

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

Date: 9 April 2019

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

Decision (including any steps ordered)

1. The complainant made a six part request to the Forestry Commission for information relating to a proposal by a company called Forest Holidays to develop a site in Mortimer Forest. The Forestry Commission withheld information from a Framework Agreement between itself and Forest Holidays, requested at part 1, under the exception provided by regulation 12(5)(e). It refused to provide the correspondence between named parties, requested at part 4, under regulation 12(4)(b), manifestly unreasonable, on the basis of cost and refused to provide an impact assessment produced by Forest Holidays, requested at part 6, under regulation 12(5)(f), voluntary supply of information. During the Commissioner's investigation the Forestry Commission disclosed the information withheld from the Framework Agreement requested at part 1.
2. The Commissioner's decision is that regulation 12(5)(e) was not engaged in respect of the disputed information originally withheld from the Framework Agreement. By not providing this information within 20 working days the Forestry Commission breached regulation 5(2). The Commissioner finds that part 4 of the request, for correspondence, can be refused under regulation 12(4)(b), but that the Forestry Commission has not provided adequate advice and assistance as required under regulation 9. In respect of the impact assessment requested at part 6 and withheld under regulation 12(5)(f), the Commissioner finds that the information is not captured by the request and that the Forestry

Commission does not hold any information that does fall within the scope of the request. In respect of this element of the request the Commissioner finds that the Forestry Commission breached regulation 14 by failing to provide a refusal notice explaining the information is not held.

3. In respect of the breach of regulation 9 the Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide additional advice and assistance to the complainant aimed at helping him narrow his request in a meaningful way.
4. The public authority 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 5 June 2018 the complainant requested information of the following description:

"...., pursuant to the Environmental Information Regulations 2004, please could you now provide the following information:

1. The Framework Agreement with Forest Holidays made in 2012;
2. Any assessment of the public interest made prior to and in relation to that Framework Agreement;
3. Full details of any pre-application discussions or communications with Herefordshire Council over the proposed development of Mortimer Forest;
- [4]. Any communications between the Forestry Commission and/or Forest Holidays and/or Natural England since 1st January 2015;
- [5]. Any correspondence between the Forestry Commission and Herefordshire or Shropshire MPs concerning the proposed development; and
- [6]. Any assessment of the impact of the likely increased footfall in Mortimer Forest (as a whole, not just the development site) that would be caused by the proposed development, with respect to impacts on

flora and fauna, increased noise and disturbance of breeding birds and animals etc.”

6. On 27 June 2018 the Forestry Commission responded explaining that due to the way in which the fourth element of the request was phrased it could be deemed manifestly unreasonable. It suggested how the complainant could refine his request and invited him to do so.
7. On 28 June 2018 the complainant refined the scope of the fourth part of his request in line with the Forestry Commission's suggestions. Part 4 of the request now captured correspondence between the Forestry Commission and Forest Holidays relating only to Mortimer Forest, together with correspondence between the Forestry Commission and Natural England, again, relating only to Mortimer Forest.
8. On 26 July 2018 the Forestry Commission provided a response. The request was dealt with under the EIR.
 - In respect of part 1 of the request the Forestry Commission provided a copy of the Framework Agreement. Some information had been redacted from that document under regulation 13, personal data. The Forestry Commission also cited regulation 12(5)(f) which protects the voluntary supply of information, but explained its application of the exception by reference to commercial interests. It is understood that the Forestry Commission intended to cite regulation 12(5)(e).
 - In respect of part 2 of the request the Forestry Commission explained that it did not hold any information and therefore refused this element of the request under regulation 12(4)(a).
 - In respect of part 3 of the request the Forestry Commission disclosed the requested information.
 - In respect of part 4 of the request the Forestry Commission explained that it still considered this element of the request to be manifestly unreasonable and so refused it under regulation 12(4)(b). It suggested that the complainant refine his request further by identifying a particular issue that he was interested in.
 - In respect of part 5 of the request the Forestry Commission disclosed the requested information.
 - In respect of part 6 of the request the Forestry Commission explained that it had not carried out any assessment of the increased footfall in the forest itself, but it is understood that one carried out by Forest Holidays was held. This was withheld under regulation 12(5)(f), voluntary supply of information.

