

## Scottish Parliament Region: Mid Scotland and Fife

Case 200502367: Forestry Commission Scotland

### Summary of Investigation

#### **Category**

Scottish Executive and Devolved Administration: Environment; Policy

#### **Overview**

The complaint concerned the way in which Forestry Commission Scotland (FCS) dealt with an investigation into alleged illegal tree felling.

#### **Specific complaints and conclusions**

The complaints which have been investigated are:

- (a) FCS unreasonably took the view that trees had been felled illegally and began an investigation (*not upheld*);
- (b) FCS acted beyond their remit (*not upheld*); and
- (c) FCS failed to consider representations made and keep complainant updated (*partially upheld*).

#### **Redress and recommendations**

The Ombudsman recommends that:

- (i) FCS apologise for their oversight in keeping the complainant properly advised about their investigation procedures; and
- (ii) FCS ensure that their investigation procedures reflect this and the need for regular updates.

## Main Investigation Report

### Introduction

1. On 25 November 2005 the Ombudsman received a complaint from Mr C on behalf of his client, concerning the way in which Forestry Commission Scotland (FCS) dealt with an investigation into alleged illegal tree felling at X House.
  
2. The complaints from Mr C which I have investigated are:
  - (a) FCS unreasonably took the view that Mr C's client had felled trees illegally and began an investigation;
  - (b) FCS acted beyond their remit in seeking to investigate; and
  - (c) FCS failed properly to consider his and his client's views in this matter and failed to keep them updated.

### Background

3. FCS are responsible to the Scottish Executive for the forestry of Scotland. They protect our forests and encourage good forestry practice by setting standards, giving advice, etc. They also control the felling of trees and issues felling licences. FCS permission is normally required to fell growing trees and in a relevant advice booklet, dated August 2001, it stated clearly that, 'Everyone involved in the felling of trees.....must ensure that a licence.....has been issued before any felling is carried out...' In bold, the document warns that, '**If there is no licence or other valid permission, or if the wrong trees are felled, anyone involved can be prosecuted. Do not begin felling until we have issued a licence or other permission.**' FCS staff are responsible for enforcing the appropriate legislation (Forestry Act 1967) and have the duty to ensure that the law is not brought into disrepute by a flagrant breach. Senior staff (Conservators) are responsible for the initial investigation of alleged illegal tree felling and prepare a report for, and liaise with the Procurator Fiscal.

### Investigation

4. The investigation of this complaint involved obtaining and reading all the relevant documentation, including correspondence between FCS and Mr C. I have also had sight of letters between Mr C's client and FCS dated 31 January and 25 February 2002; an outline planning application dated 22 March 2002 and the subsequent conditional approval of 22 June 2002; a full planning application

dated 7 November 2002 and associated conditional approval dated 30 April 2003; various plans of the development site; a Forestry Commission explanatory booklet, *Tree Felling, Getting Permission*; relevant correspondence between FCS and Angus Council; and witness statements taken as part of FCS' investigations. Reference has been made to the Town and Country Planning (Scotland) Act 1997 and the Forestry Act 1967. I made a written enquiry of FCS on 16 February 2006 and received their detailed response on 16 March 2006. I have set out my findings of fact and conclusions for each head of complaint and where appropriate, my recommendations. While I have not included in this report every detail investigated, I am satisfied that no matter of significance has been overlooked. FCS and Mr C have had an opportunity to comment on a draft of this report.

**(a) FCS unreasonably took the view that Mr C's client had felled trees illegally and began an investigation**

5. Mr C said that on 31 January 2002 his client wrote to FCS asking for their comments on his son's plans to develop the X House site. He said he was advised that this was a matter for his local Council (the Council) as planning authority and was referred to them. He said that his client subsequently applied for outline planning permission which was granted and this was then followed by a full application to erect a dwelling-house and stables. Full planning approval was given on 30 April 2003. (Note: plans accompanying both applications identified areas of trees which were specifically to be retained and hence were not to be covered by the applicant's plans. Other areas were also erroneously marked to be felled under forestry licence). Meanwhile, the complainant said he had discussions with the Council's planning department and was told that it would be in order for him to fell the trees on the site. This work began in August 2002.

6. Mr C is aggrieved that, notwithstanding the terms of the planning permission, FCS took the view that his client felled trees illegally.

7. Between January and February 2002 there was an initial exchange of correspondence and meetings between Mr C's client and FCS. I have had sight of a letter dated 25 February 2002 provided to Mr C's client by FCS' then Woodland Officer. The letter stated that there were normally two approaches to obtain permission to fell woodland: one through planning permission; and the other through an approach to FCS for a felling licence. This latter approach would

normally be conditional upon replanting the area or planting in another area to ensure no net loss in tree cover area. The Woodland Officer made it clear that FCS would want to see an alternative area of land put forward for planting to substitute for the area that was to be felled.

