Decision Notice

Decision 142/2011 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 survey which was carried out 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. The request under consideration in this decision was made by Clifford Chance LLP on behalf of PMI on 27 August 2010. However, prior to giving details of that request and its handling by the University, it is relevant to provide background information on another information request made in September 2009, which explains the context for the request under consideration.

3. On 14 September 2009, Clifford Chance LLP wrote to the University in relation to a report entitled "Point of Sale Display of Tobacco Products" that had been produced by the CTCR. In particular, it asked for information from a survey entitled "Cancer Research UK CTCR survey of adolescents' reactions to tobacco marketing" which was referred to in the introduction to the report. Clifford Chance LLP asked for the following information:

   a. all primary data relating to the Survey and the analysis in the Report based on the Survey;

   b. all questionnaires used in carrying out the Survey;

   c. all interviewers' handbooks and/or instructions used in carrying out the Survey;

   d. all data files, including weight variables, connected with the Survey; and

   e. all record descriptions connected with the Survey.

4. In addition, it requested that the University provide all information held by the CTCR, the Institute for Social Marketing and/or the University of Stirling relating to:

   i. sampling in the context of the Survey (including any information on categories of stratification of the wards, the distribution of the selected wards and of all the wards in these categories, the quota definitions for respondent selection, and the mechanisms and criteria for respondent selection);

   ii. data collection in the context of the Survey (including any information on the identity of the professional interviewers, whether interviewers belonged to a commercial organisation or were freelance, whether and what kind of training sessions were organised for the interviewers, the content of any training sessions and whether all interviewers attended, whether parents or children were approached first in responded selection, the language used to ask consent to participate, whether interviews were conducted immediately after obtaining consent, and whether parents were present at interviews).

   iii. the handling of non-response in the context of the Survey (including any information on how many people were approached to obtain responses, the characteristics of those who did not agree to participate, and when the questionnaire was considered as completed); and

   iv. post-stratification weighting and analysis in the context of the Survey (including any information on whether weighting was used to make data similar to population or to make surveys similar to each other, the distribution of the weights, the obtaining of standard errors and confidence intervals for the data, the use of goodness-of-fit measures with logistic regression and multiple regression, and the goodness-of-fit indicated by these measures).

5. Although it has since been confirmed that Clifford Chance LLP made this information request on behalf of PMI, its letter to the University made no reference to this fact.

6. On 13 October 2009, the University wrote to Clifford Chance LLP and provided it with information relevant to part III and points a), c) and d) of its request. The University also provided Clifford Chance LLP with most of the information requested at point b) of its request. The University did, however, withhold other relevant information on the grounds that it was exempt from disclosure under a number of exemptions in FOISA.

7. On 3 December 2009, Clifford Chance LLP (again, making no reference to the fact that it was acting on behalf of PMI) wrote to the University to request a review of its decision to withhold some of the requested information.

8. On 5 January 2010, the University wrote to Clifford Chance LLP, stating that, having carried out a review of its response to the information request of 14 September, it had upheld in full its decision to withhold the relevant information.

9. On 14 April 2010, Clifford Chance LLP wrote to the Commissioner, stating that it was dissatisfied with the University's review and was applying to the Commissioner for a decision in terms of section 47(1) of FOISA.

10. In response to enquiries from the Commissioner's staff, Clifford Chance LLP confirmed that, in making its information request to the University and its application to the Commissioner, it was acting on behalf of PMI. Following confirmation of this point, Clifford Chance LLP was notified that the Commissioner was unable to validate its application, and so no investigation could be taken forward in relation to the matters raised. This was because section 8(1)(b) of FOISA requires that any request for information states the name of the applicant. Since Clifford Chance LLP's correspondence with the University did not identify that its request for information was made on behalf of PMI (which in such circumstances constitutes the applicant), it did not meet the requirements of section 8(1)(b) and so did not constitute a valid information request for the purposes of FOISA.

