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Our Ref: FOI request 403 (Plain Packs)

Dear Ms Walker

**APPLICATION FOR DECISION BY THE SCOTTISH INFORMATION COMMISSIONER  
APPLICANT: PHILIP MORRIS INTERNATIONAL**

We refer to your letter of 11 April 2011 sent by email at 1.55pm informing us that the Scottish Information Commissioner (the Commissioner) has received an application for a decision from Philip Morris International in relation to an information request made to the University of Stirling on 24 August 2010. You have requested our comments on the application and also answers to 7 questions set out in your email. The questions appear to contain a degree of overlap, so our answers have been cross-referenced where appropriate

Our responses to our 7 questions are set out below.

Question 1:

Please provide a detailed submission setting out why the University of Stirling considers that the information request made by Philip Morris International on 24 August 2010 was vexatious in line with section 14(1) of FOISA.

The University understands that section 14(1) of FOISA provides that section 1(1) of FOISA does not oblige a Scottish public authority to comply with a request for information if the request is vexatious. There is no definition of what is meant by 'vexatious' in FOISA. However, in applying this exemption, the University has relied on the terms of section 14 of FOISA, the guidance produced by the Scottish Information Commissioner and on legal advice in relation to the objective tests to be applied in the particular facts and circumstances of this case.

The Commissioner's guidance indicates that his general approach to section 14(1) is that a request is vexatious where it would impose a significant burden on the public authority and:

- it does not have a serious purpose or value, and/or

- it is designed to cause disruption or annoyance to the public authority, and/or
- it has the effect of harassing the public authority, and/or
- it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate,

although the Commissioner has noted in recent decisions that he would not exclude the possibility that, in any given case, one or more of the other listed criteria may be of such overwhelming significance that it would be appropriate to consider the request vexatious in the absence of a significant burden.

## **Application of section 14(1) exemption and Commissioner's guidance to this request**

### **1. Significant Burden**

In terms of the significant burden for the University in dealing with this request, the burden arises because of the way in which the information request from Clifford Chance LLP, on behalf of Philip Morris International, was framed.

The request started by asking for **"any information that you hold in relation to this project, including, but not limited to**, written communications and notes of meetings or telephone conversations in relation to the above project". The request then went on to list four types of information that they would expect this request to include. However, this was merely an illustrative list as part of a much broader request.

The University, in its letter of 17 September 2010, attempted to obtain a more specific explanation of what information the applicant was looking for, to enable it to identify and locate the information. The University was not seeking an abstract definition of the words "any information" and "in relation to", as suggested by the applicant, but was seeking clarification of what types of information the applicant was trying to capture by the use of these terms in the context of this very general request. The University did not ask the applicant to specify the actual documents that they were seeking.

The University's letter of 17 September 2010 also noted that the very broad request did not specify a timeframe for the information requested and asked the applicant to provide an indication of the time period over which the request was intended to span. Given that FOISA is fully retrospective, the specification of a timeframe assists in clarifying the scope of a request.

The University considers that its attempts to clarify this very broad and general request were entirely reasonable. However, the applicant's response of 13 October 2010, coming almost a month after the University's request for clarification, was somewhat hostile in its tone. It stated that the University's attempt to clarify the scope of this very broad request was unreasonable. Although it provided examples of the types of question the University might ask to identify and locate some of the information, it went on to state that "these are intended to be examples of the kind of information which you may hold, and are not intended to be an exhaustive list". It did not clarify the request in any substantive way.

In its letter of 13 October 2010, the Applicant also **failed to respond at all** to the University's request that it specify a timeframe for the request, which would have assisted the University in seeking to focus the request.

Having given consideration to the information request, the University's assessment was that the impact of dealing with such a broad information request would be extremely disruptive to the research team. The significant burden would not only be the expense involved in dealing with the request as, if this were the case, the University would have invoked section 12 of FOISA and the fees regulations. The University's assessment was that the amount of time taken by research professionals who would be required to be involved in locating and retrieving the information requested, due to the expertise required to analyse the request and the information held, would represent an unreasonable proportion of its human resources being diverted away from the core functions and operations of those researchers.

The core project team involved in the day to day running of the plain packaging project consists of two members of staff, operating within very narrow time margins and externally funded by Cancer Research UK to work on this study. Such a time intensive request would have significantly impacted upon their work in multiple ways. It would have delayed publications on this and other projects. It would have hindered and potentially prevented the team from meeting project deadlines. As a consequence, this might adversely impact upon future research proposals made to the current or indeed future funders of the research. In essence, for a small team of researchers, dependent on external funding, such time consuming requests would threaten the effective operation of the research project and the whole team. The estimate of the time in terms of human resources and financial cost for locating, retrieving and providing information in response to the request is provided in the table below.