8. Shortly afterwards, on 3 April 2002, agents (the Agents) acting on behalf of Mr C's client's son submitted an application for 'Outline permission for a new house and change of use from forestry to equestrian use including 10 no. stables'. In answer to a question about whether trees were to be felled, the Agents replied 'Yes, refer to plan' (see note in paragraph 5). On 20 June 2002 the Council gave approval in outline for the erection of a dwelling-house and 10 stables and, in doing so, appear to have accepted the erroneous statement about trees being felled with the benefit of a forestry licence. The outline approval was subject to conditions, none of which referred specifically to tree felling.

9. Prior to this, from witness statements made available to me, I understand that on 26 February 2002 Mr C met with his client, who had approached him to deal with forestry management on this behalf. This included the felling of trees on the X House site on behalf of the client's son. As Mr C said that he had not been involved in or seen the planning application, and as his client wished the removal of the trees to allow development of the site, on 14 August 2002 he contacted Officer 1, a planning officer with the Council. He said he asked whether it would be appropriate for him to go ahead with the felling and was told that this would be in order. Tree felling began the next day.

10. On 7 November 2002 the Agents made an application for full permission to build a house and stables. The application noted that the current use of the land was forestry but that no trees required to be felled on site (see paragraph 5). The application was approved, subject to conditions, on 30 April 2003.

11. Mr C said that his involvement with the X House site (which was owned by his client's son) came to an end with the dispatch of timber from the site. His work for his client continued, however, and it was during a discussion on 5 May 2004 about this, with one of FCS senior officers, that he learned that there was concern about the felling done on the X House site. The FCS officer asked Mr C to explain how

the site had been felled without restocking proposals and Mr C replied that the area had been felled under planning permission.

12. FCS said they were concerned at this situation which they felt was unsatisfactory and on 21 May 2004 FCS, in an e-mail, advised the Council that they were obliged to investigate what they considered to be alleged illegal tree felling at X House. No further contact appeared to have been made with Mr C and because of the dearth of information, on 3 August 2004, Mr C and his client requested a joint meeting with officers from FCS and the Council. The meeting was held at the X House site on 11 August 2004.

*(a) Conclusion*

13. From the foregoing, it appeared to me that the Woodland Officer gave Mr C's client a choice about how to pursue his son's plans for X House; he could apply to the Council for planning permission which would include a request to fell the trees or he could apply to FCS to do so, who would require him to plant replacements (see paragraph 7). He opted to apply to the Council, who in giving permission would not require replacement planting. Agents pursued this on his behalf and they were successful in securing outline planning permission subject to conditions.

14. His clients were anxious to get on with the development and, therefore, Mr C said he rang an officer in the Council planning department to see if it would be in order to start removing the trees. He said that he was told that felling could proceed (although, from the witness statements available to me, the officer alleged to have been contacted said he has never spoken to Mr C and he speculated that it would have been unlikely for such a large number of trees to be removed with the benefit of planning permission if the Council had not been advised that a forestry licence applied to some of the trees (see paragraph 5)). Mr C said that, as far as he was aware, the site had planning permission and works had begun after that. He considered that he had acted responsibly and, from the information available to me, I see no grounds to dispute this. However, the fact remains that the permission was in outline only and no works should have taken place in advance of full planning permission or approval of reserved matters. This is notwithstanding the approval or otherwise of a planning officer. Because of this, the removal of the trees was not covered by any appropriate permission as was required.

15. The planning application in place at the time the trees were felled was in outline only and it was FCS' responsibility to ensure that any felling was covered by appropriate permission. I have been advised by FCS that outline planning consent does not confer exemptions from the felling licence regulations and that exemption only applies once consent is granted. FCS said that once they became aware that significant felling had taken place via outline planning permission, which they considered to be unprecedented, they began to make enquiries. I am satisfied that they were obliged to do so and that, in the circumstances, their actions were not unreasonable. I, therefore, do not uphold this part of Mr C's complaint.

16. However, Mr C appears only to have been told during a conversation on 5 May 2004 that FCS were looking closely at the matter, although on 21 May 2004 the Council were advised of the likelihood of an investigation. From the information available to me, it was not until the joint meeting of 11 August 2004 that it was confirmed in FCS' contemporaneous note that they were talking to Mr C about an alleged tree felling investigation. Therefore, while I conclude that FCS were fully entitled to enquire into the circumstances surrounding the tree felling, it would have been preferable for them to have formally notified Mr C, like the Council, of the probability of their conducting a formal investigation.