9. The complainant asked the Forestry Commission to carry out an internal review on 6 August 2018. When doing so he challenged the Forestry Commission's refusal to provide the information requested at part 1 of the request on the basis that it is commercially sensitive. He declined to refine part 4 of the request any further, and finally, he challenged the Forestry Commission's application of regulation 12(5)(f) to part 6 of the request.
10. On 30 August 2018 the Forestry Commission provided the complainant with the outcome of its internal review.
 - The Forestry Commission now considered that some parts of the Framework Agreement should have been considered under the FOIA and withheld information under section 43(2), prejudice to commercial interests. However it continued to withhold one element of agreement, the Exclusivity List, under regulation 12(5)(e), commercial confidentiality.
 - The Forestry Commission maintained its application of regulation 12(4)(b), manifestly unreasonable to the correspondence requested at part 4 and again suggested the complainant refine his request.
 - In respect of part 6 of the request, the Forestry Commission maintained that any impact assessment produced by Forest Holidays was exempt under regulation 12(5)(f), voluntary supply of information.

Scope of the case

11. The complainant contacted the Commissioner on 3 October 2018 to complain about the way his request for information had been handled. He was concerned with the Forestry Commission's decision to withhold the Exclusivity List requested at part 1 of the request under regulation 12(5)(e), commercial confidentiality, the application of regulation 12(4)(b), manifestly unreasonable, to part 4 and the application of regulation 12(5)(f), voluntary supply of information, to the impact assessment produced by Forest Holidays.
12. The Commissioner considers the issues to be determined are those raised by the complainant i.e. whether the Exclusivity List is exempt under regulation 12(5)(e), whether part 4 can be refused under regulation 12(4)(b) and whether the impact assessment should have been refused under regulation 12(5)(f).

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

13. In response to part 1 of the request the Forestry Commissioner has disclosed the majority of the Framework Agreement between itself and Forest Holidays. It did however withhold a limited amount of information. Initially all that information was withheld under regulation 12(5)(e), commercial confidentiality. However at the internal review stage the Forestry Commission decided some of the withheld information, for example, the rental values for sites, was not environmental information and therefore should be withheld under section 43 of the FOIA, prejudice to commercial interests. However it continued to withhold the Exclusivity List, contained in one of the schedules to the agreement, under regulation 12(5)(e). The Exclusivity List identifies sites to which Forest Holidays will have exclusive access to for the possibility of future development. The complainant has only asked the Commissioner to consider his right of access to this list. Therefore the Commissioner has not considered the Forestry Commission's handling of any other information withheld from the Framework Agreement. In any event, for reasons that will become clear, determining whether such information does or does not constitute environmental information and whether there are valid grounds for withholding that information, would serve no practical purpose for either the complainant or the public authority.
14. Regulation 12(5)(e) of the EIR states that information can be withheld to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law.
15. The Commissioner considers the exception sets of a number of tests which have to be satisfied before it is engaged. Briefly these are:
 - The information has to be commercial or industrial in nature;
 - The information has to be subject to a duty of confidence provided by law;
 - The confidentiality has to be required to protect an economic interest; and
 - That confidentiality has to be adversely affect by disclosure of information.
16. When raising his complaint to the Commissioner the complainant directed her to two, publicly accessible, websites on which the full, un-redacted, Framework Agreement was published. One of these was the Data Parliament website, the other was that of Natural Resources Wales. It is not absolutely clear when the agreement was published on the Data Parliament site, but it had been published on Natural Resources Wales'

site since May 2017. It would therefore have been available by the time the complainant made his request.

17. When the Commissioner made the Forestry Commission aware of this, it readily accepted that this meant arguments as to the confidentiality or commercial sensitivity of the information could no longer be sustained. It therefore withdrew its reliance on regulation 12(5)(e) and has since disclosed the Exclusivity List to the complainant.
18. Nevertheless the Commissioner's decision is that the Forestry could not rely on regulation 12(5)(e) to withhold the Exclusivity List. By not making this information available to the complainant until the Commissioner's investigation, the Forestry Commission, breached regulation 5(2) which requires a public authority to provide information within 20 working days of the request being received.

