

Decision Notice



Decision 129/2011 Philip Morris International and the University of Stirling

Whether a request was vexatious

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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Philip Morris International (PMI) requested from the University of Stirling (the University) information relating to a project being undertaken by the University's Centre for Tobacco Control Research (CTCR). The University refused to comply with PMI's request on the grounds that it was vexatious, in terms of section 14(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, PMI remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the information request was not vexatious. He also found that the University had unreasonably sought clarification from PMI before responding to its request and that, as a consequence, had failed to respond to the request within the time limit set down by FOISA.

In addition, he found that the University did not fulfil its duty under section 15 of FOISA in relation to providing advice and assistance to PMI.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (6) (General entitlement); 10(1) (Time for compliance); 14(1) (Vexatious or repeated requests) and 15 (Duty to provide advice and assistance)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. According to its website, PMI is the leading international tobacco company with products sold in over 180 countries. In 2010, it held an estimated 16% share of the international cigarette market outside the USA.



2. On 24 August 2010, solicitors acting on behalf of PMI (in this decision, all references to correspondence with PMI is to correspondence with its solicitors) wrote to the University in relation to a project entitled, “Piloting the Use of Plain Packs in a Real Life Environment: Experiences of Young Adult Smokers”, which was being undertaken by the CTCR. PMI asked for all of the information the University held in relation to the project including, but not limited to, written communications and notes of meetings or telephone conversations in relation to the project. PMI stated that it would expect this to include:
 - a. the terms of reference of the project;
 - b. information relating to the methodology used in the project;
 - c. all information relating to the design and purpose of the project; and
 - d. all data collected and drafts produced in connection with the project.
3. On 17 September 2010, the University wrote to PMI, advising it that, with the exception of the information described in part I. of the request, it was unable to identify and locate the information it had requested. (The application received from PMI does not deal with the University’s response to part I. of the request, so it will not be considered further in this decision.)
4. The University commented that the remainder of PMI’s request was framed in very broad terms and, in terms of section 1(3) of FOISA, sought clarification as to what PMI meant by “any information” in its overarching request and as to what it meant by certain words in parts II., III. and IV. of its request.
5. PMI wrote to the University on 13 October 2010, indicating that it considered that the University’s request for clarification was unreasonable. However, it sought to provide the University with an indication of the type of information that it considered may be covered by its overarching request and by parts II., III. and IV. of the request, but indicated that these were intended as examples of the kind of information which may be held, not an exhaustive list.
6. On 20 October 2010, the University advised PMI that, in light of its response to the University’s request for clarification, it considered the remainder of the request to be vexatious in terms of section 14(1) of FOISA. Accordingly, the University took the view that it was not obliged to comply with the remainder of the request. The University said that it had given detailed consideration to guidance issued by the Commissioner¹ on the requisite criteria for determining a request to be vexatious and was of the view that the requisite criteria had been met. However, it did not make a specific reference to which criteria it considered applied.

¹ “Vexatious or Repeated Requests”

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2513&SID=2591>



7. On 15 November 2010, PMI wrote to the University to request a review of this response. With reference to the Commissioner's guidance, PMI asked the University to address the question of what significant burden is placed on the University by its request, and which of the four criteria outlined in the Commissioner's guidance the University believed was relevant to the request. PMI also noted that the guidance says that a request may be vexatious where "an authority has taken reasonable steps to explain the difficulties involved in processing a request, and offered assistance with refining the request, and the applicant (without good cause) refuses to refine their request." The University was asked to describe the "reasonable steps" the University took to explain the difficulties posed by the request and the assistance offered in refining the request.
8. On 10 December 2010, the University wrote to PMI to advise that, as it had considered parts II, III, and IV. of PMI's request to be vexatious, section 21(8) of FOISA meant that it was not obliged to undertake a review. The University explained that it had, however, carried out a review and, having done so, had upheld its decision that the remaining parts of PMI's request were vexatious in terms of section 14(1) of FOISA. The notice from the University informing PMI of the outcome of the review stated that it was satisfied that complying with the request would place a significant burden on the University and that other criteria set out in the Commissioner's briefing are also satisfied. Although, in terms of section 21(5) of FOISA, such a notice must give a statement of reasons, the notice did not explain why responding would impose a significant burden on the University or address any of the other criteria in the Commissioner's guidance.
9. On 15 March 2011, PMI wrote to the Commissioner, stating that it was dissatisfied with the outcome of the University's review and was applying to the Commissioner for a decision in terms of section 47(1) of FOISA. PMI disputed that the remainder of its request (from now on in the decision, this is referred to as "the request") was vexatious, and commented on the time taken by the University to seek clarification of its request, particularly as it considered that this took longer than the 20 working days allowed for a public authority to respond to an information request. PMI also considered that the University did not comply with its obligations under section 15 of FOISA and that the University's request for clarification was an attempt to delay the publication of the requested information.
10. The application was validated by establishing that PMI had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