#### PLAIN PACKAGING REQUEST

Estimate of time and cost for locating, retrieving and providing documentation and associated administration required for compliance with FOI request

Tasks/Steps	Estimated time (hours)	Estimated cost (pounds)
Reply to letter to confirm receipt of FoISA request	0.5	0
Liaise with University's Registry and Governance Services	3 (1.5 x 2 people)	0
Analyse (break down) what the request is specifically asking for	1.5	0
Familiarisation with the FoISA process (Scottish Information Commissioner's documents and the University's policies) by relevant ISM staff	6 (2 x 3 people)	0
	11	0
<b>Locating what data / documentation is held by ISM</b>		
Work through our data archives: electronic project folders (live server); archived electronic documentation (back-up discs); filed paper documentation (on-site).  Types of documentation: questionnaire development; data collection fieldwork materials and administration; hard copies of the data (questionnaires, focus group audio recordings); data entry administration; electronic data files; data analysis; reports/papers.	14 (7 x 2 people)	210
Assess what information is in the public domain already	0.25	0
Liaise with project funder (to confirm issues of data ownership, whether FoISA applicable to funder etc)	6 (2 x 3 people)	0

Funder may draft response for ISM to consider in theirs	2	0
	<b>22.25</b>	<b>210</b>
<b>Retrieval and assessment</b>		
Internal meetings: each document has to be considered individually by project staff on whether ISM is in agreement that the information be disclosed, whether there are concerns about it being disclosed and whether disclosure at this time (rather than later) would undermine the project.	45 (14 x 3)	0
Internal meetings: Apply the public interest test and, as data controller, the personal data test (and others too if necessary).	14 (7 x 2 people)	0
Final decisions on whether to release, partially release (redacted) or withhold data. And on what is not held (or not recorded) by ISM.	12 (6 x 2 people)	0
For the electronic data files, this includes looking at each heading/item in the SPSS files individually	8	120
Liaise with University's Registry and Governance Services	6 (2 x 3 people)	0
Aggregate and anonymise data	8	120
Redact personal data/sensitive	5	75
Photocopying and collating	5	35 (lower rate)
Printing	5	35 (lower rate)
Printing costs (approx. 1200 sheets)		120
	<b>108</b>	<b>505</b>
<b>Providing requested data</b>		
Print the University's copyright statement	0.25	3.75
Collate the data and copies of documentation that are to be provided	1	15
Draft the cover letter to the requester	12 (6 x 2 people)	180
Liaise with University's Registry and Governance Services	4 (2 x 2 people)	0
Liaise with University's Solicitor on final letter	4 (2 x 2 people)	0
Arrange Special Delivery for mailing the requested information	0.25	0
	<b>21.5</b>	<b>198.75</b>
<b>Total</b>	<b>162.75 hours</b>	<b>913.75</b>

## 2. Designed to cause disruption or annoyance to the public authority

In considering the application of section 14(1) to this request, the University understands that the name or business of an applicant should not result in their information request being treated any differently from any other information request. However, the University also noted the guidance of the Commissioner, which states that if the intention of a request is to cause disruption or annoyance to the authority, rather than to access the information that is the subject of the request, the request may be vexatious. The guidance notes that it will be easiest to gauge an applicant's intention where he or she has made it explicit, but that it may be possible to demonstrate the applicant's intention from prior knowledge of the applicant.

In the circumstances of this very broadly worded request, made in close proximity to a similar and very broad request by the same applicant to the University (which was originally made through an international law firm which did not state the identity of the applicant), focusing on the tobacco control research of the CTRC, and given the University's prior knowledge of how tobacco companies and organisations with links to this applicant or the wider tobacco industry, appear to have used freedom of information legislation in other

jurisdictions to disrupt the work of public health professionals and others involved in work it considers to be against its own interests, the University considers that this request is designed to cause disruption to the research being carried out by the Centre for Tobacco Control Research at the University. The University also notes the documented evidence of such activities being particularly focused on plain packaging and point of sale tobacco displays.

The University has provided evidence in support of its view in the form of reports of studies from a number of other jurisdictions, which are enclosed as an appendix to this response. A summary of that evidence is also provided below.

