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Our Ref: FOI request 404 (Point of Sale)

Dear Jill

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 1.57pm 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 27 August 2010 and received by the University on 1 September 2010. You have requested our comments on the application and also answers to 6 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 your 6 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 27 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 on 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 of 27 August 2010 was framed by reference to the applicant's invalid request of 14 September 2009, which contained a very broadly framed and wide-ranging request.

In the request of 27 August 2010, the applicant stated that *"we are now writing to make a new request, on the same terms as set out in our letter of 14 September 2009, but on the basis that we are requesting the information on behalf of our client Philip Morris Limited (5, Thameside Centre, Kew Bridge Road, Brentford, Middlesex TW8 0HF). Please refer to our letter of 14 September 2009 (enclosed) for full details of the information sought*".

In its letter of 17 September 2010, the University, in exercising its duty to give reasonable advice and assistance under section 15(1) of FOISA, sought confirmation of whether the applicant simply wanted the University to consider what information it held as at 14 September 2009, as was suggested by the formulation of the new request, or whether in fact the applicant intended the request to apply to all information held as at 27 August 2010.

Responding to this letter, Clifford Chance on behalf of the applicant confirmed that the request should be treated as a request up to 27 August 2010. It also stated at that stage that the request was made on behalf of Philip Morris International (the true applicant), not Philip Morris Limited (understood to be an affiliate of Philip Morris International Inc) as originally stated in its letter of 27 August 2010.

Having given consideration to the scope of the information request, the University's assessment was that the impact of dealing with such a broad information request would be very 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 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 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.

POINT OF SALE 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	4.5 (1.5 x 3 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
	12.5	0
Locating what data / documentation is held by ISM		
Work through our data archives: electronic project folders (live server); archived electronic documentation (back-up discs); filed paper documentation (on-site); archived paper documentation (off-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.	28 (14 x 2 people)	420
Meet with ex-project workers	3	0
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
	39.25	420
Retrieval and assessment		
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.	42 (14 x 3)	0
Internal meetings: Apply the public interest test and, as data	42 (14 x 3	0

controller, the personal data test (and others too if necessary).	people)	
Final decisions on whether to release, partially release (redacted) or withhold data. And on what is not held (or not recorded) by ISM.	21 (7 x 3 people)	0
For the electronic data files, this includes looking at each heading/item in the SPSS files individually	21	315
Liaise with University's Registry and Governance Services	8 (2 x 4 people)	0
Aggregate and anonymise data	70	1050
Redact personal data/sensitive	35	525
Photocopying and collating	5	35 (lower rate)
Printing	5	35 (lower rate)
Printing costs (estimate. 3000 sheets)		300
	249	2260
Providing requested data		
Print the University's copyright statement	0.25	3.75
Collate the data and copies of documentation that are to be provided	3	45
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
	23. 5	228.75
Total	**324.25 hours**	**2908.75**

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 broad request, of it being:

- originally made through an international law firm who did not state the identity of the true applicant
- made only a few days after another very broad and general information request to the University from the same applicant through the same law firm and focusing on the work of the Centre for Tobacco Control Research on a tobacco control-related research project,

and given the University's prior knowledge of how tobacco companies and organisations with links to this applicant or the wider tobacco industry, have engaged in campaigns using requests under freedom of information legislation in other jurisdictions to disrupt the work of public health professionals and others involved in tobacco control work, the University decided that there were sufficient grounds to support a finding that this request was vexatious. In summary, in light of a change in the facts and circumstances surrounding this request in terms of the pattern of behaviour now emerging in relation to the University,

compared to those existing when the applicant made its invalid request in 2009, the University was entitled to reach the conclusion that this request was vexatious. The University notes the evidence of such disruptive activities being particularly focused on plain packaging and point of sale tobacco displays.

The University has provided evidence in support of its finding 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 point of sale display 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 be 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, who represented 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. The study found that 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. They also found that the Office on Smoking and Health (OSH) of the Centers for Disease Control and Prevention (CDC) had consistently received FOIA based requests, mainly through law firms and document research and retrieval companies. The authors reported 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 it 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 3rd 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, contracts 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, the approval of who should give media interviews and the management of a strategy for lobbying the Government. 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 by 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 of 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 that they will disrupt the work of those involved in tobacco use reduction policy. In response to requests from the University to clarify the focus of the scope of its requests, Philip Morris International has not made any substantive attempt to do so.

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 measures.

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 the Introduction at paragraph 1, cite 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 polices 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 required 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".

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 the University's submission to the Commissioner in support of the University's contention that the information request from Philip Morris International is made with the intention of disrupting the work of the University's Centre for Tobacco Control Research.

The information request is intentionally drawn in very broad terms, designed to cause disruption and annoyance to the University, and is underpinned by a particular opposition by the applicant to measures that might support the introduction of tobacco control policy measures.

Based on a significant body of documented evidence, it is anticipated that Philip Morris International, if it succeeds in this application to the Commissioner, will continue thereafter to make or co-ordinate FOI requests to the University's Centre for Tobacco Control Research, to disrupt its work on tobacco control research generally, and specifically increase the burden of work on the research staff of the Centre in a way that will continue to jeopardise the University's work on point of sale display, plain packaging and other tobacco control research projects.

3. 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 objective effect of the information request is the harassment of the University and the researchers within the CTCR's team.

4. Manifestly unreasonable or disproportionate

Given the very broad nature of the information request, the significant burden that the request would place on the CTRC given the size of the team, the limited funding and human resources of the CTRC, the disruption and damage to the work of the CTRC that would be a consequence of dealing with this request and the specialist expertise needed to identify and locate all the information that might fall within the scope of the request, 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 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 contain such a requirement.

3. 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 2 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.

4. 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 to the applicant's legal representatives 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, as set out in our response to question 1 above.

5. 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?

Section 14(1) of FOISA does not require an authority to deal with a request under section 1(1) if the request is vexatious. Section 15(1) states that an authority must, so far as it is reasonable to expect it do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. The University's decision that this request was vexatious did not rely entirely on the imposition of a significant burden upon the University. The evidence relating to an intent to disrupt the work of the CTRC was so strong in this case that, even if the University had been able to negotiate with the applicant to narrow the scope of this information request and reduce the burden, the evidence around the circumstances of this request supported the conclusion that the request was intended to disrupt the work of the CTRC.

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 made a more focused request had they wished to do so.

At the point at which the University considered that documented evidence supported a finding that the applicant's intent behind the request was to disrupt the work of the CTRC, the University considered that it was not reasonable to expect it to seek to negotiate with the applicant to narrow the scope of the request. Had the University decided to simply apply the fees regulations to the request, then it would have considered it reasonable to consider what could have been provided to the applicant under the prescribed limit and what charges to apply. However, because of the evidence regarding the intent to disrupt, the University decided that application of the fees regulations was not the most appropriate response to the request and opted instead to treat the request as vexatious, after serious consideration of all the evidence.

The Commissioner has noted in Decision 108/2010 Mr Mark Irvine and South Lanarkshire Council that, although his general approach to the question of whether a request is vexatious is that he will require a significant burden on the public authority, "This does 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".

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

6. Philip Morris International has asked the Commissioner to consider whether the difference between the University of Stirling's response to a request from Clifford Chance (request dated 14 September 2009) and its response to a request from Philip Morris International (dated 27 August 2010) might suggest that the University is applying FOISA in an inappropriately discriminatory way, and whether the response to the request of 27 August (seeking clarification) and the response to the request of 27 August might be viewed as attempts to delay publication of the requested information. I would welcome the University's comments on this matter.

The University absolutely refutes any suggestion that it is applying FOISA in an inappropriately discriminatory way. In its response to question 1, the University has provided a clear explanation of the different facts and circumstances prevailing at the time of the applicant's request of 27 August 2010, compared with those prevailing at the time of the applicant's invalid request, namely that a further request had been made by the same applicant a few days earlier, in very broad terms, through a law firm, focusing on tobacco control work of the CTRC, work in respect of which the tobacco industry has a documented history of seeking to disrupt, including through the use of information requests.

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

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