11. On 6 April 2011, the University was notified in writing that an application had been received from PMI, and was invited to provide comments on the application (as required by section 49(3)(a) of FOISA), along with any evidence or arguments to support the view that PMI's request of 24 August 2010 was vexatious in terms of section 14(1) of FOISA.



12. The University was also asked to comment on the time taken by it to request clarification from PMI, together with the assertion from PMI that the request for clarification was an attempt on the University's part to delay the publication of the requested information. Submissions were also sought from the University as to PMI's assertion that it did not fulfil its duty under section 15 of FOISA in responding to its request.
13. On 6 May 2011, the University provided the Commissioner with its submission in relation to PMI's application for a decision.
14. The University advised that, in deeming PMI's request vexatious, it relied on the terms of section 14(1) of FOISA, the guidance produced by the Scottish Information Commissioner² and legal advice regarding the objective tests that should be applied in the particular facts and circumstances of the case.
15. The University understood from the Commissioner's guidance that his general approach is that a request is vexatious where it would impose a significant burden on the public authority and one or more of the following conditions can be met;
 - (a) it does not have a serious purpose or value, and/or
 - (b) it is designed to cause disruption or annoyance to the public authority, and/or
 - (c) it has the effect of harassing the public authority, and/or
 - (d) it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
16. The arguments advanced by the University are considered below.

Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both PMI and the University and is satisfied that no matter of relevance has been overlooked.

Section 14(1) of FOISA

18. Under section 14(1) of FOISA, a public authority is not obliged to comply with an information request if the request is vexatious.
19. As noted above, the Commissioner has published guidance on the application of section 14(1) of FOISA. The Commissioner's general approach is set out in paragraph 15 above.
20. In summary, the University's arguments in support of the application of section 14(1) of FOISA are as follows:

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.asp>



- the impact of dealing with this broad information request, which did not specify a timeframe for the information requested, would be extremely disruptive to the research team, and so would be a significant burden on the University;
- the fact that the request was submitted in close proximity to another broadly worded request from PMI, together with knowledge of how tobacco companies and organisations with links to PMI or the wider tobacco industry appear to have used freedom of information legislation in other jurisdictions to disrupt the work of health professionals and others involved in work it considers to be against its own interests, leads the University to consider that this request is designed to cause disruption or annoyance;
- the significant burden placed on the research team in having to deal with this request, together with the tone of the correspondence from the applicant, leads the University to consider that the objective effect of the information request is the harassment of the University and researchers within the CTCR's team;
- collectively, these points demonstrate that the request, in the opinion of a reasonable person, could be considered to be manifestly unreasonable and disproportionate in all the facts and circumstances of the case.

Significant burden

21. The Commissioner, in his briefing, has indicated that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time, and the diversion of an unreasonable proportion of its financial and human resources away from its core operations. However, if the expense involved in dealing with the request is the only consideration involved, the authority should consider the application of section 12 of FOISA (under section 12 of FOISA, a public authority is not currently required to comply with a request if the cost of compliance exceeds £600).
22. In terms of the burden imposed by PMI's request, the University argued that the request was framed in broad terms, seeking "any information that you hold in relation to this project, including, but not limited to, written communications and notes of meetings or telephone conversations in relation to the above project". The request went on to list four types of information that PMI would expect this request to include (see paragraph 2), but this was merely an illustrative list.
23. The University advised that it attempted to obtain a more specific explanation of what information PMI was looking for, to enable it to identify and locate the information. The intention of this communication with PMI was, the University submitted, to seek clarification on the types of information PMI was trying to capture by the use of these terms in the context of what the University considered to be a very general request. The University also sought an indication of the time period over which the request was intended to span as none was given in the original request.