### **Evidence from the United States of America**

Internal document analysis shows that the tobacco industry has used FOIA to “interfere with activities of public health agencies seeking to reduce tobacco use” (Aguinaga & Glantz, 1995, p.222). It is reported that the tobacco industry used the California Public Records Act to disrupt American Stop Smoking Intervention Study (ASSIST) – a study which was deemed to be a threat because, like the plain packaging study at the University of Stirling, it concerned tobacco control policy (White & Bero, 2001).

Stella Aguinaga and Stanton A Glantz, 'The use of public records act to interfere with tobacco control', in *Tobacco Control* 1995; 4: 222-230

This article provides documentary evidence suggesting that the applicant, Philip Morris International, has connections with organisations that have made wide-ranging FOI requests in other jurisdictions that have been described by Aguinaga and Glantz as causing “systematic disruption of tobacco control programmes through the use of public records acts”.

The objective of the study by Aguinaga and Glantz was to examine the content of public records requests to the Tobacco Control Section (TCS) of the California Department of Health Services (CDHS) and other health agencies to determine if the tobacco industry is using the law to interfere with tobacco control.

The methods used in the study involved data being collected through review of TCS files, newspapers, Californians for Smokers' Rights publications, and interviews with key informants. Requests sent to the CDHS AIDS and Drug and Alcohol Program, the Department of Education HIV Prevention Program and the Air Resources Board (ARB) were used as ‘control groups’ in the study.

The results reported from the study were that, between 1991 and 1993, TCS received 59 requests for 371 documents, averaging 15.5 documents per month. The health programmes that acted as ‘control groups’ in the study did not receive any document requests during this period. ARB received their usual requests for approximately 100 narrowly specified documents a year.

The article contains a diagram demonstrating the apparent connections between most of the CPRA requestors and the tobacco industry. Many of the requests came from law firms or attorneys with connections to the tobacco industry. As soon as requests from a particular firm or group ceased to arrive, requests would start from another source.

In April 1991, the law firm Munger, Tolles, Olson, which according to the study was later associated with the Los Angeles Hospitality Coalition, described by the authors as “a tobacco industry front-group”, made a large CRSA request to TCS, requesting all Proposition 99 documents. The previous year, the same firm made a request for all documents related to the research and market surveys conducted by CDHS before the development of the health education and media campaign.

Between April 1991 and June 1991, the study found that CPRA requests came primarily from the law firm of Nielsen, Merksamer, Hodgson, Parrinello and Mueller, through two of their lawyers, Paul Dobson and Thomas Hiltachk. The study reported long-standing ties between this law and lobbying firm and the tobacco industry. It reported that its clients included **Philip Morris**, R J Reynolds and the Tobacco Institute. At the time of the article, the law and lobbying firm was reported to have received over \$2 million from the tobacco industry since 1988.

In January 1992, when Nielsen, Merksamer, Hodgson, Parrinello and Mueller requests ceased, requests started to come from the law firm of Howard, Rice, Nemerovski, Canady, Robertson and Falk (January to April 1992), through attorney H Joseph Escher, representing R J Reynolds. This firm requested data tapes of a research study that showed, amongst other things, that the use of a cartoon character by R J Reynolds led more children to smoke.

Aguinaga and Glantz found that the requests continued to be made in 1992, including requests by Californians for Smokers’ Rights through its President, or through its legal representative Thomas Hiltachk, now with law firm Bell and Hiltachk. CSR shares its mailing lists with, amongst others, Sacramentans for Fair Business Policy, reported by Aguinaga and Glantz be a “tobacco industry front group”. Thomas Hiltachk’s business partner, Charles Bell, was found by the study to be the treasurer of Sacramentans for Fair Business.

Aguinaga and Glantz reported that, in August 1993, whilst CSR was still active in its CPRA campaign, the Claremont Institute, a not-for-profit political science analysis group, requested all Proposition 99 related documents either directly or through a consulting firm, Nelson Consulting. They also reported that the Claremont Institute received \$40,000 from **Philip Morris International** in 1993.

Aguinaga and Glantz found that the requests from the tobacco industry disrupted the work of the TCS staff, who had to divert time away from informing the public about the dangers of smoking to meet demands for documents from the tobacco industry. They found that requests in California and elsewhere were for a wide range of unspecified documents and in many cases came through law firms who used intimidating language and threatened further legal action.

Aguinaga and Glantz found that the Office on Smoking and Health (OSH) of the Centers for Disease Control and Prevention (CDC) has consistently received FOIA based requests, mainly through law firms and document research and retrieval companies. It reports that, in general, the requests are for **drafts** and **all documents related to** the surgeon general’s reports on the health dangers of tobacco use.

In summary, the conclusions of the study were that tobacco control programmes received a high volume of public records requests, **many framed in broad terms**, compared to other health programmes. The study concluded that, although access to public records is every citizen's right, unfortunately **it appears that the tobacco industry is abusing this right and turning it into a weapon to complicate and discourage public health activities.**

Jenny White, MSC and MPH and Lisa A Bero PhD, 'Public Health Under Attack: The American Stop Smoking Intervention Study (ASSIST) and the Tobacco Industry' in *American Journal of Public Health*, February 2004, Vol 94, No. 2

This article reports the results of a study that examined the response of the tobacco industry to the American Stop Smoking Intervention Study (ASSIST) through analysis of tobacco industry documents on the University of California, San Francisco's Legacy Documents Library, Industry websites, Lexis Nexis and the Library of Congress's Thomas website.

It found that the results of a well-co-ordinated attack on ASSIST by the tobacco industry ultimately had a chilling effect on ASSIST. ASSIST was the largest, most comprehensive tobacco control intervention trial ever conducted in the United States. A \$165 million project of the National Cancer Institute and the American Cancer Society, it awarded contracts to 17 state health departments to implement the program.

This article cites the reaction of a Philip Morris International executive to ASSIST, who is reported to have stated that: "the simple fact is we are at war, and we currently face the most critical challenges our industry has ever met".

The study analysed the strategies adopted by the tobacco industry in its plan of action against ASSIST. One of the strategies identified, described as "Disrupt ASSIST (Strategy 3) specified tactics including the use of **exhaustive FOIA requests and formal complaints**. The article reports that a task force was convened by Philip Morris International in 1993 that identified the following objectives, including a "public relations program designed to erode the credibility of opponents over the long term".

The study found that the tobacco industry attempted to use 3<sup>rd</sup> parties to hide its efforts. It concluded that continual FOIA requests, lawsuits, complaints and negative publicity "had a dampening effect" on ASSIST.

## **Evidence from New Zealand**

**Grace Wong, Ben Youdan and Ron Wong, 'Misuse of the Official Information Act by the tobacco industry in New Zealand', in *Tobacco Control* 2010, 19: 346-347**

This article states that tobacco companies exploit freedom of information acts which make official information publicly available and reports that they disrupted tobacco control work through public records requests to the California Department of Health Services in the 1990s.

The authors examined all OIA requests to the Ministry of Health (MoH) in New Zealand about tobacco control and smoke-free services from 2005 to August 2009 to ascertain their origin, their content and the charges made for providing information. In total, 129 requests

were made, 84% of which were found to be from tobacco industry related sources, law firms who have represented tobacco companies or tobacco companies.

Topic areas included the 2006 review of tobacco packaging, labelling and display provisions of the Smoke-free Environment Amendment Act, a review of point of sale tobacco product displays and tobacco control research.

This study found that tobacco industry related sources asked for copies of presentations, tobacco control service purchase agreements, contract and information "including, but not limited to papers, minutes, reports, briefings, memoranda and correspondence (including emails) caught by the wording". The study established that requests increased from 3 in 2005 to 79 in 2006 when the review of the Smoke-free Environment Amendment Act was under way.

The authors concluded that the work of public health officials was disrupted at a critical juncture in tobacco control action by an influx of repetitive and time consuming OIA requests from the tobacco industry.

### **Evidence from Australia**

The Australian Government is in the process of introducing legislation to introduce plain packaging by July 2012. Philip Morris International has been reported to be involved in the funding of a campaign run by the "Alliance of Australian Retailers" to stop the legislation (ABC 2010, Generation Next, 2010). The campaign included the retention of a public relations firm to run the campaign, approval of who should give media interviews and management of a strategy for lobbying the Government.

#### **"The Tobacco Files" - transcript of 'Lateline' programme broadcast by the Australian Broadcasting Company, dated 10 September 2010 Statement of Philip Morris Limited in response of 10 September 2010**

This transcript, and **Philip Morris Limited's** statement in response, indicate that Philip Morris Limited is involved in efforts to prevent measures being adopted to introduce plain packaging requirements for tobacco products. It indicates that the stakes for Philip Morris Limited are high and that they are committed to providing financial support and public relations advice to campaigning against plain packaging. Notwithstanding this summary, the full transcript of this programme and the statement of Philip Morris Limited in response are relied upon in support of the University's contention that the information requests from Philip Morris International are made with the intention of disrupting the work of the University's Centre for Tobacco Control Research and to bring to an end research which could contribute to the evidence in support of the adopt of plain packaging laws in the UK and elsewhere.

The transcript of the programme reports that ABC disclosed the existence of a tobacco-industry funded campaign against a looming ban on logos and branding on cigarette packets in Australia. This transcript details the links between **Philip Morris Ltd**, the Alliance of Australian Retailers, to which it is reported it gave \$2.1 million, and the public affairs company Civic Group. Representatives of Civic Group are reported by the programme to have stated to Chris Argent **of Philip Morris International Ltd** that the campaign to stop plain packaging of cigarettes should "be forthright – at times even aggressive – in nature (if the campaign fails you won't have any brands left anyway, so there is no point worrying too



much about damage to your brands)” and that it ought to “Build concern amongst the targeted decision makers that the campaign will not cease, is likely to increase and that it will extract a political cost”.

A statement from Philip Morris Limited posted on the ABC News website on Friday September 2010 confirmed the support given by Philip Morris Limited to the Alliance of Australian Retailers’ efforts to urge the Australian Government not to proceed with proposals for plain packaging.

**Generation Next, ‘Big tobacco companies behind resistance to plain packaging’, 16 September 2010**

The article on the website of ‘Generation Next’ (which is a national seminar series aimed at protecting and enhancing the wellbeing of children and teenagers), commenting on the findings of the ABC Lateline programme, reported the comments of the Alliance of Australian Retailers on their website: “We are fed up with excessive regulation that is making it harder for us to run our businesses. The government proposal to mandate plain packaging for cigarettes is the last straw. That’s why we have formed The Alliance of Australian Retailers Pty Ltd”. It quotes a spokeswoman for the Alliance stating that “The Alliance is financially supported by three tobacco companies” and a statement from the Council on Smoking and Health, reported that the Alliance’s campaign has been developed, masterminded and run to the finest detail by **Philip Morris**.

The disruption and cost to the Australian Government of FOIA requests made by the tobacco industry has been the topic of discussion in the Australian Senate Community Affairs Committee.

**List of Tobacco FOI requests made to the Department of Health and Ageing of the Australian Government (see appendix), as provided to the Community Affairs Committee of the Australian Senate, 20 October 2010, extract of the official report of the Community Affairs Committee meeting of 20 October 2010 and extract of the official report of the Community Affairs Committee meeting of 23 February 2011**

The tobacco industry has been documented as making broad and burdensome information requests at a time when the Australian Government was considering legislative measures to require **plain packaging** of tobacco products. Out of 20 freedom of information requests being dealt with by the Australian Government’s Department of Health and Ageing in October 2010, 19 were confirmed to have come from tobacco companies the Secretary of Health and Ageing, Jane Halton (at CA 133). **The list of FOI requests demonstrates the very broad construction of the information requests being made by the tobacco industry, requesting all documents “relating to..” or “referring or relating to..”.**

The official report of the Community Affairs Committee meeting of 23 February 2011 illustrates the cost implications of dealing with such broadly framed requests and the burden that they place upon an authority trying to deal with them and identify every piece of information falling within the scope of such a request. The Secretary for Health and Ageing reported to the Committee (at CA 158) that in one case, a request was construed as potentially covering over 10,000 files, but the Government was negotiating with the tobacco industry applicant over an 8 month period and at the time of the Committee hearing had reduced the scope of the request to 242 files containing over 92,000 documents. The

estimated initial cost of dealing with the original request was \$1,471,372.52. The Secretary also reported on the costs of dealing with other requests and negotiations, noting that not all costs were recoverable and that her department had required to take on extra staff and external legal advisers to deal with the volume these tobacco industry requests.

Whilst the University has produced its own costings of the two Philip Morris International requests, which are provided in response to the Commissioner's request for these, the evidence from Australia demonstrates that the tobacco industry generally makes extremely broad requests in the knowledge that they have a cost implication for the authority dealing with them and disrupt the work of those involved in tobacco use reduction policy, and yet in response to requests from the University to clarify the scope of its requests, Philip Morris International has not made any substantive attempt to do so.

#### **Framework Convention Alliance Bulletin, Issue 108, 18 November 2010, p6**

In an article headed "More industry attacks expected as Australian plain packaging nears", the Bulletin states that, although tobacco companies never hid their funding of the Alliance' campaign, "the extent to which they had been involved was only revealed a few weeks after it began. A news organisation obtained leaked documents that showed Philip Morris to be closely orchestrating the whole thing, from who would be the retailers' spokespeople to what they would say in the media interviews". The Bulletin also reported that, although the Alliance campaign went "off air" after this media report, "Big Tobacco has still been busy recently bombarding government health agencies with 19 Freedom of Information (FOI) requests over documents relating to plain packaging and various other tobacco control measures dating back almost 20 years. **It seems the intent of this is to increase workloads of government health staff to delay or even stop implementation of the plain packaging**".

#### **Evidence from the World Health Organisation**

##### **WHO Framework Convention on Tobacco Control, 2003 and Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control**

Both the UK and the EU are parties to the World Health Organisation's Framework Convention on Tobacco Control (FCTC). This treaty highlights the broad array of well-evidenced strategies and tactics used by the tobacco industry to resist the setting and implementation of tobacco control measures. Article 5.3 of the FCTC states that "There is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests". Both the plain packaging study and the point of sale study being carried out by the University's CTRC are designed to inform and advance tobacco control.

The Preamble to the WHO's Framework Convention on Tobacco Control notes that the Parties to the Convention, in reaching agreement on the Convention, have recognised "the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts". The University notes, in support of its own view that Philip Morris International's information requests would cause, and are intended to cause, disruption to the work of the Centre for Tobacco Control Research, that the WHO has

recognised the efforts by the tobacco industry to undermine or subvert tobacco control efforts.

The Guidelines for implementation of Article 5.3 of the Convention, in its Introduction at paragraph 1, cites the findings of the Committee of Experts on Tobacco Industry Documents that “the tobacco industry has operated for years with the express intention of subverting the role of governments and of WHO in implementing public health policies to combat the tobacco epidemic”. At paragraph 11, the Guidelines state that: “*The broad array of strategies and tactics used by the tobacco industry to interfere with the setting and implementing of tobacco control measures, such as those that Parties to the Convention are requirement to implement, is documented by a vast body of evidence. The measures recommended in these guidelines aim at protecting against interference not only by the tobacco industry but also, as appropriate, by organisations and individuals that work to further the interests of the tobacco industry*”.

### **Further information in relation to plain packaging and Philip Morris International**

#### **Philip Morris International Inc. Inter-Office Correspondence, 1 March 1995, PMI Corporate Affairs Meeting, Rye Brook Befurary 15 and 16, 1995**

There is additional evidence to show that Philip Morris International is particularly averse to the idea of plain packaging. Internal documents from a Philip Morris International Corporate Affairs meeting in the mid-1990s, which clarifies the company’s position, states that “We don’t want to see plain packaging introduced anywhere regardless of the size and importance of the market” (Dangoor, 1995, p 2).

Notwithstanding the summaries of all of the articles, Convention, guidelines, reports and other documents given above, the full content of each of these items of evidence is relied upon in support of the University’s contention that the information requests from Philip Morris International are made with the intention of disrupting the work of the University’s Centre for Tobacco Control Research. The information requests are intentionally drawn in very broad terms, are designed to cause disruption and annoyance to the University and are underpinned by a particular opposition by the applicant to measures that might support the introduction of tobacco control policy measures.

### **Harassment**

The University wishes to rely on the evidence already provided in the above responses in support of its claim that harassment results from this information request, as an objective effect and an intended outcome. The University relies on the information provided about the significant burden that would be placed on a small research team in having to deal with the information request from the applicant Philip Morris International. The University also points to the tone of the correspondence from Clifford Chance on behalf of the applicant in response to attempts to clarify the scope of the request, the accusation that the University’s request for clarification was unreasonable, the accusation that the University is in breach of the timescale to respond to a section 1 request because it made the request for clarification, and the failure of the applicant to confine the information request to a particular timeframe when asked to do so. The objective effect of the information request is the harassment of the University and the researchers within the CTCR’s team.

## **Manifestly unreasonable or disproportionate**

Given the very broad nature of the information request, the applicant's failure to clarify the terms of its request, the applicant's failure to specify the timeframe to which the request applies, the significant burden that the request would place on the CTRC given the size of the team, the limited funding and human resources of the CTRC, the disruption and damage to the work of the CTRC that would be a consequence of dealing with this request and the specialist expertise needed to identify and locate all the information that might fall within the scope of the request, the University considers that any reasonable person would regard the request as being manifestly unreasonable and disproportionate in all the facts and circumstances of the case.

2. In their application to the Commissioner, Philip Morris International has indicated that it took the University of Stirling longer than the time in which they were expected to reply to the request to seek clarification of what had been requested. Please provide any comments that the University wishes to make regarding this assertion.

The applicant's request, made through its lawyers Clifford Chance, was sent on 24 August 2010 and received by the University on Wednesday 25 August 2010, outwith University term time when availability of relevant personnel, including the University's external advisers, was restricted. The University required to consider the request and to try to ascertain its scope. Having attempted to undertake this task, and given that the request was being made by a law firm on behalf of its client, the University considered it appropriate to seek external legal advice on how to deal with the request and, in particular, how it should respond in order to clarify the information being sought by the applicant. The University required time to meet with its external advisers to discuss the request. Members of the CTRC team were required to join the meeting by conference call from London, rather than delay the meeting.

At the same time as dealing with this request, the University was dealing with a further request from the same applicant sent on 27 August 2010, worded in very broad terms but relating to a different research project, which also lacked focus. Those staff required to meet to consider both requests were staff of the CTRC who were also having to ensure that they undertook other time-critical tasks in relation to ongoing research projects and fulfilled their contractual obligations in relation to core functions and to their external funders.

The University does not consider the time taken to seek clarification to be unreasonable in the circumstances. The University also notes that, in spite of the emphasis in correspondence from the applicant for substantive and prompt replies, the applicant did not respond to the University's letter of 17 September 2010 until 13 October 2010. The University expects that the applicant, similarly, required time to give proper consideration to the letter and to prepare its response.

3. Also in their application to the Commissioner, Philip Morris International has commented that they consider that the University of Stirling made no attempt to justify its decision to declare the request vexatious. Please provide the University's comments on this assertion.

The Commissioner's statutory duty in dealing with this application by Philip Morris International for a decision under section 47 of FOISA is to assess whether the University has complied with Part 1 of FOISA in dealing with this request.

Part 1 of FOISA does not place a requirement on the University to justify to an applicant a decision to declare a request vexatious, nor does the guidance produced by the Commissioner on dealing with vexatious requests.

4. Philip Morris International also commented that the University of Stirling has not stated in what way responding to their request would constitute a significant burden. Please provide a detailed submission setting out why the University of Stirling considers that responding to this request from Philip Morris International would impose a significant burden on it?

We refer to the responses given to question 3 above in relation to the requirements of responses to FOISA requests that are deemed vexatious as to why the University considers its response to the applicant to be compliant with Part 1 of FOISA. We also refer to the evidence provided in response to question 1 above, where a detailed submission is provided setting out why the University considers that responding to this request would impose a significant burden upon it.

5. In its response to Philip Morris International's request and requirement for review, the University of Stirling commented that the requisite criteria detailed in the Commissioner's guidance for determining whether a request is vexatious had been met in relation to their request. Philip Morris International stated in their application that the University of Stirling had not indicated which of the four criteria set out in the Commissioner's briefing on section 14(1) of FOISA it considers to be applicable in this case, and the reasons why. Please provide a detailed submission, giving full reasons why the University considers that the four criteria set out in the Commissioner's briefing on section 14(1) of FOISA are met in the case of Philip Morris International's request.

On a preliminary point, the University's statement that it has met the requisite criteria in the section 14(1) briefing does not mean that it has met all four criteria set out in that briefing, as is assumed by this question. The statement means that it has met the generally required criteria of the request placing a significant burden upon it and at least one of the other four criteria specified.

The Commissioner's statutory duty in dealing with this application by Philip Morris International for a decision under section 47 of FOISA is to assess whether the University has complied with Part 1 of FOISA in dealing with this request.

The University considers that its response to Philip Morris International's request complies with Part 1 of FOISA and the guidance provided in the Commissioner's briefing in section 14(1). Neither FOISA nor the briefing require an authority to provide an explanation of why the request is being deemed to be vexatious.

Where a request has been deemed to be vexatious, FOISA and the guidance do not require an authority to carry out a review at all. Notwithstanding this, the University nonetheless did carry out a review of this request at a senior level within the University, demonstrating that it did not take lightly the decision to declare the request vexatious. Following this review, the University confirmed that it considered the request to be vexatious. Neither FOISA nor the Commissioner's guidance stipulate that such a review response must include a detailed explanation of why the request was deemed vexatious.

However, the University has kept its own records at both request and review stage detailing why it deemed this request to be vexatious. The content of these records sets out in detail the reasons why the University considers the request to be vexatious, namely that it imposes a significant burden, that it is intended to disrupt the work of the CTRC, that its effect is to harass the University and the staff of the CTRC and that it is manifestly unreasonable and disproportionate, are set out in our response to question 1 above.