Regulation 12(4)(b) – manifestly unreasonable

19. The Forestry Commission has refused part 4 of the request under regulation 12(4)(b) which provides that a request can be refused to the extent it is manifestly unreasonable.
20. Part 4 of the request is for all correspondence, since 1st January 2015, between:
 - The Forestry Commission and Forest Holidays relating only to Mortimer Forest, and
 - The Forestry Commission and Natural England relating only to Mortimer Forest
21. The Forestry Commission argues that the amount of staff time it would take to locate all the correspondence captured by this element of the request renders it manifestly unreasonable. The Commissioner accepts that where complying with a request would mean a public authority incurred unreasonable costs, or where compliance would mean an unreasonable diversion of resources, that request would be manifestly unreasonable. However it is for the public authority to demonstrate that this would be the case.
22. As one would expect the majority, possibly all, the communications captured by the request are emails. The Forestry Commission has many business reasons for communicating with both of the parties named in the request. For example, the Forestry Commission has explained that it works with Natural England to deliver elements of the Government's Countryside Stewardship Scheme and that a substantial proportion of its 60,000 hectare estate is covered by some form of conservation protection which necessitated consultation with the Natural England. It is clear therefore that there was a need to narrow down the scope of the

original request. Hence the Forestry Commission's suggestion that the complainant refined his request to just correspondence relating to Mortimer Forest. As set out in paragraph 7, the complainant accepted the Forestry Commission's advice to refine his request on 28 June 2018. This notice therefore considers whether the refined request is still manifestly unreasonable and therefore whether the Forestry Commission can rely on regulation 12(4)(b) to refuse this element of the request.

23. The Commissioner is satisfied that at the time it suggested the complainant refine his request by limiting it to correspondence about Mortimer Forest, the Forestry Commission was acting in good faith and expected this approach would allow it to provide a response without creating an excessive amount of work. However, the Forestry Commission has argued that when it considered the refined request in more detail, it became apparent that this was not the case.
24. The Forestry Commission explained that the time period covered by the request is one in which there was intense public and political interest in the area as a result of the proposal to develop the site. There was a well organised public campaign and significant media interest, including the national press, and questions asked in both houses of parliament. This generated a significant amount of correspondence between itself and the two parties named in the request.
25. The Commissioner understands that searching email inboxes by sender and outboxes by recipient, combined with the search terms 'Mortimer' and 'Juniper' (Juniper Hill being an alternative name for the proposed development site) would locate emails relevant to the request. Therefore where the correspondence has been retained in email accounts it is understood that the Forestry Commission would not have any great difficulty in identifying those relevant to the request. However the Commissioner understands that not all the correspondence is still held in email accounts. Given the fact that the request goes back to January 2015, the Commissioner considers it plausible that a significant proportion of the emails captured by the request would no longer be held on email accounts. The Commissioner understands the emails would have been transferred from the email account and saved to a relevant folder on various electronic document management systems.
26. Where an email is sent from the Forestry Commission to an external party the details of the recipient are not held separately when the email is saved to the document management system. The emails are only listed in the folder by reference to the title that had been given to the email. These titles may not identify whether Forest Holidays, or Natural England was one of the recipients of that email. To try and identify the recipient of an email the title and contents of the emails could be searched. But the Forestry Commission has said that carrying out such a search using the terms 'Forest' or 'Holidays' in an attempt to identify

any email sent to Forest Holidays would return many thousands of irrelevant results due to the potential for those terms to be used in respect of many aspects of the Forestry Commission's work.

Furthermore, even where those search terms did return emails relating to Forest Holidays, it does not follow that they would all be emails actually sent to that organisation. For example, the results would include internal emails that simply discussed Forest Holidays. Therefore any email returned by such searches would have to be checked individually to see if it was relevant to the request. To try and narrow the results down searches were therefore limited to using the terms 'Mortimer' and 'Juniper'.

27. The Commissioner queried the approach taken by the Forestry Commission. It seemed to her that if emails had been saved to a particular folder it would be apparent from the subject or title of that folder whether any emails contained within it were would be relevant to the request.
28. Through two telephone conversations the Forestry Commission explained more fully the position it had set out in its main written submission. Identifying and collating any relevant correspondence is complicated by the fact that it is not all held in one central file, but is held by the separate business areas responsible for the particular issue raised in the correspondence. Those business areas include the local Forest District (West England), the (National) Forest Enterprise England Commercial Development Manager, the Media Relations and Communications Managers, the Chief Executive's Office Forest Enterprise England and the Director's Office (Forestry Commission). These officers and business areas are not all in the same geographical location.
29. It is understood that the lead official within the Forestry Commission dealing with Forest Holidays is its Commercial Development Manager. It is understood that this officer organises their folders by reference to each of the Forestry Commission's business partners. Therefore they have a folder relating to Forest Holidays. Using the search terms 'Mortimer' and 'Juniper' returned 800 emails that would potentially be within the scope of the request. As explained earlier though, those emails would not necessarily be ones that had been sent to, or received from, Forest Holidays. They could include internal emails discussing Forest Holidays. Therefore each of those 800 emails would have to be opened and skim read to determine its relevance to the request.
30. In addition to this the Local Forest District Land Agent who was dealing with Forest Holidays in preparing the public exhibition on the proposals, has several hundred emails that are potentially relevant to the request. The Director's Office, which dealt with all parliamentary business also has a large number of emails that would have to be searched