24. The University explained that it was of the view that its attempts to clarify the broad and general request were entirely reasonable. However, it considered that PMI's response, which it received a month after its request for clarification, was somewhat hostile in its tone and did not clarify the request in any substantive way. The University also commented that PMI failed to respond at all to its request that it specify a timeframe for the request, which would have assisted the University in focussing the request.
25. The University advised that, having considered PMI's information request, its assessment was that the impact of dealing with such a broad information request would be extremely disruptive to the research team. The University asserted that the significant burden would not only stem from the expense involved in dealing with the request (if this were the case, it advised that it would have invoked section 12), but also from the amount of time taken by the research professionals who would be required to locate and retrieve the requested information, due to the expertise required to analyse the request and the information. This would, the University argued, represent an unreasonable proportion of its human resources being diverted away from the core functions and operations of those researchers.
26. The University provided submissions detailing the make up of the core project team, the deadlines affecting their work and the reasons why it considered that responding to this request from PMI would have significantly impacted on their work in various ways. The University considered that dealing with such a time consuming request would threaten the effective operation of the research project and the team involved in that. Although the Commissioner had not asked the University for to provide him with an estimate of the time in terms of human resources and in terms of the financial cost for locating, retrieving and providing information in response to the request, the University provided such an estimate. The University advised that the cost of fulfilling this request would be £913.75.
27. In its application to the Commissioner, PMI commented that it is most likely that the requested information is filed in one place and may be stored electronically. This information, PMI argued, is likely to have been collated by those involved in the project and be easily accessible. PMI is of the view that, if a disproportionate amount of time were required in order to produce the response to their request, this would suggest that the information relating to the design and purpose of the project and the data collected had not been collated and analysed in an orderly method.
28. Having considered the arguments advanced by the University, together with the submission from PMI, the Commissioner accepts that the request submitted by PMI was wide ranging and could capture a lot of relevant information. He also accepts that, where specialist knowledge of the information covered by the request is contained in one, small team, then the impact on that team could be significant in seeking to fulfil this request, as well as meeting tight deadlines in satisfying their project brief (PMI were aware that the project was due to end a matter of weeks after the request was made).



29. The Commissioner notes that the University has highlighted that the cost of complying with this request (as one of the factors which leads to a significant burden being imposed) would be significant, but considers that this factor could have been addressed through the application of section 12 of FOISA by the University. However, given that this was only one of the factors considered by the University to be responsible for PMI's request imposing a significant burden on it, the Commissioner accepts that, taking all of these factors into account, the request from PMI did impose a significant burden on the University.
30. Although the Commissioner accepts that PMI's request would impose a significant burden on the University, he does not consider that this is sufficient in order for him to be satisfied that the University was correct to apply section 14(1) to PMI's request. He will therefore go on to consider whether one or more of the conditions listed in parts a) to d) in paragraph 15 have been fulfilled in relation to this request.

No serious purpose or value

31. PMI advised that the UK Government has previously raised the possibility of introducing requirements on the use of plain packaging for cigarettes, and has recently published further, more concrete, proposals in this regard, in the form of the Tobacco Control Plan³. PMI submitted that, if these proposals were to be implemented, they would have major implications for it, for its brand and for branded competition, as well as wider implications for illicit or contraband trade. In this context, PMI stated that it has a genuine and pressing interest in seeing the information requested. PMI stated that there can be no suggestion that the request does not have a serious purpose.
32. The University has not provided the Commissioner with any submissions to demonstrate that the request from PMI has no serious purpose or value.
33. The Commissioner has therefore concluded that this criterion has not been met.

Request is designed to cause disruption or annoyance to the public authority

34. The University has commented that, in seeking to determine whether PMI's request is intended to cause disruption or annoyance, it took into account the Commissioner's guidance, which notes that it will be easiest to gauge an applicant's intention where he or she has made it explicit, but that it may be possible to demonstrate an applicant's intention from prior knowledge of the applicant and documented interactions with the applicant.

