

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

Decision notice

Date: 11 June 2020

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

Decision (including any steps ordered)

1. The complainant has requested correspondence exchanged with two particular hunts. The Forestry Commission refused the request as manifestly unreasonable.
2. The Commissioner's decision is that the Forestry Commission has failed to demonstrate why Regulation 12(4)(b) of the EIR is engaged and is therefore not entitled to rely on the exception.
3. The Commissioner requires the Forestry Commissioner to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response, to the request, which does not rely on Regulation 12(4)(b) of the EIR.
4. The Forestry Commission must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 21 August 2019, the complainant wrote to the Forestry Commission and requested information in the following terms:

"I'm writing to request copies of the following:

"Correspondence between the Forestry Commission and representatives of the United Pack between 01/01/2014 and today's date.

"Correspondence between the Forestry Commission and representatives of the Staintondale Hunt between 01/01/2014 and today's date."

6. The Forestry Commission responded on 16 September 2019 to this request and four additional requests the complainant had made between 14 August and 19 August 2019. It stated that it could not provide any information because:

"it would unfairly reveal the personal details of other people"

7. The complainant sought an internal review on the grounds that a version of the correspondence, with the contact details redacted, could be provided to him without infringing privacy. Following an internal review the Forestry Commission wrote to the complainant on 10 October 2019. It stated that it had considered redaction of the correspondence and that the amount of time necessary to apply redactions would render the request manifestly unreasonable. It therefore now relied on Regulation 12(4)(b) of the EIR to refuse the request.

Scope of the case

8. The complainant contacted the Commissioner on 30 October 2019 to complain about the way his request for information had been handled.
9. The Commissioner wrote to the Forestry Commission on 27 February 2020. She asked it to provide a detailed justification for its use of Regulation 12(4)(b) of the EIR to refuse the request. The Commissioner made clear in her letter that the Forestry Commission would have one opportunity to set out its position and that, should it fail to justify the use of Regulation 12(4)(b) to her satisfaction, she reserved her right to issue an adverse decision notice.
10. The Commissioner considers that the scope of her investigation is to consider whether the Forestry Commission is entitled to rely on Regulation 12(4)(b).

Reasons for decision

Would the requested information be environmental?

11. Regulation 2(1) of the EIR defines environmental information as being information on:

- (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- (c) *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;*

12. Although she has not seen the requested information, as it is information relating to hunting, the Commissioner believes that the requested information is likely to be information on a "measure" affecting the elements of the environment – namely biological diversity. For procedural reasons, she has therefore assessed this case under the EIR.

Regulation 12(4)(b) – Manifestly Unreasonable (burden)

13. Regulation 5(1) states that:

"a public authority that holds environmental information shall make it available on request."

14. Regulation 12 of the EIR states that:

- (1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—*
 - (a) *an exception to disclosure applies under paragraphs (4) or (5); and*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*
- (2) *A public authority shall apply a presumption in favour of disclosure.*

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

(b) the request for information is manifestly unreasonable;

15. The Commissioner considers that a request can be manifestly unreasonable for two reasons: firstly, if it is vexatious and secondly where it would incur unreasonable costs for a public authority or an unreasonable diversion of resources.
16. The Forestry Commission, in its internal review response, only appeared to consider the request manifestly unreasonable on grounds of burden. However, in its submission, it introduced arguments which, it claimed, demonstrated that the request was also vexatious. The Commissioner has considered both grounds to determine whether Regulation 12(4)(b) would apply.
17. The EIR do not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOI Act under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the "appropriate limit". This appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") as £600 for central government departments and £450 for all other public authorities.
18. Although the Regulations are not directly applicable to the EIR, in the Commissioner's view they can provide a useful point of reference when public authorities argue that complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b).
19. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
 - Determining whether the information is held;
 - Locating the information, or a document which may contain the information;
 - Retrieving the information, or a document which may contain the information; and
 - Extracting the information from a document containing it.
20. In her investigation letter, the Commissioner asked the Forestry Commission to provide her with an estimate of the burden it believed it would incur if it were to answer the request and for details of any sampling exercise it had conducted in order to arrive at its estimate.

21. In its submission, the Forestry Commission outlined two principle reasons why the request was burdensome: firstly that the request was one of a number of requests which the complainant had submitted (thus imposing a cumulative burden) and secondly that the request was, on its face, burdensome to answer.
22. The Forestry Commission drew the Commissioner's attention to five previous requests which the complainant had made. There had been two in October 2018, one in January 2019, one in February 2019 and it referred to a further request made in August 2019. The Forestry Commissioner also referred to three further requests having been submitted between the date of the response and the date the internal review was completed.
23. Curiously, the Forestry Commission did not refer to the additional four requests from the complainant that it had responded to in September 2019 – at the same time at the present request.
24. The Forestry Commission did not wish to place an estimate on the cost of complying with any of the requests, but stated that it believed that the requests were, by October 2019, "*becoming manifestly unreasonable.*"
25. In relation to this particular request, the Forestry Commission noted that:

"Requests for non-standard documentation, especially over an extended period of time (i.e. beyond the current or previous trail hunting season) takes time to locate as it is likely to be held by both individual members of staff and, substantive records, in a more formal filing system....It is not a simply a case of searching a number of files and extracting information. It would primarily be a case of identifying who would have been involved in the matters in question and those copied in, then for them to search their e-mails, with terms which unfortunately are not unique to the case in question."
26. Despite having been asked to provide an estimate of the burden of complying, the Forestry Commission declined to do so. It stated that determining how long it would take to respond to the request would, in effect, be tantamount to complying with the request itself and thus defeat the purpose of applying the exception in the first place. However it stated that there was "little doubt" that complying would have exceeded the cost limit, had the request been handled under the FOIA.

Vexatious

27. Following the lead of the Upper Tribunal in *Craven v Information Commissioner & DECC* [2012] UKUT 442 (AAC), the Commissioner considers that there is, in practice, no difference between a request that is vexatious under the FOIA and one which is manifestly unreasonable under the EIR – save that the public authority must also consider the balance of public interest when refusing a request under the EIR. The analysis that follows looks at vexatiousness as, if the request is found to be vexatious, then it will also be manifestly unreasonable and hence Regulation 12(4)(b) will be engaged.
28. The term “vexatious” is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that “vexatious” could be defined as the “*manifestly unjustified, inappropriate or improper use of a formal procedure*”. The Upper Tribunal’s approach in this case was subsequently upheld in the Court of Appeal.
29. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
30. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: “...*adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests.*” (paragraph 45).
31. The Commissioner has published guidance on dealing with vexatious requests, which includes a number of indicators that may apply in the case of a vexatious request.¹ However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatiousrequests.pdf>

32. When considering the question of vexatiousness, a public authority can consider the context of the request and the history of its relationship with the requestor, as the guidance explains: *"The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request."*
33. In its submission, the Forestry Commission referred to "indications of the request being vexatious." In evidence, it offered up two blog posts that the complainant had written, which were critical of the Forestry Commission's decision to allow drag or trail hunts on its land – particularly where the hunts involved individuals who had previously been prosecuted for criminal offences under the Hunting Act 2004.
34. The Forestry Commission stated that it believed that this and previous requests had been submitted to cause annoyance and disruption to its work. It also argued that the blog posts in question had been attempts, by the complainant, to motivate others to also cause annoyance and disruption. However, it admitted that the attempts had "not been particularly successful."

The Commissioner's view

35. The Commissioner considers that public authorities must meet a high bar in order to demonstrate that a request is manifestly unreasonable and, in the case of this particular request, the Forestry Commission has failed to justify its use of the exception.
36. The Commissioner finds it particularly disappointing that, despite being specifically asked to do so, the Forestry Commissioner failed to provide any quantifiable evidence base to support its conclusion that complying with the request would be burdensome.
37. When demonstrating that a request would be burdensome, the Commissioner does not expect a public authority to go through all the actions it would have gone through, had it been required to comply with the request, to give a definitive figure for the time that would be necessary. Clearly this would defeat the purpose of the exception. However, a public authority can conduct a sampling exercise – finding out how long it would take to respond to provide a section of the requested information – whose results it can then use to provide a more solid estimate of the cost of complying with the request in its entirety – or at least demonstrate that the request would be burdensome.
38. Whilst the time parameters of the request were broad, the Forestry Commission appeared to have conducted no analysis to indicate the frequency with which it had corresponded with either hunt. If

correspondence only occurred a handful of times per year, locating four and a half years' worth of correspondence should not be an overly burdensome task. Had correspondence been on a weekly basis, this would have encompassed a significant volume of information. The Forestry Commission gave no indication of the frequency with which correspondence occurred and it is therefore difficult for the Commissioner to make any kind of assessment of the burden.

39. In the case of this particular request, the Forestry Commission could have conducted a simple keyword search in the email accounts of several key members of staff to establish how much information would potentially fall within scope. Given its concerns about "non-standard documentation", it could also have searched a small portion of these files to estimate how much of this documentation might potentially require searching. Whilst this might not have enabled the Forestry Commission to have quantified the burden of the request in its entirety, it would have provided an indication of whether the request was likely to impose a burden that was manifestly unreasonable.
40. The Forestry Commission referred to five requests that the complainant had submitted prior to the present request. However, the Commissioner notes that, prior to August 2019, the complainant had only submitted four requests over a period of ten months and had not submitted a single request in the previous six months. The Commissioner cannot consider that such a volume of requests (none of which appear to have been particularly burdensome) would be excessive for a public authority of this size.
41. It is not clear why the Forestry Commission made no reference to the four requests that the complainant appears to have submitted between 14 August and 19 August 2019. Whilst the Commissioner has given consideration to these requests, she has not seen any evidence to suggest that the Forestry Commission incurred a significant burden in responding.
42. Whilst there is no requirement for a public authority to demonstrate that complying with a request would exceed a particular cost or time limit in order to demonstrate that a request is manifestly unreasonable, the Commissioner does consider that a public authority should be able to provide evidence of the burden that would be imposed.
43. In this particular case, the Commissioner is being asked to accept little more than mere assertions of unreasonableness. She therefore cannot accept that the public authority has demonstrated that complying with this particular request would impose a burden that is manifestly unreasonable.

