that the burden would have been disproportionate. This is because, by 15 August 2016, the requests had reduced in focus (compared to the original requests), value and importance. The Commissioner is therefore satisfied that the complainant's correspondence of 15 August 2016 can be categorised as manifestly unreasonable under regulation 12(4)(b).

Public interest test

35. As it set out to the complainant in its response of 29 March 2016 and its internal review of 17 November 2016, FC's overall position is that there is no public interest in the detailed issues that the complainant is pursuing. It considers there is a general interest in the wetland restoration and that this interest has been addressed in a wider range of fora. There is, however, no detailed interest in the Harvestslade Bottom project of the nature that the complainant is pursuing. FC says that despite the complainant copying numerous people and organisations into its correspondence with FC, FC has not received any interest in the issues that the complainant has raised from any other organisation or individual.
36. FC says that if there had been real public interest in the issues it is sure it would have heard directly from some of the individuals or organisations that the complainant has attempted to engage in his quest for information. FC's conclusion from this is that there is no serious purpose or value to the requests for information submitted on 15 August 2016, in terms of the public interest test, and that the exception can be reasonably sustained.
37. In the complainant's correspondence to the Commissioner, he has said that the Harvestslade 'situation' continues to be a considerable worry to the Parish Council's villagers and the Parish Council. This is because of the damage he says was caused during the process of the works and the resultant 'unhappy state' of the Harvestslade watercourse and surrounding land. The complainant says that the future ecological implications for all the relevant stream catchment area will not become clear in measurable reality because it seems the appropriate monitoring processes were not put in place from the outset.
38. According to the complainant, those worries have greatly increased since the Harvestslade project can now be seen in the much wider context of the ongoing New Forest Wetland Restoration programme. This programme, as FC has also told the Commissioner, is now part of an ongoing National Audit Office enquiry into the New Forest Higher Level Stewardship Scheme. The complainant says that the importance of establishing the full extent and nature of the works carried out at Harvestslade Bottom should be seen in this wider context.
39. The Commissioner appreciates that the complainant, Parish Council and local villagers may have been, and perhaps still are, concerned about the restoration work carried out at Harvestslade Bottom. However, the complainant has not brought to the Commissioner any evidence that the works were improperly carried out in some way or have caused serious and significant damage to the site or its ecology, or have raised

significant concerns about the wider New Forest Wetland Restoration programme. Such evidence would mean that the public interest in FC complying with the requests in question, and disclosing relevant information, would be likely to be greater than the public interest in allowing FC to direct its resources on its day to day business, and not to comply with the requests.

40. As it is, the Commissioner is satisfied that the public interest in the Harvestslade Bottom project having a satisfactory outcome, and in FC's activities more generally, is sufficiently met through assessment by the planning authority and Natural England, and by the intervention by others where appropriate: the local MP and National Audit Office in this case. The Commissioner has therefore decided that the public interest favours maintaining the exception on this occasion.

Other matters

41. Regulation 5(1) of the EIR says that a public authority that holds environmental information shall make it available on request. To confirm, the EIR concern releasing environmental *information* that public authorities *hold* at the time of the request. The EIR and FOIA do not require authorities to create new information in order to respond to a request, or to give opinions, even where it might be helpful to do so.
42. Once an authority has responded to a request under the EIR (or FOIA), and has provided an internal review, it has met its obligations under the legislation. If the applicant remains dissatisfied following the internal review, the authority can direct him or her to the Commissioner at that point.
43. An authority should consider each situation on a case by case basis and there will often be occasions when further correspondence with an applicant is practical and expedient. However, there will also be occasions when the more appropriate approach would be to confirm that the applicant should submit a complaint to the Commissioner if he or she remains dissatisfied after a review. This prevents prolonged correspondence that is perhaps unproductive for both parties and is a drain on the authority's resources.
44. The EIR do not oblige public authorities to respond to more general questions and enquiries from members of the public that do not concern held information. Authorities can deal with these type of enquiries as part of their normal course of business. A complaint about how an authority has responded to a more general enquiry – or about the content of the response – can be managed through the authority's internal complaints process.