11. The Commissioner adopted this view in line with the Opinion in the Court of Session case of *Glasgow City Council and Dundee City Council v The Scottish Information Commissioner* [2009] CSIH 73 (the *Glasgow City Council case)*. That case considered a request for information made by a firm of solicitors on behalf of an unnamed client. Paragraph 77 of the Opinion states:

> "*in the present case, as we have explained, the purported requests stated that they were made on behalf of an unnamed client. In our opinion, the true applicant in that situation was the client, who should therefore have been named in accordance with section 8(1)(b). In view of the potential importance of the identity of the applicant to the operation of the Act … compliance with section 8(1)(b) [of FOISA] must, in our view, be regarded as an essential requirement of a valid request under the Act. It follows that, on that ground also; the purported requests were not valid requests under [FOISA]".*

12. In the light of this Opinion, the Commissioner advised Clifford Chance LLP to submit a further request for information to the University, clearly indicating that it was acting on behalf of PMI in order to meet the requirements of section 8 of FOISA. Subsequent references in this decision to communications sent to or from PMI refer to communications sent to or from Clifford Chance LLP on behalf of PMI.

13. On 27 August 2010, PMI wrote to the University making reference to the request for information of 14 September 2009, and the subsequent communications between Clifford Chance LLP and the University regarding this (as detailed above). PMI explained that it wanted to seek a decision from the Commissioner regarding the University's decision to withhold relevant information, but it was unable to do so in light of the Opinion, since the request did not name it as the client on whose behalf the information was requested.

14. PMI indicated it was now writing to make a new request, on the same terms as set out in the letter of 14 September 2009 (see paragraphs 3 and 4), but with the identity of PMI as the applicant made clear. PMI indicated that it presumed that the position of the CTCR/University had not changed since it was expressed in its letter of 13 October 2009, and if this was correct then it asked the University to reply to its letter confirming this. PMI also commented that the University did not need to send further copies of the documents which had previously been disclosed.

15. On 17 September 2010, the University wrote to PMI, advising it that it was seeking to clarify the scope of the request of 27 August 2010. The University indicated that it understood that PMI was seeking all information falling within categories I. to V. (see paragraph 4) as held, and which was held on 14 September 2009. It also stated that it understood that PMI did not want to receive the information from the University that it held on 14 September 2009 falling within categories I. to V. which was previously provided to it in response to that request. However, the University advised that it was unclear from the formulation of PMI's current request whether it was seeking further information which it may hold at the current time, which it did not hold at the time of the request of 14 September 2009.

16. PMI wrote to the University on 13 October 2010, acknowledging its request for clarification and advising it that it wanted the University to treat its request as a request for information held at the date on which it received its renewed request of 27 August 2010.

17. In responding to the University's request for clarification, PMI commented on the time taken by the University to seek clarification (21 days) and the content of paragraph 20 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (commonly known as "the Section 60 code")[1] which indicates that "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 e-mail…" and that the Commissioner will take a hard stance against any authority that uses clarification as a means of delaying dealing with an application.

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

18. On 20 October 2010, the University advised PMI that, having given consideration to its request following its clarification, it had reached the view that the request for information was vexatious in terms of section 14(1) of FOISA. The University said that it had given detailed consideration to the guidance from the Commissioner[2] on the requisite criteria for determining a request to be vexatious and was of the view that the requisite criteria for the application of section 14(1) had been met in relation to PMI's request. However, it did not make a specific reference to which criteria it considered applied.

19. On 15 November 2010, PMI wrote to the University, requesting a review of its response. PMI advised the University that, against the background of the previous correspondence it had had with the University when it initially made this request in September 2009, it considered the University's decision to declare this request vexatious to be wholly inappropriate. 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 this request. It also asked the University which of the four criteria outlined in the Commissioner's guidance it believed was relevant. PMI also commented that the University did not consider this request to be vexatious when it was first made, in identical terms, in September 2009, and it had not given any reasons why it had since decided that the request was vexatious.

20. On 10 December 2010, the University wrote to PMI to advise that, as it considered 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 PMI's request was 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.