44. Similarly, the Commissioner does not consider that the Forestry Commission has demonstrated that the request is manifestly unreasonable on grounds of vexatiousness.
45. The Forestry Commission adduced two blog posts as evidence that the request was vexatious. The Commissioner considered both articles – though noted that the second was written after the request had been responded to.
46. The blog posts challenge the Forestry Commission's handling of hunts which wished to use Forestry Commission-owned land to conduct drag or trail hunts.² The complainant was particularly critical of the Forestry Commission's decision to grant licences to hunts which associated with individuals convicted of criminal offences under the Hunting Act. He encouraged individuals sharing his concern to report incidents they were aware of, where hunts had strayed onto Forestry Commission land without a licence, or had hunted under a licence, but had breached the terms of that licence, to the Forestry Commission.
47. The Commissioner notes that hunting is an issue which arouses strong passions on both sides of the argument. Whilst the deliberate hunting of live animals is illegal, should hounds be engaged in a drag or trail hunt and pick up the scent of a live fox, continuing to pursue that fox may not necessarily be illegal. Opponents of hunting are concerned to see that legal hunts remain legal and one way of doing so is to ensure that, where hunting is taking place under licence, the hunt sticks strictly to the terms of its licence.
48. Equally there are some that are morally opposed to any sort of hunting and particularly that which takes place on land owned by the Forestry Commission – and hence the taxpayer.
49. The Commissioner also notes that the Hunting Act makes a landowner (including a corporate landowner such as the Forestry Commission) criminally liable for allowing illegal hunting activity to take place on land that they own.
50. It is not for the Commissioner to take a view on where and when hunting should or should not take place. However it is her view that, the more controversial an environmental policy, the stronger the public

² Whilst hunting live animals with dogs is illegal, hunts can still be conducted by following a trail of scent laid along the ground. Alternatively, the hounds can chase a source of scent which is dragged behind a horse.

interest in having access to information which might shed light on why a public authority is acting in the way that it is.

51. The EIR derive from and are guided by reference to, the Aarhus Convention on access to environmental information. The principle behind the Aarhus Convention was to enable citizens to participate in decision-making about environmental matters by giving them powerful rights of access to the information used to inform such decision-making.
52. The Forestry Commission has not made the Commissioner aware that the complainant has ever been rude or aggressive in his correspondence – and the Commissioner has seen no evidence to suggest that he has. Whilst the requests have all focused on hunting, the Forestry Commission has not provided evidence to suggest that the complainant is pursuing a personal grudge or being unreasonably persistent in pursuing that matters have already being addressed. There is therefore no additional evidence to suggest that the complainant is using his information access rights inappropriately.
53. The Commissioner also notes that the complainant's blog posts are clearly informed by the information he has obtained from the Forestry Commission via previous information requests. She thus considers that there is a journalistic purpose behind the requests and that the right of access is being used in the way it was intended.
54. Equally, encouraging others to scrutinise the activities of the Forestry Commission, by reporting perceived licensing breaches, or lobbying it to change its policy on allowing hunt-related activities is not, in itself, proof that a request is vexatious. The Forestry Commission may consider such scrutiny to be unwelcome and even uncomfortable, but a public authority should be capable of withstanding robust scrutiny.
55. The Forestry Commission has drawn the Commissioner's attention to a number of requests which the complainant has submitted since it completed its internal review, whilst the numbers of new requests do seem high, the Commissioner can only consider matters as they stood at the point the request was responded to.
56. At the point the request was responded to, the Forestry Commission has failed to demonstrate that the request was manifestly unreasonable. The Commissioner therefore finds that the Forestry Commission was not entitled to rely on Regulation 12(4)(b) to refuse the request.
57. As the exception is not engaged, the Commissioner has not gone on to consider the balance of the public interest or the presumption in favour of disclosure.

Other matters

58. Whilst the Commissioner has found that this particular request was not manifestly unreasonable, that does not mean that any future requests the complainant may submit will also not be manifestly unreasonable. The Commissioner notes the Forestry Commission's assertion that the complainant has continued to submit further requests since it completed its internal review of this request.
59. The complainant must be careful to ensure that he is mindful of the burden his requests are placing on the public authority and must continue to exercise his rights of access to information in a responsible manner.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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