³ 'Healthy Lives, Healthy People: A Tobacco Control Plan for England' published by the Department for Health on 9 March 2011



35. The University has advised that, in the circumstances of this very broadly worded request, made in close proximity to a similar and very broad request by the same applicant to the University focusing on the tobacco control research of the CTRC, taken together with its prior knowledge of how tobacco companies and organisations with links to PMI or the wider tobacco industry appear to have used freedom of information legislation in other jurisdictions to disrupt the work of public health professionals and others involved in work it considers to be against its own interests, the University considered that this request was designed to cause disruption to the research being carried out by the CTRC. The University stated that there is documentary evidence of such activities being particularly focused on plain packaging and point of sale tobacco displays.
36. In seeking to justify its assertions, the University provided the Commissioner with a number of articles which have been published in journals and guidance notes which show that PMI and other tobacco companies have used freedom of information and access to information legislation widely in other countries (USA, Australia and New Zealand) to submit requests for information regarding public health research or policy in relation to tobacco related matters, including the introduction of plain packets. Some of these articles took the view that these requests were a misuse of the statutory right to know provisions.
37. The University stated that it was relying on the full content of these articles and guidance notes to support its contention that the information requests submitted by PMI were made with the intention of disrupting the work of the CTRC. The University argued that the information requests were intentionally drawn in very broad terms, were designed to cause disruption and annoyance to the University and were underpinned by a particular opposition by the applicant to measures that might support the introduction of tobacco control policy measures.
38. PMI advised that it has a genuine interest in seeing the requested information in order to enable an analysis of the methodological rigour and accuracy of the project and a consideration of its objectivity. PMI is of the view, that in no sense can its request be considered to be designed to cause disruption or annoyance to the University.
39. PMI also noted the content of the Commissioner's guidance and, in particular, the statement that it may be possible for a public authority to demonstrate an intention to cause disruption or annoyance from prior knowledge of, and documented interactions with, the applicant. PMI submitted that the documented interactions with the applicant demonstrate a clear desire to obtain access to the information. PMI indicated that it also wished to refer the Commissioner to a separate application that it submitted to him in respect of another request for information that it made to the University (this is the subject of a separate investigation). Correspondence on these two requests, together with a previous request which was made to the University in 2009, represents the sum total of the interaction between PMI and the University.
40. Having taken into account the submissions from the University and PMI, the Commissioner cannot accept that the evidence and arguments advanced by the University here justify its view that this request from PMI is designed to cause disruption or annoyance to it.



41. It is apparent that, to date, PMI has submitted three separate information requests to the University. Two of these requests relate to different matters, with one being a repeat of the one submitted in 2009 (the Commissioner determined that the original information request was invalid because it was made by solicitors on behalf of PMI, but did not name PMI, as required by section 8(1)(b) of FOISA) and, although broad ranging, clearly identifies the information being sought.
42. While the articles the University has provided are interesting, the Commissioner considers that he can only give them very limited weight. These articles relate to information requests made by a number of different requesters in other jurisdictions using other freedom of information and access to information legislation. These do not relate to any information requests that PMI has made to the University (or, indeed, to other Scottish public authorities) and do not demonstrate prior knowledge that the University itself has of PMI or provide any documented interactions that the University has had with PMI. It would be premature for the Commissioner and indeed for the University to make assumptions about the intentions of PMI based on these articles and notes.
43. The University argued that the information requests were intentionally drawn in very broad terms in order to cause disruption, but when it asked for clarification it did not make any reference to the fact that the request would cover a wide range of information.
44. In addition, the Commissioner does not consider that the fact that a requester may be opposed to a project that the University is carrying out, about which it is seeking to find out more, leads to that information request being designed to cause disruption or annoyance to the University. The Commissioner accepts the submission from PMI that its intention behind the information request is to fulfil an understandable interest it has in seeing the requested information.
45. For the reasons set out above, the Commissioner has concluded that the information request submitted by PMI was not designed to cause disruption or annoyance to the University.

Request has the effect of harassing the University

46. The University advised that it wished to rely on the evidence provided within the journal articles and guidance notes to support its claim that harassment results from PMI's information request, as an objective and intended outcome.
47. The University also indicated that it is relying on the information it presented as to the significant burden that would be placed on a small research team in having to deal with a request from PMI in seeking to demonstrate that the request has the effect of harassing the University.
48. In the University's view, the tone of the correspondence from PMI, where it responded to the University's request for clarification and pointed out that the University had failed to respond to the request within the statutory timescale, is evidence of the objective effect of PMI's request being harassment of the University and the researchers within the CTCR team.