21. On 15 March 2011, PMI wrote to the Commissioner, stating that it was dissatisfied with the outcome of the University's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. PMI disputed that its request was vexatious, and considered that the University did not comply with its obligations under section 15 of FOISA. PMI also wondered whether the responses by the University to the request of 27 August 2010 and request for review of 15 November 2011 might be viewed as a disingenuous attempt to delay publication of the requested information.

22. 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.

[2] "Vexatious or Repeated Requests"
http://www.itspublicknowledge.info/nmsruntime/saveasdislog.asp?IID=2513&sID=2591

Investigation

23. 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 27 August 2010 was vexatious in terms of section 14(1) of FOISA.

24. The University was also asked to comment on the assertion from PMI that the request for clarification and response to the request of 27 August 2010 might be viewed as attempts 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.

25. On 6 May 2011, the University provided the Commissioner with its submission in relation to PMI's application for a decision.

26. 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 Commissioner[3] and legal advice regarding the objective tests that should be applied in the particular facts and circumstances of the case.

27. 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.

28. The arguments advanced by the University are considered below.

Commissioner's analysis and findings

29. 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.

[3] http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.asp

Section 14(1) of FOISA

30. Under section 14(1) of FOISA, a public authority is not obliged to comply with an information request if the request is vexatious.

31. 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 26 above.

32. In summary, the University's arguments in support of the application of section 14(1) of FOISA are as follows:

- the impact of dealing with this broadly framed and wide ranging request would be extremely disruptive to the research team, and so would be a significant burden on the University.
- the fact that the request was originally made by an international law firm, who did not state the identity of the true applicant, and was submitted in close proximity to another broadly worded request from PMI, together with the knowledge of how tobacco companies and organisations with links to PMI or the wider tobacco industry appear to have used freedom of information in other jurisdictions to disrupt the work of public health professionals and others involved in tobacco control work, leads the University to consider that this request is designed to cause disruption or annoyance.
- the significant burden placed on the research team and the evidence provided by the University in seeking to justify its assertion that this request is designed to cause disruption or annoyance leads the University to consider that the objective effect of the information request is the harassment of the University and researchers within the CTCR 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

33. 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 refusing the request in line with section 12 of FOISA (under section 12, a public authority is not required to comply with a request if the cost of compliance exceeds £600).

34. In terms of burden imposed by PMI's request, the University submitted that the request of 27 August 2010 was framed by reference to the request made by Clifford Chance LLP on 14 September 2009 (set out in paragraphs 3 and 4 above), which contained a very broadly framed and wide ranging request.

35. As noted above, the University sought clarification as to whether PMI simply wanted the University to consider the information held as at 14 September 2009 (as it considered was suggested by the formulation of the new request) or whether PMI intended the request to apply to all information held as at 27 August 2010. PMI's response confirmed that the request should be treated as a request for information held up to 27 August 2010.

36. The University submitted that, having considered the scope of 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 and the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations)), 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.

37. 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 project and the whole team. Although the Commissioner had not asked the University 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 £2,908.75.

38. 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 preparing the Report or engaged in the Survey, 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 Survey had not been carried out in an orderly manner, or that the material used to prepare the Report had not been methodically collected and analysed.

39. 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 for this and other projects being undertaken by the team.

40. 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.

41. 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 factors listed in parts (a) to (d) in paragraph 27 have been fulfilled in relation to this request.

No serious purpose or value

42. PMI advised that the Report referred to in its request has been cited as evidence to support the introduction of a comprehensive tobacco display ban, and that the UK Government recently published further proposals to introduce such a ban[4]. PMI submitted that, if these proposals were to be implemented, they would have major implications for its business and its ability to compete. In this context, PMI stated that it had a genuine and pressing interest in seeing the requested information, which is directly relevant to the proposed ban. PMI stated that there can be no suggestion that the request does not have a serious purpose.

43. The University has not provided the Commissioner with any submissions to demonstrate that the request from PMI has no serious purpose or value.

44. The Commissioner has therefore concluded that this criterion has not been met.

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

45. 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.