Right of appeal

45. 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

46. 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.
47. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Requests of 3 February 2016:

Freedom of Information Act/ Environmental Information Regulations

Harvestslade Bottom, Burley, New Forest BH24 4DF - Stream Engineering Works

This enquiry concerns a project within the Forestry Commission's Wetland Restoration Programme known as "Harvestslade Bottom" which was covered by Planning Permission No.14/00611 (as granted by the New Forest National Park Authority on 21st October 2014) for the "Replacement of approx. 320m of artificial drain with approx. 525m of restored meander; bed level raising for a total length of approx. 340m; complete infill of redundant drainage channel and the construction of one gravel stock crossing".

Please provide the following information: -

1. By comparison to the dimensions envisaged in Permission 14/00611 and Description of Works shown on Drawing 004 attached thereto, what are the actual figures ("as built") for:

- a) the total length of the stream which was infilled;**
- b) the total length of the stream where the bed level was raised;**
- c) the total length of the new route of meanders;**
- d) the total length of new meander where the historic course of the streambed was found and restored and from what date?**
- e) how has Section 8b been assessed bearing in mind that there has been no development of any channel along this route?"**

2. In respect of the materials imported as part of the works undertaken on behalf of the Forestry Commission at Harvestslade and the surrounding area (including access routes etc.) in 2015:

- a) how many tonnes of hoggin, gravel, clay, and large stones respectively were used in order to complete the project?**
- b) how many tonnes of hoggin, gravel, clay, and large stones respectively were actually added to the stream channels at Harvestslade in this operation?**
- c) what was the source of those materials?**
- d) were any other materials imported to the site?**
- e) what measures were taken to ensure that all/any of those materials were not contaminated in any way that might adversely affect the integrity of the watercourse, its site, and the health of the animal & vegetable life existing there/passing through?**

3. In order to complete all these works (including materials, labour, plant hire and professional fees together with all preparations, incidental repairs and finishings) and covering both direct costs by the Partners, and contracted out costs:

- a) what was the total cost of all the works undertaken?**
- b) what were the total direct costs incurred by each Partner organisation ?**

4. We were originally informed simply that a 'basic' cost of approx. £65,000 would be involved, which appears to have related only to the supply of necessary materials (as referred to in **2.** above); observation of the works in progress seemed to indicate a very much higher level of total expenditure was ultimately

required:

How was reasonable value for money achieved in these circumstances?

5. Prior to commitment to this project, and during the progress of the weather-affected works:
What other approach(es) were explored in order to achieve the desired results that could have accomplished better value for money?

6. **With regard to the financing of the project:**

- a) **how was the required expenditure funded?**
- b) **from what sources did the monies flow**
- c) **along what path did they flow?**
- d) **what will be the final burden on the public purse?**

7. **Can you confirm that these works were planned on the basis that they would qualify for EU Rural Development support for non-productive Investments in Agriculture?**

In any event, and as an adjunct to Q5 above:

To what degree is the Cost-Effectiveness of the project calculated?

8. With regard to the various SAC, SPA, SSSI and Ramsar statuses accorded to this site:

- a) **what timetable has been agreed with Natural England to re-assess its "condition"?**
- b) **what improvements have been agreed to be necessary in order to achieve 'Favourable' condition,**
- c) **how will this be judged?**

9. **How have the criteria for the success of the project been set in recognised, quantifiable scientific terms as against the necessary equivalent assessment of site conditions prior to commencement of the works?**

10. **Have any consequent adverse effects of the completed works become apparent yet (downstream as well as on site)?**

11. **What was the justification for the reintroduction of brown trout into the stream only one month after the works were completed, and were the Environment Agency informed or involved?**

12. This Parish Council understands that, in accordance with the Habitats Regulations, all English competent authorities, **must** undertake a formal assessment of the implications of new plans or projects which are capable of affecting the designated interest features of European Sites before deciding whether to undertake, permit or authorise such a plan or project i.e. a 'Habitats Regulations Assessment' (as set out in the NE HRA Operational Standard):

When was a Habitats Regulations Assessment carried out for this project?

13. With reference to the terms of Natural England's HRA Operational Standard and the relevant legislation and regulations:

Please provide the full record made by Natural England justifying that the proposed scheme was necessary for the management of the site and that no "appropriate assessment" would be completed.