6. In their application to the Commissioner, Philip Morris International have also asserted that the University of Stirling did not comply with its duty to provide advice and assistance under section 15 of FOISA, and where it considered that responding to the request would be a significant burden it would have been reasonable for the University of Stirling to advise how Philip Morris International could best formulate their request which would provide access to the requested information at least inconvenience to the University. Please provide any comments the University wishes to make on this assertion?

In dealing with this very broad and general request, the University sought to clarify what information the applicant was seeking in order to identify and locate that information. The content of the response from the applicant was that it considered this step to be unreasonable and, whilst providing some hypothetical questions, did not provide the University with any substantive information which might have assisted the University in identifying specific information the applicant was seeking. The applicant also failed to respond to the University's request to specify a timeframe for the request.

These attempts at clarification were made under section 1(3) of FOISA. In the absence of the required clarification under section 1(3), the University is not obliged to give the information requested. The University submits that, without identifying the information falling within the scope of a request, the University is not in a position to provide section 15 advice and assistance as to how to formulate its request to enable the University to provide information without a significant burden falling on the University. The University notes the opinion of the Court of Session in the case of *Glasgow City Council, Dundee City Council v The Scottish Information Commissioner* [2009] CSIH 73, at para 45, that "the importance of giving appropriate assistance to persons who have difficulty describing the information which they desire is not however inconsistent with the necessity of identifying precisely what that information is. Public authorities can only perform their duties under the Act correctly if they understand what information is requested".

The applicant's legal advisers, Clifford Chance, who were making the request on their behalf describe their own expertise in freedom of information on their website in the following terms:

*"The public policy practice has been advising on freedom of information issues for many years, both on how to access information, and on how to keep information confidential. The Freedom of Information Act 2000 came fully into force on 1 January 2005, introducing a new statutory right to publicly held information. Individuals and businesses now, potentially, have access to a vast range of information collected or created by the private sector. Lawyers in the public policy practice have been active in assisting clients to make requests, in advising clients how best to protect information they have provided to government from being disclosed, and in drawing up and advising on internal mechanisms to deal with the requirements of the legislation both for the public and the private sector. We also advise public sector clients in dealing with FOI requests and assist in presenting legal arguments to the Information Commissioner's Office and to the Information Tribunal."*

Given this expertise, and noting the comments of the Court of Session in *Glasgow City Council, Dundee City Council v The Scottish Information Commissioner* [2009] CSIH 73, at para 44 in relation to what might be expected of a firm of solicitors drafting a request, the University considers that the applicant could have taken steps to clarify the focus of their request had they wished to.

The University considers that the request could have been clarified by the applicants, through their legal advisers, both in terms of the description of the information sought and the provision of a time period in relation to the scope of the request, but this was not done when the opportunity was presented by the University.

7. Philip Morris International has asked the Commissioner to consider whether the University of Stirling's request that they clarify the scope of this request, and in particular, the request that they explain what they mean by such words as "relating to" and "information" might be viewed as a disingenuous attempt to delay publication of the requested information. I would welcome the University's comments on this matter?

The University absolutely refutes any suggestion that its attempt to clarify the scope of this request was a disingenuous attempt to delay publication of the requested information. As already noted, the University's request for clarification under section 1(3) was a reasonable request to clarify the scope of a very broad and general request for information and to request the provision of a timeframe applying to the request. In its response of 17 September 2010 to the applicant's request, what the University asked the applicant to do was to provide details of other types of information that the applicant was seeking, in addition to the non-exhaustive list of items in the request and the reference to "**any information you hold in relation to this project** including, but not limited to, written communications and notes of meetings or telephone conversations in relation to the above project". The University was not asking the applicant to provide a definition or explanation of the words "information" and "relating to" in isolation, as is inferred in your question. This appears to be an interpretation placed by the applicant on the University's attempt to clarify the request and is not an interpretation that the University considers to be reasonable.

The University was seeking to clarify the scope of the request by asking the applicant what it meant by "information held in relation to the project", "information relating to the methodology" and "information relating to the design and purpose of the project", as the scope of these terms is very broad and carries a sufficient degree of uncertainty to entitle the University to seek clarification.

The University trusts that this information is of assistance to you in progressing your investigation. Please let us know if we can provide further information to you in respect of our response to the information request from Philip Morris International.

Yours,

Alastair Work  
Academic Registrar