49. In its application to the Commissioner, PMI commented on the content of the Commissioner's guidance in relation to cases where a large number of requests in aggregation were considered to be vexatious. As noted above, PMI also advised the Commissioner that it has made one other request to the University and one previous request. It is PMI's view that the effect on the University of its request, even if aggregated with the other requests, could not be considered in any way to be harassing.
50. PMI also referred to guidance issued by the UK Information Commissioner (who is responsible for enforcing and regulating the Freedom of Information Act 2000; that Act contains an identical provision to that of section 14(1) of FOISA). The guidance states that relevant factors to consider in determining whether a request has the effect of causing harassment could include the volume and frequency of correspondence; the use of hostile, abusive or offensive language; an unreasonable fixation on an individual member of staff; or mingling requests with accusations and complaints. PMI advised that, in its view, the volume of correspondence that it has had with the University does not justify a claim that the request has the effect of harassing the University.
51. For the same reasons as outlined previously, the Commissioner does not accept that the content of the journal articles and guidance notes provided by the University leads to a conclusion that this particular request from PMI would have the effect of harassing the University.
52. In his own guidance on the application of section 14(1) of FOISA, in particular whether a request could be considered to have the effect of harassing a public authority, the Commissioner notes that consideration should be given to the effect that a request has on a public authority, regardless of the requestor's intentions. Even if the requester may not have intended to cause inconvenience or expense, if the request has the effect of harassing the public authority, then it may be vexatious. The Commissioner considers that the language and tone of the request may be relevant in assessing this.
53. While the Commissioner has previously accepted that the request would place a significant burden on the University, he does not accept that this has the effect of harassing it.
54. The Commissioner has considered the tone and language used in PMI's letter of response to the University and, while parts of the letter may be described as having an "exasperated" tone, the Commissioner does not accept that the response contains language, or is of a tone, which could be considered to be abusive or inappropriate. The Commissioner does not accept that the fact that PMI pointed out to the University that it may be in breach of FOISA has the effect of harassing the University.
55. For the reasons set out above the Commissioner does not accept that the request from PMI has the effect of harassing the University.



Request is manifestly unreasonable or disproportionate

56. It is the University's view that, given the very broad nature of the information request, the applicant's failure to clarify the terms of the request, the applicant's failure to specify the timeframe to which the request applies, the significant burden that the request would place on the CTRC given the size of the project team, the limited funding and human resources of the CTRC, the disruption and damage to the work of the CTRC that would be a consequence of dealing with this request and the specialist expertise needed to identify and locate all of the information that might fall within the scope of the request, any reasonable person would regard the request as being manifestly unreasonable and disproportionate in all the facts and circumstances of the case.
57. For the reasons given in the course of this decision, the Commissioner does not accept that PMI's request should be considered to be manifestly unreasonable or disproportionate.
58. Furthermore, the Commissioner does not consider that PMI's failure to specify the timeframe to which the request applies means that the request is manifestly unreasonable and disproportionate. It is apparent from information that is available in the public domain that there was a clearly defined start and end date for this particular project. Where the Commissioner acknowledges that information relevant to the project may have been produced which pre-dates the start of the project, he does not accept that the timescale would be so lengthy as to make the request manifestly unreasonable or disproportionate, nor does the Commissioner consider it unreasonable, in these circumstances, for PMI to continue to seek all information about the project. From the evidence provided to the Commissioner, he is satisfied that the only intention behind PMI's request to the University was to gain access to the requested information.
59. The Commissioner does not consider that PMI's response to the University's request for clarification, to what was a clearly expressed request, would lead to this request being manifestly unreasonable or disproportionate. The matter of the University's request for clarification is dealt with below in this decision.

Conclusion on section 14(1)

60. Although the Commissioner has found that the request submitted by PMI would impose a significant burden on the University, the Commissioner did not consider that, in the circumstances of this case, that factor alone was sufficient to deem the request vexatious. As a result, he went on to consider whether one or more of the factors set out in parts a) to d) of paragraph 15 above would also be met. As can be seen from the consideration given to these factors in this decision, the Commissioner is not satisfied that any of these factors are relevant to PMI's request.
61. The Commissioner recognises that these criteria, stemming as they do from his own guidance, are not the only criteria which may be relevant in determining whether a particular request is vexatious under section 14(1). However, he does not believe that there are any other reasons as to why this particular request should be deemed to be vexatious.