individually. The Chief Executive's Office, which dealt with MPs' and protestors' letters and which had direct contact with Forest Holidays, again has several hundred emails that could be captured by the request. The Media Relations and Communications Department has at least 100 hundred emails that would need checking. In total the Forestry Commission estimates that there are at least 3,000 emails that have to be viewed. The Forestry Commission has stated that this is a conservative estimate. Working on the basis that it would take 30 seconds to check each email, this task would take 25 hours.

31. The Forestry Commission has also referred to the possibility that once all the correspondence captured by the request had been collated, it would need to consider whether any of the information they contained should be withheld under other exceptions. It has believes that there is the potential for some of the contents to contain commercially confidential information or identify the exact locations of protected plants. Therefore some of the information could attract one of the exceptions contained in regulation 12(5) of the EIR.
32. The Commissioner acknowledges there may be occasions where the consideration of exceptions would be so onerous that a request became manifestly unreasonable. However the Commissioner would expect a public authority to provide strong arguments as to why this would be case. The Forestry Commission has not provided any substantial arguments to this effect. Nor has it provided any estimates of the time that may be required to consider any exceptions. Therefore the Commissioner is not persuaded that the consideration of exceptions would be more involved than it would be with any other request. The Commissioner has not given this ground any weight. Therefore she will determine whether part 4 of the request is manifestly unreasonable based purely on the argument that it would take 25 hours to search through the files to identify the relevant emails.
33. When considering whether the fact that it may take 25 hours to identify all the relevant emails would render the request manifestly unreasonable the Commissioner is guided by the amount set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 as the appropriate limit under section 12 of the FOIA. Very briefly, section 12 of the FOIA provides that where it is estimated it would cost a public authority more than a set amount to comply with a request, the public authority is entitled to refuse the request. The Regulations set the appropriate for public authorities such as the Forestry Commission at £450. When estimating whether a request would exceed the appropriate limit a public authority is only entitled to take account of certain activities. In broad terms these are the costs of determining whether the information is held, together with the cost of locating and retrieving the information, these are the very

activities which the Forestry Commission has estimated would take 25 hours to carry out in respect of this request.

34. Under The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, commonly referred to as the 'Fees Regulations', the cost of staff time in dealing with a request can be calculated at £25 per hour. Therefore £450 equates to 18 hours at £25. It can be seen therefore that had the request fallen under the FOIA it could have been refused under section 12 (25 hours at £25/hour equates to £625).
35. 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). Given the work, and therefore the cost to the Forestry Commission that complying with the request would involve is nearly 40% more than a public authority would be expected to undertake under the FOIA, the Commissioner is satisfied that the request is manifestly unreasonable.

Public interest

36. Regulation 12(4)(b) is subject to the public interest test. This means that even though the exception is engaged the Forestry Commission can only rely the exception if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in responding to it.
37. The Forestry Commission has not explicitly suggested any public interest arguments in favour of disclosing the information.
38. From the information submitted by the complainant the Commissioner understands his concerns over the proposed development relate to the impact it would have on, what he describes in the preamble to his request as, the "tranquillity and wildlife rich setting of Mortimer Forest". He also challenges the Forestry Commission to explain how the development meets its duties under the Forestry Act 1967 to balance commercial forestry activities with the enhancement of natural beauty and the conservation of flora and fauna.
39. The Commissioner also notes from the Forestry Commission's submissions that the proposals met significant resistance from what it describes as a "well organised public campaign" and led to questions being asked in parliament. The Commissioner concludes that the proposals were clearly controversial.
40. The proposals to develop the Mortimer Forest site were ultimately shelved. The Commissioner understands from searches of the internet

this decision was taken around October 2018. However the request was submitted in June 2018 at which time the proposals were still live. At that time there was clearly a public interest in disclosing information that would have allowed those concerned about the scheme to better understand how the proposal had been developed. This would have allowed them to reach informed opinions on the issue and better influence the decisions of the Forestry Commission and its partners.

