

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

Decision notice

Date: 19 January 2015

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 requested from the Forestry Commission information held as part of a research project into the Pine-tree Lappet ("PtL") Moth. The Forestry Commission refused to disclose the information under the exceptions in regulation 12(4)(b) (manifestly unreasonable), 12(4)(d) (incomplete data), 12(5)(c) (intellectual property rights) and 12(5)(g) (protection of the environment) of the EIR.
2. The Commissioner's decision is that Forestry Commission has incorrectly applied the exceptions in regulation 12(4)(b), 12(4)(d), 12(5)(c) and 12(5)(g).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant the information to which has applied the exceptions in regulation 12(4)(b), 12(4)(d), 12(5)(c) and 12(5)(g).
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 6 May 2014 the complainant requested the following information from the Forestry Commission in respect of the PtL Moth:

"1. The number of PtL larva recorded by trunk banding in spring and in autumn (separately) for each year the technique has been used, together with the total number of bands employed. Preferably including spring 2014 results.

2. The number of adult male PtL caught in pheromone traps for each year, plus the total number of traps employed.

3. The number of adult PtL caught in light traps run by FCS (not in those of visiting moth-ers) for each year, plus the total number of traps employed."

6. The Forestry Commission responded on 22 May 2014 and refused to provide the requested information citing the exception in regulation 12(4)(d).
7. The complainant requested an internal review on 25 May 2014. The Forestry Commission provided the result of its internal review on 18 June 2014 in which it maintained its original position. It also claimed that regulation 12(5)(g) was applicable to the withheld information.

Scope of the case

8. The complainant contacted the Commissioner 9 July 2014 to complain about the way his request for information had been handled. Specifically he complained about the Forestry Commission's refusal to disclose the information that he had requested.
9. During the course of the Commissioner's investigation the Forestry Commission also sought to rely on the exceptions in regulation 12(4)(b) and 12(5)(c) to withhold the requested information.
10. The Commissioner considered whether the Forestry Commission was entitled to rely on the exceptions that it had cited to withhold the requested information.

Reasons for decision

Exceptions

Regulation 12(4)(d) – Incomplete data

11. The Forestry Commission explained that the requested information was being collected by Forest Research (an agency of the Forestry Commission) which is responsible for providing independent high quality scientific evidence and advice to Government and Ministers to help inform forestry policy decisions. It went on to explain that, whilst part of the Forestry Commission in terms of the open information legislation, Forest Research operates with significant independence. The Forestry Commission informed the Commissioner that Forest Research confirmed the decision to exempt the information requested.
12. The Forestry Commission's arguments for withholding the information were initially centred on the application of regulation 12(4)(d). It explained that, when considering the initial response to the complainant's request and when reviewing the case, very careful account was taken of the ICO's published guidance and the Decision Notice in respect of Queen's University Belfast (FS50163282) which appeared particularly relevant to this case. The Forestry Commission stated that it remained satisfied that there were fundamental differences between the two cases. In particular, unlike the Queen's University case where the tree ring data were no longer being collected and were simply being held for analysis, the raw data on the pine-tree lappet moth was still being collected. This data collection was part of a research project that has been funded to 2015, with the intention to publish the results in 2015. From the Forestry Commissioner's perspective, it was therefore, without doubt, still in the course of completion.
13. The Forestry Commission stated that the research work to locate the breeding sites and distribution of the moth and subsequently monitor the population for range expansion, as well as its density and dynamics, for signs of increase required a number of years' study to complete. This was partly due to the average 2-year lifecycle of the insect, the current very low densities in the field and the fact that summer pheromone adult capture must be followed by a spring larval capture in the subsequent year to confirm changes to the breeding range. It believed that this fully supported its argument that the data collection was unfinished until the end of the pre-planned and funded collection period.
14. Whilst the Forestry Commission argued that regulation 12(4)(d) was applicable, it informed the Commissioner that it also recognised the need to be as open as possible with the information it held. It explained

that it had released summary information to the (PtL Moth) Outbreak Management Team which included industry and conservation interests and its successor, the PtL Moth Management Group, which included a representative from Butterfly Conservation Scotland. It went on to explain that the information that it had published was available on its website from which an overview of the research project and issues raised for the forestry sector by the PtL Moth, including the potential risk to Scotland's Caledonian pinewoods, could be obtained. In addition, it said that more extensive data than was available on its website was released to the complainant in a form that would not compromise Forest Research's lead scientist's ability to publish in scientific journals.

15. The Forestry Commission informed the Commissioner that it believed that by disclosing information for 2013 and 2014 that was broadly in line with information which it had already published on its website it would be able to fulfil the first part of the complainant's request. It added that it said 'broadly in line' because the information on its website had been written in a non-standardised way in order to inform the public but protect the data from scientific publication until the on-going study was complete and could be written up by its lead Forest Research scientist. However, it stated that it would not be able to fully satisfy the latter part of the request as the disclosure of this information would enable the calculation of mean captures for individual trap types and annual population cycles over the full (updated) 5 year period and hence provide a complete overall summary of the dataset for the entire duration of the study, a key element of the research work.

16. In relation to the application of the exception to incomplete data, the Commissioner's guidance on regulation 12(4)(d) states, at paragraph 12, that:

"... if a public authority has collected raw data and is using it as part of ongoing research, that data is not incomplete, even though the data may later be published in a more meaningful form. Where data is collected on a regular basis, it is not incomplete simply because the data collection is ongoing."

17. The Commissioner notes that the relevant research project commenced in 2009. Consequently, by the time of the request, data would have been collected on a regular basis over a number of years and, at that time, it appears that data collection would still have been on-going.
18. The Commissioner accepts that, at the time of the request, the research project was incomplete as further work was still to be done. However, he does not accept that the data collected up until that point was incomplete as it was a complete record at that time. He therefore does not believe that the information requested by the complainant was

incomplete data simply because the process of data collection was still continuing and further data was to be collected after the request had been made. As result he has determined that the exception in regulation 12(4)(d) is not engaged.

Regulation 12(4)(b) – Manifestly unreasonable

19. The Forestry Commission argued that the request for raw data that was being collected by Forest Research raised a fundamental question for Forest Research about its ability to complete research work and publish the outcomes in accordance with established scientific protocols.
20. In the Forestry Commission's view, the inability of Forest Research to provide the outcomes of its work first to the commissioning bodies, particularly where they were other public bodies or where the scope for confidentiality agreements may be limited, could have an impact on the ability of the organisation to retain Government confidence and gain future research contracts. The Forestry Commission went on to explain that Forest Research operated in a competitive market for the provision of research services to non-government third parties and must be able to provide assurance that it could maintain confidentiality, at least until the client had been provided with the results, even where this was a public body which itself would be subject to FOIA and the EIR.
21. It noted that the Freedom of Information Act had been amended by the Intellectual Property Act 2014 to give increased protection from immediate disclosure to information held as a result of research which it was intended to be published. In this case, it argued that it was seeking no greater protection for the information being collected than would be provided under the Freedom of Information Act. However it explained that, due to the nature of Forest Research's activities, most of what it did fell within scope of the Environmental Information Regulations rather than the Freedom of Information Act.
22. The Forestry Commission informed the Commissioner that as a result of the above, it had been led to conclude that the request, if extended beyond what it was willing to disclose, could quite properly be considered "manifestly unreasonable" and exempt from disclosure under regulation 12(4)(b). It had been unable to identify a case where the "manifestly unreasonable" argument had been used in these circumstances and accepted that it was normally engaged on the ground of cost or vexatious requests. However, it believed that an argument could be made in this case.
23. The Forestry Commission went on to contend that it would appear obvious (the definition of 'manifestly') that it was unreasonable for a public body to be required to disclose scientific data which was still

demonstrably in the course of being collected and which would compromise the authority's ability to publish it in accordance with established scientific protocols. It also suggested that the unreasonableness of prematurely releasing information of this nature had been recognised by Parliament. This was why it had amended the Freedom of Information Act with the introduction of Section 22A.

24. In the Commissioner's view the purpose of this exception is to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation, in handling information requests.
25. The Commissioner's guidance on regulation 12(4)(b) states, in paragraph 10, that:

"Public authorities should also note that we consider this exception to be concerned with the nature of the request and the impact of dealing with it and not any adverse effect that might arise from disclosure of the content of the information requested. If a public authority is concerned about the content of the requested information being disclosed then it should consider whether another exception applies."

26. It appears to the Commissioner that the Forestry Commission's arguments for the application of this exception relate to the adverse effect that might arise for Forest Research if the information were to be disclosed as opposed to the impact that dealing with the request (in terms of the burden it might impose or distress or disruption it might cause) would have on Forest Research. Consequently, he has determined that the exception in regulation 12(4)(b) is not engaged.

Regulation – 12(5)(c) – Intellectual property rights

27. The Forestry Commission explained that it believed that the exception in regulation 12(5)(c) applied to the requested information as it was covered by intellectual property ("IP") rights, specifically by database rights.
28. The Commissioner's view is that in order to establish that there would be an adverse effect on IP rights, a public authority must demonstrate that:
 - the material is protected by IP rights;
 - the IP right holder would suffer harm. It is not sufficient to show that IP rights have merely been infringed;

- the identified harm is a consequence of the infringement or loss of control over the use of the information; and
 - the potential harm or loss could not be prevented by enforcing the IP rights.
29. Database rights protect the significant work that goes into gathering the material which is included in a database, verifying and presenting that information in the database and also maintain the database. These rights are established under the Copyright and Rights in Databases Regulations 1997, whilst the definition of what constitutes a database is contained in the Copyright Design and Patents Act 1988.
30. Section 3A of the Copyright Design and Patents Act 1988 defines a "database" as
- "(1) In this Part "database" means a collection of independent works, data or other material which –*
- (a) are arranged in a systematic or methodical way, and*
- (b) are individually accessible by electronic or other means."*
31. The Commissioner, having been provided with a sample of the information that the Forestry Commission holds, accepts that the requested information is contained in a database.
32. The Forestry Commission explained that the work being undertaken by Forest Research has been commissioned and funded by Forestry Commission GB, Forestry Commission Scotland and Forest Enterprise Scotland. As a result, these bodies and the scientists involved had a reasonable expectation that they should be first to receive the detailed information and peer-reviewed conclusions. In the Forestry Commission's view, premature release of work in the course of completion could adversely affect the IP rights of Forest Research and the commissioning bodies and therefore regulation 12(5)(c) of the EIR applied.
33. The Forestry Commission explained that the scientist who was undertaking the research project had estimated the total costs and man hours for the work to collect the PtL Moth survey data, compile the database, constructing it and developing the survey protocols and managing the project. It confirmed that these figures, detailed below, were a best estimate and had not been subject to a full verification process.

Year	Manpower (in Hours)	Cost (in £)
2009-10	1050	£ 50K
2010-11	1450	£ 70K
2011-12	1600	£ 80K
2012-13	1600	£ 80K
2013-14	1875	£ 90K
2014-15	2300	£ 110K
Total to date	9875	£ 480k

34. The Forestry Commission went on to explain that to undertake a survey programme it had to:-

- Interrogate other databases to locate suitable Scots pine sites to monitor and obtain/collate names/contact details of local forest owners to seek permission to monitor.
- Test trapping methods and lures for suitability for monitoring PtL Moth populations.
- Develop new innovative trapping techniques to enable cost-effective monitoring over large spatial scales (implemented due to low insect densities and so enable location of initial breeding populations, as well as over time population change and spread).
- Design sampling programmes for pheromone trapping, light trapping and glue banding.

35. The Forestry Commission informed the Commissioner that it also considered the following factors to be relevant:

- The database was unique as it was the first dataset for a newly discovered insect species in the UK.
- Forest Research created the entire dataset and database from scratch (unique).
- Although the actual numbers were small in the database this did not match the amount of investment in collecting the data as the table above showed.
- It believed the low numbers were because the insect was a new species to the UK that was currently at very low densities and was likely to gradually spread, prior to increasing, if containment measures were not put in place.
- Insect collections were from remote sites (long travel times/labour intensive).

- The survey work and research was ongoing due to the threat the insect poses to the forest industry and especially to the few remaining sensitive and protected ancient Caledonian pine forests.
36. In the Forestry Commission's view, disclosing summary information on lava and adults found and trunk bands and traps deployed would disclose all the annual results to date for all trapping techniques which was in effect the entire content of the database because the database only held information on the PtL Moth from the ongoing work by Forest Research.
37. In relation to the application of the exception in regulation 12(5)(c) to database rights, the Commissioner's guidance on intellectual property rights states at paragraph 32 that:
- "... databases relate to existing information that has been gathered together and presented in a way that makes it more useful. The database is then protected by the Database Regulations, which recognise that the effort in gathering the material to be included in the database, and subsequently maintaining the database, warrants protection."*
38. The Copyright and Rights in Databases Regulations 1997 provides details of when database rights will arise. Regulation 13(1) states that:
- "(1) A property right ("database right") subsists, in accordance with this Part, in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database."*
39. In the Commissioner's view this means that a public authority will need to show that the creator of a database has invested substantial effort in obtaining, verifying, presenting and maintaining the information included in a database. This will be judged on both the amount of work and how difficult the work is, so it can be evaluated both quantitatively and qualitatively.
40. The Commissioner guidance goes on to state that:
- "The substantial effort must be involved in obtaining and verifying the contents at the time the database is constructed. This is different from the effort involved in creating the information (the independent works) in the first place."*
(Paragraph 29)
41. The leading case from the European Court of Justice on database rights is *The British Horseracing Board Ltd and Others v William Hill*

Organisation Ltd [2004] EUECJ C-203/02 (09 November 2004). In that case, the European Court of Justice stated that the expression "investment in ... the obtaining ... of the contents' of a database" :

"... must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database." (para 42)

42. Database rights are infringed when a substantial part of the database is used without permission of the right holder.

43. The Commissioner's guidance states at paragraph 30 that:

"A substantial part can mean the volume of information or the importance or significance of the part extracted, in relation to the data base as a whole."

44. The Commissioner notes from the European Court of Justice's decision, referred to above, that for database rights to be engaged a substantial amount of effort must have been invested in seeking out existing independent materials and collecting them in the database. The information that the complainant requested is not existing independent information that has been collected by Forest Research, it is part of the information that Forest Research has created through its own extensive research efforts and wishes to prevent being put into the public domain under the EIR. It is therefore not information which the Commissioner believes is protected by the Copyright and Rights in Databases Regulations 1997. Consequently, he has determined that the exception in regulation 12(5)(c) is not engaged.

Regulation 12(5)(g) – Protection of the environment

45. The Forestry Commission stated that it believed that the exception in regulation 12(5)(g), adverse effect on the protection of the environment to which the information relates, of the EIR was applicable. This was because the relevant research work was being carried out on both the national forest estate in Scotland and on land in private ownership, with the cooperation of the landowners. It said that the raw data that had been requested would go beyond what had already been provided and would be placed in the public domain. It believed that this would result in the public disclosure of the forest names, the grid references of all Forest Research glue banding locations for caterpillar monitoring and the grid references of all Forest Research pheromone trapping locations for adult monitoring.
46. The Forestry Commission expressed concerns that if information were disclosed before the current work was completed, private landowners

could decide to refuse access to sites which would damage the good working relations already established and potentially disrupt the continuity of the project. If data collection was constrained it could, in the short to medium term, have an adverse effect on the environment to which the information related because it could result in poorly informed management decisions being made.

47. In addition, the Forestry Commission argued that disclosure of information that would identify the location of all traps raised the prospect of interference with the traps. It believed that, as well as the plant health risk, removal of lava or caterpillars from trees without Forest Research's knowledge would compromise future datasets. In its view, this would increase the risk of poorly informed management decisions, based on these datasets, being made by the PtL Moth Management Group. This was in addition to compromising the data for scientific publication.
48. The Forestry Commission also raised concerns about the potential misrepresentation or premature misinterpretation of the facts. This was another reason why it stated that it did not want the detailed ongoing research data to be disclosed to the public before it had been published following the normal peer-reviewed scientific protocols as to do so could serve merely to confuse rather than enlighten lay observers. In its view, this would be more than just an annoyance as it could be a serious disruption to some important scientific research and evidence-based policy making.
49. During the course of the Commissioner's investigation, the complainant confirmed that his request, as he had indicated, was simply for the amalgamated totals of larvae and adults per year, plus the total number of trunk bands and traps employed, in the region as a whole. He also confirmed that he did not ask for, nor did he require, a detailed breakdown of where the trunk bands and traps were sited such as grid references, the names of the forests or any details of ownership of forests, whether public or private.
50. The Commissioner notes the confirmation from the complainant of the limited nature of the information that he was seeking to obtain from his request. He has made clear that he was not seeking to obtain information to the level of detail assumed by the Forestry Commission. In light of this, the Commissioner is not satisfied that the disclosure of the information that he requested would be likely to have the adverse effects identified by the Forestry Commission and, consequently, he has determined that the exception in regulation 12(5)(g) is not engaged.

51. As the Commissioner has determined that none of the exceptions cited by the Forestry Commission are applicable, he requires it to disclose the requested information to the complainant.

Right of appeal

52. 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

53. 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.
54. 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

Rachael Cragg
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