46. The University has advised that, in the circumstances of this very broadly worded request,

- originally made through an international law firm which did not state the identity of the true applicant, and
- made in close proximity to another very broad and general information request by the same applicant to the University, focussing on the work of the CTCR on a tobacco control related research project,

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

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 there were sufficient grounds to support a finding that this request was vexatious.

47. The University also considered that in light of a change in the facts and circumstances surrounding this request in terms of the pattern of behaviour now emerging in relation to the University compared to those existing when Clifford Chance LLP made its invalid request in September 2009, it was entitled to reach the conclusion that the request was vexatious. The University stated that there is evidence of such disruptive activities being particularly focussed on plain packaging and point of sale tobacco displays.

48. In seeking to justify its assertions, the University provided the Commissioner with a number of articles that 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 point of sale tobacco displays. Some of these articles took the view that these requests were a misuse of the statutory right to know provisions.

49. 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.

50. PMI advised that it has a genuine interest in seeing the requested information in order to enable analysis of the methodological rigour and accuracy of the Report and the related Survey. 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.

51. 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 University's documented interactions with it (the applicant) demonstrate a clear desire to obtain access to the information. PMI referred the Commissioner to its communications with the University with regard to this request, which included the previous request which was made by Clifford Chance LLP to the University in 2009.

52. 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.

53. It is apparent that, to date, PMI has explicitly submitted two separate information requests to the University. The request under consideration in this case essentially repeats a third request made by Clifford Chance LLP on PMI's behalf, but without making this fact clear, and so failing to meet the requirements of section 8(1) of FOISA. Although broad ranging, that request clearly identifies the information being sought.

54. 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 the University to make assumptions about the intentions of PMI based on these articles and notes.

55. The University argued that the information requests were intentionally drawn in very broad terms to cause disruption, but when it asked PMI to advise it as to whether it wanted its requests to be considered with respect to the information held by the University at the time of Clifford Chance LLP's request of 14 September 2009, or at the time of its request of 27 August 2010, the University did not make any reference to the fact that the request would cover a wide range of information.

56. In addition, the Commissioner does not consider that the fact that a requester may be opposed to work 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.

57. 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

58. 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.

59. 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 and the researchers within the CTCR team.

60. 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. PMI also advised the Commissioner that it has made one other request to the University (which was the subject of *Decision 129/2011: Philip Morris International and the University of Stirling*), and one previous request (that submitted by Clifford Chance LLP in September 2009). 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.

61. 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 history of correspondence that it has had with the University does not justify a claim that the request has the effect of harassing the University.

62. For the same reasons 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.

63. 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 requester'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.

64. 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.

65. The Commissioner has considered the tone and language used in PMI's correspondence with the University and does not consider that the correspondence contains language or is of a tone which would be considered to be abusive or inappropriate.

66. 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

67. It is the University's view that, given the very broad nature of the information request, the significant burden that the request would place on the CTRC given the size of the 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 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.

68. 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.

Conclusion on section 14(1)

69. 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 27 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.

70. 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.

71. 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

72. 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 further information.

73. Prior to providing a substantive response to PMI's request for information, the University asked PMI to confirm to it, as soon as possible, whether the scope of its request of 27 August 2010 extended to information which may have been held by it falling within the categories I to V of its request which was not held by the University at the time of PMI's request of 14 September 2009. The University indicated that, under its duty in section 15(1) of FOISA to give advice and assistance, it was seeking to clarify the scope of PMI's request of 27 August 2010.

74. PMI provided a response to this request for clarification from the University.

75. In its application to the Commissioner, PMI commented that it considered the University's request for clarification to be a disingenuous attempt to delay the publication of the requested information.

76. The University commented that the wording of the request by reference to making a new request "on the same terms as set out in our letter of 14 September 2009" inferred that the applicant might not wish the University to apply the usual presumption that a request for information applies to the information held on the date on which the request was made. The response of the University to seek confirmation of the time period for the request was, it submitted, entirely reasonable, given the uncertainty arising from the wording of the request by reference to the previous invalid request. The University further advised that it absolutely refutes that the request for confirmation on time period was an attempt to delay publication of the requested information.