41. The Commissioner notes however that as requested correspondence has not been collated due to the cost of doing so, its contents are not known and so it is difficult to know the extent to which the information would have assisted those wishing to participate in influencing decisions on the development.
42. The Forestry Commission has argued that had the proposal progressed to a stage where planning applications needed to be submitted, a significant amount of detailed and finalised information would have been made available to the public. Therefore it considers the public would have had access to the information they required in order to fully participate in the decision making process at the appropriate time; refusing this element of the request would not have frustrated the public's opportunity to scrutinise or comment on the development.
43. Nevertheless the proposals had been made public in February 2018. The Forestry Commission has also provided the Commissioner with links to information produced as part of an exhibition promoting the development. This information was archived with The National Archives website in May 2018. The Commissioner concludes from this that the exhibition had taken place before the request was submitted. If the Forestry Commission had already started promoting the scheme, presumably with the intention of soliciting the public's views on the proposals, there would have been some public interest in disclosing information that would have allowed those views to be well informed, regardless of the opportunities that would have existed at the formal planning stage.
44. Turning now to the public interest arguments for maintaining the exception and refusing the request, the Forestry Commission has argued that it should be allowed safe space to formulate the proposals with its commercial partners without unnecessary distractions until they are sufficiently well developed to be placed in the public domain.
45. The Commissioner does not accept that this argument is relevant to the engagement of the exception. The exception exists to prevent a public authority having to incur a disproportionate burden when complying with a request. In broad terms this relates to time, effort and cost, of identifying the requested information and then locating and retrieving the information. Therefore the Commissioner would only consider the

additional burden imposed by the time it would take to consider the exceptions had the Forestry provided an estimate of how long that would take. The Commissioner would not take account of the public interest in preventing any harm that the exceptions are designed to protect against.

46. If the Forestry Commission wanted the Commissioner to consider arguments around safe space it would have had to identify specific information and apply an appropriate argument before presenting its public interest arguments in favour of maintaining that exception.
47. The Forestry Commission has also argued that if the correspondence was released it could have been seized upon by protest groups which may have misinterpreted or misrepresented the information. This, it argues, could have caused distress and additional burden on the Forestry Commission and its commercial partners. Again both these arguments relate to the contents of the information, rather preventing the harm caused by having to search for the information. The Commissioner therefore rejects these arguments. The Commissioner would also comment that the potential for information to be misunderstood or misinterpreted is not a ground for refusing an information request. A public authority is always at liberty to provide an explanation of the information it discloses in order to help clarify its meaning or the bearing it has on an issue.
48. Some of the Forestry Commission's public interest arguments in favour of maintaining the exception are weak and some are irrelevant. The Commissioner will therefore limit her assessment of the public interest in favour of maintaining the exception to fact that she has accepted the Forestry Commission's estimate that collating the requested would take around 25 hours, which equates to a cost of £625. The Commissioner recognises that this amount of time is around 40% greater than a public authority would be expected to incur had the request been considered under the FOIA.
49. In weighing the public interest arguments for and against maintaining the exception the Commissioner also takes account of the fact that by making the proposal public and holding a public exhibition the Forestry Commission had initiated a public awareness campaign that it would clearly have expected to prompt some feedback. The Commissioner also recognises the controversy that the proposed development generated. There is therefore a clear public interest in disclosing information that would have helped those with concerns about the scheme's impact to reach well informed opinions. However the Commissioner has also factored into her consideration the Forestry Commission's argument that, had the proposals progressed to the stage where Forest Holidays would need to submit a planning application, there would have been a

significant amount of finalised information made public and the opportunity for public scrutiny and comment.

50. In light of the fact that maintaining the exception would not deprive the public of a formal opportunity to comment on the proposals had they progressed to the planning stage, the Commissioner finds there is weight to the public interest in maintaining the exception. Furthermore the contents of information captured by the request is not known. Although it can reasonably be assumed that it would include information that had a bearing on the issues raised by the proposals, it is also likely that it would have also captured more mundane correspondence that would have shed little light on the development or its impact. The balance of the public interest arguments is finely balanced, however the Commissioner concludes that the public interest does favour maintaining the exception.