62. As a consequence, the Commissioner finds that the University has not demonstrated that PMI's request for information was vexatious and, as such, the Commissioner has concluded that he is unable to uphold the University's application of section 14(1) of FOISA to this request.

Section 1(3) – General entitlement

63. Section 1(3) of FOISA provides that, if an authority requires further information in order to identify and locate the requested information and has told the applicant so (specifying what the requirement for further information is), then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.
64. Prior to providing a substantive response to PMI's request for information, the University requested, in line with section 1(3) of FOISA, that PMI provide a more specific explanation of what it meant by certain words it had used in its information request. The University advised PMI that it was seeking this clarification as it was unable to identify and locate the information that PMI had requested.
65. Although it provided a response to this request from the University, PMI indicated that it considered the University's request for clarification to be unreasonable.
66. In its application to the Commissioner, PMI also commented that it considered the University's request for clarification to be a disingenuous attempt to delay publication of the requested information.
67. The University refuted this suggestion, arguing that its request for clarification under section 1(3) of FOISA was a reasonable request to clarify the scope of a very broad and general request for information and to request the provision of a timeframe applying to the request.
68. The University explained that, in its response of 17 September 2010 to PMI's request, it had asked PMI to provide details of other types of information that PMI was seeking
69. The Commissioner does not accept the argument from the University that its attempts to clarify the request were reasonable. The request from PMI was wide ranging, but was clearly for all of the information the University held in relation to the project in question (as noted above, the request begins, "Please provide us with any information that you hold in relation to this project ..."). The Commissioner considers that the University was using this process to press PMI to modify and narrow the scope of its request, rather than to clarify it.



70. The purpose of section 1(3) of FOISA is to allow the University to seek information required for it to locate and retrieve information. In the Commissioner's view, the University would have been able to identify the information requested based on the request that was submitted by PMI originally. This is evidenced by the fact that, in its submissions to the Commissioner, the University was able to provide the Commissioner with an estimate of the time it would take and the cost which would be incurred in responding to the request. If further information was required to identify and locate the information, the Commissioner fails to understand how it was possible to provide such an estimate. (The University told the Commissioner that the clarification from PMI did not provide any substantive information which might have assisted it in identifying the specific information that PMI were seeking, so it cannot be the case that the University was only able to provide the estimate following clarification of the request from PMI.)
71. For the reasons set out above, the Commissioner has concluded that the request by the University for PMI to clarify their request was not reasonable for the purposes of section 1(3) of FOISA.

Section 10(1) of FOISA

72. Under section 10(1) of FOISA, Scottish public authorities have a maximum of 20 working days to respond to a request. The 20 working days starts the day after the request is received or, where section 1(3) applies, the day after the further information is received.
73. The University wrote to PMI on 17 September 2010 to seek clarification of its request of 24 August 2010 in line with section 1(3) of FOISA. Clarification was provided on 13 October 2010 and a substantive response was provided to PMI on 20 October 2010.
74. PMI asserted in its application that, because the University did not seek clarification until 17 September 2010, it breached section 10(1) of FOISA.
75. The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (commonly known as "the Section 60 code") states, at paragraph 20⁴:
- "Where more information is needed to clarify the request, it is important that the applicant is contacted as soon as possible; preferably by telephone, fax or email. The 20 day period will run from the date of clarification..."*
76. Where section 1(3) is used appropriately, there is no set timescale for asking for clarification under FOISA, although unreasonable delay will clearly breach the Section 60 Code. The University has explained to the Commissioner why it was unable to ask for clarification more quickly (this included the fact that relevant personnel were unavailable) and the Commissioner accepts that the request for clarification, while delayed longer than he would normally wish, was not unreasonably delayed in the circumstances of the case.

⁴ This is a reference to the Code issued on 6 September 2004, which was in effect when the University dealt with PMI's request.



77. However, given that the Commissioner has determined that section 1(3) was not used appropriately, and given that a substantive response to the request of 24 August 2010 was not given until 20 October 2010 (it should be noted that PMI took almost a month to provide clarification), he has no option but to find that the University did fail to comply with the requirements of section 10(1).

Section 15 – Duty to provide advice and assistance

78. In its application, PMI advised that it considered that the University had failed to comply with its obligations under section 15 of FOISA to provide advice and assistance.
79. It is PMI's view that, if the University genuinely felt that responding to the request would be a significant burden, it would have been reasonable to expect the University to advise PMI how best to formulate its request in a way which provided access to the information sought at least inconvenience to the University.
80. In response, the University commented that, in dealing with this very broad and general request, it sought to clarify what information the applicant was seeking in order to identify and locate that information. The University submitted that the content of the response from PMI was that it considered this step to be unreasonable and, whilst providing some hypothetical questions, did not provide the University with any substantive information which might have assisted the University in identifying specific information that PMI was seeking. The University also commented that PMI also failed to respond to its request to specify a timeframe for the request.
81. The University stated that these attempts at clarification were made under section 1(3) of FOISA and, in the absence of the required clarification under section 1(3), the University is not obliged to give the information requested.
82. The University submitted that, without identifying the information falling within the scope of a request, the University is not in a position to provide advice and assistance under section 15 of FOISA, as to how to formulate its request to enable the University to provide information without a significant burden falling on the University.
83. Reference has been made by the University to the Opinion in the Court of Session case of *Glasgow City Council and Dundee City Council v The Scottish Information Commissioner* [2009] CSIH 73, in particular paragraph 45 of the Opinion, which states
- “the importance of giving appropriate assistance to persons who have difficulty describing the information which they desire is not however inconsistent with the necessity of identifying precisely what that information is. Public authorities can only perform their duties under [FOISA] correctly if they understand what information is requested”.*
84. The University noted that PMI's legal advisers, who made the request on PMI's behalf, describe having expertise in making FOI requests on its website. Given this expertise, and having noted paragraph 44 of the Opinion in the above case mentioned above, which states



“The request was [...] drafted by solicitors, and might therefore be expected to have specified exactly what was desired”

the University considered that the applicant could have taken steps to clarify the focus of their request, had they wished, through their legal advisers, both in terms of the description of the information sought and the provision of the time period in relation to the scope of the request, but this was not done when the opportunity was presented by the University.

85. The Commissioner has considered all of the submissions from both the University and PMI. As the Commissioner has found that the request for clarification on the part of the University was unreasonable, and the request from PMI, although wide ranging, was clearly expressed, he cannot agree with the University's view that, because it did not receive detailed clarification, from PMI it could not offer advice and assistance.
86. The Commissioner notes the comment made by the University that it might be expected that a firm of solicitors drafting a request could have taken steps to clarify the focus of the request if they wished to. However, the University did not advise PMI that its request would impose a significant burden on it until 10 December 2010 (when it notified PMI of the outcome of the review), so PMI was not given the opportunity to address this point at the stage of clarification or even at the stage where it decided to seek a review. The Commissioner notes that, when seeking clarification, the University stated that clarification was being sought to enable it to identify and locate relevant information, not to narrow the focus of the request to avoid the request costing too much to fulfil, or imposing a significant burden on the University. He also notes, as mentioned in paragraph 70, that the University was able to provide the Commissioner with an estimate of the time and cost which would be incurred in responding to the request, suggesting that it was able to locate and retrieve the information without further clarification.
87. The Commissioner considers that, given that the University considered that the request was likely to impose a significant burden on it, it could have invited PMI to re-formulate its request, and provide advice to it on how it could go about doing this. As such, while the Commissioner accepts that the request from PMI did impose a significant burden on the University, he also finds that the University did not comply with its duty under section 15 of FOISA to provide advice and assistance to PMI.



DECISION

The Commissioner finds that the University of Stirling (the University) failed to comply with Part 1 (and in particular section 1(1)) of FOISA in refusing to comply with Philip Morris International's request for information under section 14(1) of FOISA.

The Commissioner also found that the University's request for clarification under section 1(3) of FOISA was unreasonable and that, given this fact, the University breached section 10(1) of FOISA in responding to the request.

The Commissioner also found that the University of Stirling did not fulfil its duty under section 15 of FOISA in relation to providing advice and assistance to Philip Morris International.

The Commissioner therefore requires the University of Stirling to respond to Philip Morris International's request for information in terms of Part 1 of FOISA, other than in terms of section 14(1), by 15 August 2011.

Appeal

Should either Philip Morris International or the University of Stirling wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
30 June 2011



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (3) If the authority –
- (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

...



14 Vexatious or repeated requests

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

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).