77. While the Commissioner notes that the University considered that its request of 17 September 2010 to PMI was made in line with its duty under section 15(1) of FOISA, it made no reference to section 1(3) of FOISA in relation to this request. However, the Commissioner's view is that, in seeking PMI's clarification, the University effectively sought further information in terms of this provision.

78. Having considered this request for clarification from the University, the Commissioner does not accept that this was a reasonable request or that it was necessary.

79. 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. Section 1(4) of FOISA states that, the information to be given by the authority is that held by it at the time the request is received. Therefore, where the Commissioner has noted the comment made by the University, he would expect that it would be apparent to the University that the information request from PMI should have been interpreted to cover any relevant information that it held, falling within the scope of PMI's request, at the time that it received the request of 27 August 2010. The reference by PMI to its request of 14 September 2009 was, in the Commissioner's view, simply giving an indication of the nature of the information covered by PMI's request, not suggesting that the information requested was that held as at the receipt of the request of 14 September 2009.

80. For the reasons set out above, the Commissioner has concluded that the request by the University to clarify their request was not reasonable for the purposes of section 1(3) of FOISA.

Section 10(1) of FOISA

81. 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.

82. The University wrote to PMI on 17 September 2010 to seek clarification of its request of 27 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.

83. The Section 60 code states at paragraph 20[5].

" 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…."

84. 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 not provided the Commissioner with any explanation as to why it was unable to seek clarification from PMI more quickly. The Commissioner has therefore concluded that in the absence of any explanation to the contrary (submissions were sought from the University, but not received), that this request for clarification was unreasonably delayed in this case.

85. Given that the Commissioner has determined that section 1(3) was not used appropriately, and given that a substantive response to the request of 27 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

86. In its application, PMI advised that it considered that the University had failed to comply with its obligation under section 15 of FOISA to provide advice and assistance.

87. It is PMI's view that if the University genuinely felt that responding to its request would be a significant burden, it would be 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.

88. In response, the University commented that its decision that this request was vexatious did not rely entirely on the imposition of a significant burden upon the University. The University submitted that the evidence relating to the intent to disrupt the work of the CTRC was so strong in this case that, even if the University had been able to negotiate with PMI to narrow the scope of this information request and reduce the burden, the evidence around the circumstances of the request supported the conclusion that the request was intended to disrupt the work of the CTRC.

89. 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 Court of Session case of the *Glasgow City Council case*, which states:

[5] Again, this is a reference to the Code issued on 6 September 2004, which was in effect when the University dealt with PMI's request.

"*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.

90. The University submitted that, at the point at which it considered that documentary evidence supported a finding that PMI's intent behind the request was to disrupt the work of the CTRC, it considered that it was not reasonable to expect it to seek to negotiate with the applicant to narrow the scope of the request. The University advised that, had it decided to simply apply the Fees Regulations to the request, then it would have considered it reasonable to consider what could be provided to the applicant under the prescribed limit and what charges to apply. However, the University is of the view that because of the evidence regarding the intent to disrupt, it decided that the application of the Fees Regulations was not the most appropriate response to the request and opted instead to treat the request as vexatious.

91. The University also advised that, even if it could have reduced the burden by narrowing the scope of this request through negotiation, assuming that PMI would have been willing to do that, it considers that the evidence of intention to disrupt the work of the CTRC is of such overwhelming significance that it is appropriate to consider the request vexatious, even if the burden is reduced.

92. The Commissioner has considered all of the submissions from both the University and PMI. As the Commissioner has already concluded that the evidence presented by the University did not demonstrate that PMI's request would have the effect of disrupting the work of the CTRC, he cannot accept the assertions from the University that this was a valid reason for not seeking to provide advice and assistance to PMI.

93. The Commissioner also notes the comments made by the University that it might be expected that a firm of solicitors drafting a request could have taken steps to focus the request if they wished to. However, the University did not advise PMI that its request would impose a significant burden on it until it responded on 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 clarify the scope of the request in terms of the timescale for the information requested, 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.

94. 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 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 unnecessary and 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 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 5 September 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.

Margaret Keyse
Head of Enforcement
22 July 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).