Regulation 9 - Advice and assistance

51. Regulation 9 states that a public authority shall provide advice and assistance, so far as it is reasonable to do so, to applicants and prospective applicants. The Commissioner considers that where a public authority refuses a request on the basis that it is manifestly unreasonable due to cost, it should provide advice and assistance aimed at helping the complainant make a fresh, refined request that would not be so onerous to deal with.
52. The request as originally phrased was for any communications between the Forestry Commission and Forest Holidays and with the Forestry Commission and Natural England since the start of 2015. As explained earlier, given that the nature of its business meant that the Forestry Commission would have been in frequent contact with both these organisations, the scope of this request would have captured an extremely large amount of information. It was clear to the Forestry Commission that such a request was manifestly unreasonable and therefore it suggested to the complainant that he may wish to narrow the scope of his request down to focus on correspondence relating to Mortimer Forest.
53. Despite the complainant narrowing his request as suggested it still proved too large to deal with. Although the Commissioner is satisfied the Forestry Commission made the suggestion in good faith she can understand the complainant's frustration that the refined request was still deemed onerous.
54. The Forestry Commission suggested that the complainant refine his request further when issuing a refusal notice and at the internal review stage. On both these occasions the Forestry Commission suggested that

if the complainant identified a specific issue relating to Mortimer Forest that was of interest to him it may be able to deal with the request.

55. Applicants are frequently at a disadvantage when trying to narrow a request. They are obviously cautious of refining their request in such a way as it excludes information that may be of significant interest to them and at best will have a limited understanding of how the public authority is organised and therefore who within the public authority is most likely to hold relevant information, or how information is filed. The Commissioner therefore recognises that it may be difficult for an applicant to identify a 'specific issue' which would narrow the request sufficiently to prevent it being too onerous whilst at the same time capturing the information, or a significant proportion of the information, they seek. The danger for a public authority though is that by being very prescriptive as to the way in which a request could be narrowed, it could be seen as trying to direct an applicant to a particular set of information or away from other information.
56. In the circumstances of this case however the Commissioner considers there may still be scope for the Forestry Commission to assist the complainant further in narrowing the scope of his request. Although it has suggested that the request could be refined by reference to a specific issue, the Forestry Commission has not given any indication of whether identifying the proposed development as the specific issue would allow an efficient search of the Forestry Commission's records. Nor has it given any indication of whether limiting the scope of the request to just one of the named bodies would allow the request to be dealt with without imposing an unjustifiable burden on the Forestry Commission.
57. The Commissioner also notes that in the submissions it provided during the investigation, the Forestry Commission explained in more detail the various business areas that would hold information in respect of Forest Holidays and identified a lead official dealing with this body. The Commissioner does not consider that it would be unreasonable for the Forestry Commission to provide the complainant with similar information so that he can then make a more informed decision as to where information of most interest to him would be held.
58. In light of the above the Commissioner finds that the forestry did not discharge its responsibilities under regulation 9 to provide advice and assistance so far as it was reasonable to do so. The Commissioner requires the Forestry Commission to consider what meaningful advice and assistance it could provide to the complainant and then provide that assistance. This should include advising the complainant whether narrowing the scope of his request to just one of the named bodies is likely to allow the request to be dealt with, providing him with an explanation of how the Forestry Commission is organised similar to that

provided on page 4 of its submission to the Commissioner dated 26 February and whether there would be any merit in narrowing the scope of the request by reference to the specific issue of the proposed development.

Regulation 12(5)(f) – voluntary supply of information

59. Regulation 12(5)(f) provides that a public authority can refuse to disclose information to the extent that doing so would have an adverse effect on the interest of the person who provided that information where that person:
- i. was not under, and could have been put under, any legal obligation to supply it to that or any other public authority,
 - ii. did not supply it in circumstances that that or any other public authority is entitled apart from under the EIR to disclose it, and
 - iii. has not consented to its disclosure.
60. This exception has been applied to the information identified by the Forestry Commission as being captured by part 6 of the request. This part of the request sought information on any assessment of the impact that the increased footfall generated by the proposed development would have on the fauna and flora of the forest. The information identified by the Forestry Commission is a report produced by Forest Holidays into the economic benefits of the development. The Forestry Commission appears to consider the report is captured by the request on the basis that it contains information on the visitor numbers that the site would attract, and therefore relates to "... the likely increased footfall...". The Commissioner has read the report and although it does provide an estimate of the number of visitors, there is no reference at all to how those visitors will impact on the natural environment of the site or Mortimer Forest as a whole. Therefore the Commissioner does not accept that report does fall within the scope of the request.
61. The Commissioner was surprised that the Forestry Commission had not identified any other documents that fell within part 6 of the request. The Forestry Commission confirmed that it does hold reports on the fauna and flora of the forest but only in respect of the forest's current condition, for example as part of its normal forest planning and management activities. However these do not relate to the impact that the proposed development would have had on the site. The Commissioner is satisfied that such reports would not be captured by the request.
62. However, as mentioned in paragraph 43, the Forestry Commission provided links to documents now held on The National Archives' website, that were produced as part of the exhibition to promote the