**(b) FCS acted beyond their remit in seeking to investigate**

17. Mr C considered that FCS went beyond their remit in this matter because, if his actions in terms of the planning permission had caused concern, it was for the planning authority to pursue.

*(b) Conclusion*

18. Mr C is correct in so far as it is for the Council, as planning authority, to take the action they consider necessary in terms of alleged breaches of planning permission. Nevertheless, FCS' duties are quite clear (see paragraph 3). On enquiring about the felling of trees at X House, FCS became concerned and it then became their duty to look into the matter. As it turned out, the trees were felled without the benefit of planning permission and FCS were fully entitled to investigate the circumstances. Accordingly, I do not uphold this aspect of the complaint.

**(c) FCS failed properly to consider his and his client's views in this matter and failed to keep them updated**

19. Mr C did not feel that his or his client's opinions, with regard to the circumstances covered by the investigation, were properly taken into account by FCS. Nor did he feel that appropriate discussions were held with them prior to the decision to investigate. The complainant believed that, once the investigation began, neither he nor his client was properly updated, despite his requests for information.

20. I have already noted that it was not until the joint meeting on 11 August 2004 that the complainant became aware of the formal investigation, although I understand from FCS' formal comments to me that the formal investigation began in early August 2004 and certainly on 15 July 2004 they had formally notified the Council. In the circumstances, I am critical of the failure to properly advise Mr C. From the evidence available, while the complainant became aware on 5 May 2004 of general concerns, up until the joint meeting there was little discussion with him about the likelihood of a formal investigation. Then it seems nothing further was heard until a telephone conversation on 18 October 2004 between Mr C's client and FCS. Mr C then wrote on 9 November 2004, saying that he had heard nothing further since the meeting on 11 August 2004 and he received a reply on 17 November 2004. It was about this time that FCS made an interim report to the Procurator Fiscal, in accordance with their investigations procedure, but again Mr C does not appear to have been advised.

21. FCS continued with their investigations, as they believed trees not covered by the planning applications had also been felled and they said reference had been made to their concern about this at the meeting of 11 August 2004. At that point, Mr C's client confirmed that one section had been accidentally removed while the other had been felled by a utility company to allow the provision of electricity. Agreement was reached at that meeting that further specific enquiries would be made. However, FCS have advised that they had difficulty in progressing matters as the Council had mislaid the X House file and it was not until late June 2005 that it was located.

22. I have had sight of correspondence from Mr C throughout this period requesting information and, on 22 February 2005, he was advised that the Procurator Fiscal

did not intend to act on the interim report submitted by FCS in November 2004. FCS pointed out, however, that they were continuing to look into the other areas where they suspected that trees had been felled illegally. On 3 March 2005, Mr C wrote to FCS asking for clarification and expressing his unhappiness with the continuing proceedings. He later followed this with another letter on 11 March 2005, saying that he and his client no longer felt disposed to assist FCS in their investigations. Mr C wrote his first letter asking FCS for an update on progress on 17 May 2005 and between then and August he received a number of 'holding' letters. It was not until 16 August 2005 that Mr C was informed that on this occasion FCS did not intend to continue to prosecution although a warning was made about unauthorised tree felling.

*(c) Conclusions*

23. Mr C said that he and his client were not properly updated and that their views were not taken into account. From the evidence available, I am satisfied that Mr C's and his client's views were taken into account. However, although FCS followed their own procedures, I am not satisfied that Mr C was kept properly advised about the start of the formal investigation (see paragraph 20) or about its conclusion. In the circumstances, the Ombudsman recommends that FCS apologise for these oversights and now ensure that their investigation procedures reflect the need for this. Further, it appears that as a matter of course neither Mr C nor his client received regular updates on the progress of the enquiries and investigation. If this had happened, one cause for concern may have been removed. FCS may, therefore, wish to consider adding regular updates to those affected by these particular procedures into their process.

24. Finally, Mr C was disgruntled about the time this whole matter took to conclude and, while I have some sympathy for the situation in which he found himself, I am satisfied that the time involved was not overlong taking into account the Council's involvement and the fact that the case was a complicated one.

25. In all the circumstances, I partially uphold this aspect of the complaint.

29 August 2006

**Explanation of abbreviations used**

Mr C	The complainant
FCS	Forestry Commission Scotland
The Council	Angus Council
The Agent	Agents acting on behalf of Mr C's client's son
Officer 1	A planning officer with Angus Council