development. It is clear from that material that what are described as 'detailed surveys', including ecological surveys, tree constraint analysis and initial ecological planning reports were produced as early as 2015. The Commissioner therefore challenged the Forestry Commission as to why such information had not been considered when dealing with the request.

63. In response the Forestry Commission explained that it has a deliberate policy of not holding such information in order to ensure that the person who produced the information, in this case Forest Holidays, retains control over the information. The Forestry Commission considers this allows Forest Holidays to manage the disclosure of such information at the appropriate time, for example at the stage when planning permission is applied for.
64. The Forestry Commission acknowledged that it would have had sight of the surveys and ecological assessments, but where they were presented at meetings between itself and Forest Holidays, the surveys were collected and retained by Forest Holidays at the conclusion of the meeting. The Commissioner understands that the policy of ensuring no information is held by the Forestry Commission on these subjects extends to making certain any minutes of such meetings do not contain details of surveys.
65. The request sought information on any assessment of the impact on the environment. This is not limited to formal reports or to only documents titled 'impact assessment', but would capture information contained in any internal minutes of other meetings or email conversations between officers. The Forestry Commission again assured the Commissioner that it made a point of not holding such information to ensure there was no risk of compromising the interests of a commercial partner.
66. In support of its position the Forestry Commission explained that it had no business need to hold the requested information considering that Forest Holiday properties took up less than half of one percent of its total forest estate. It also explained that as Forest Holiday sites were only permitted at locations which had no conservation designation, for example Site of Special Scientific Interest, they would not have any need to correspond with Natural England over the environmental impact of such developments.
67. In light of the assurances provided by the Forestry Commission that it did not hold any information on the environmental impact of the scheme, and the fact that this is a position which it maintained when pressed by the Commissioner, the Commissioner concludes that the Forestry Commission does not, on the balance of probabilities, hold any information falling within this element of the request.

68. In terms of its handling of this part of the request the Commissioner finds that the Forestry Commission was wrong to identify the economic assessment as falling within the scope of the request and therefore was wrong to suggest to the complainant that some information may have been held, but that the information was exempt under regulation 12(5)(f). Where a public authority does not hold the requested information it would be obliged to refuse the request under regulation 12(4)(a) – information not held, and inform the complainant of this in a refusal notice, in accordance with regulation 14. Although this may appear a minor procedural breach, the Commissioner would comment that revealing what information a public authority does not hold can in itself be very informative. By failing to issue an adequate refusal notice in this respect the public authority has failed to comply with regulation 14.

Other Matters

69. Although not forming part of the formal decision notice the Commissioner uses the 'Other matters' section to record issues that have arisen during an investigation which she wishes to comment on.
70. In response to the Commissioner's enquiries regarding information on the impact of the development on the ecology of the site, the Forestry Commission explained that the only information that would have existed at the initial stages of the proposals would be that produced by its commercial partner, Forest Holidays and that such information was not retained by the Forestry Commission itself. This appears to be as a consequence of a deliberate policy decision by the Forestry Commission not to hold information of this type. The rationale for this policy seems to be to ensure the commercial partner is fully in control of that information.
71. It may be that at the very initial stages of a proposed development there is less of a business need for the Forestry Commission to hold these impact assessments. However the effect of this is to reduce the amount of information available to the public when the proposals are first aired and so limits the public's ability to reach informed views on the issues those proposals raise.
72. The EIR contains exceptions which allow a public authority to withhold information that would genuinely have an adverse effect on the commercial interests of a third party or adversely affect the willingness of third parties to supply such information to a public authority. These exceptions are of course subject to the public interest. If the Forestry Commission chose to hold impact assessments the appropriate application of these exceptions may well allow information of value to

the public to be disclosed without compromising the position of third parties. Such an approach would promote transparency.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

74. 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.
75. 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

Rob Mechan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF