



# Commissioner for Ethical Standards in Public Life in Scotland

## FREEDOM OF INFORMATION POLICY AND PROCEDURES

(also covering Environmental Information (Scotland) Regulations 2004)

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The contents of this policy have been developed using the Scottish Government's *Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004* published in December 2014 and guidance available on the Scottish Information Commissioner's website.

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## PART 1: Introduction

### 1. Background

- 1.1 The Freedom of Information (Scotland) Act 2002 ('FOISA') and the Environmental Information (Scotland) Regulations 2004 ('EIRs') enable the public to access information held by Scottish public authorities.
- 1.2 These regimes require authorities to either make available the information requested by an applicant or to explain why the information is not being made available.
- 1.3 Throughout this document, reference to 'the regimes' and to FOI is a reference collectively to FOISA and the EIRs.
- 1.4 Public authorities subject to FOISA must have a Publication Scheme that sets out the information which they will routinely publish.
- 1.5 The Scottish Information Commissioner ('SIC') is responsible for enforcing and promoting both regimes.
- 1.6 The Commissioner for Ethical Standards in Public Life in Scotland ('Commissioner') is a listed body under Schedule 1, Part 7 of FOISA and is therefore subject to both the FOISA and the EIRs.
- 1.7 This document outlines the Commissioner's policy and procedures in relation to FOISA and EIRs.
- 1.8 The Commissioner has separate policies relating to the requirements of the Data Protection Act (the Data Protection Policy) and the Public Records (Scotland) Act (the Records Management Plan).

### 2. Commissioner's Statement

- 2.1 The Commissioner supports the aims of FOISA and the EIRs and encourages all staff members to follow both the letter and spirit of the law. He encourages good practice in providing advice and assistance to applicants and promotes the importance of proactively publishing information. The Commissioner aims to support and promote improved openness and accountability in the public sector.

### 3. Main terms of the regimes

- 3.1 Anyone may make a request for recorded information. FOISA applies to all information while the EIRs apply to environmental information only.
- 3.2 Requests for information must be answered **as soon as possible** and within 20 working days. If a request is for environmental information and the information held is both complex and voluminous, the authority may extend this period up to a maximum of 40 working days.

- 3.3 A fee may be payable for receipt of the information requested. Authorities should publish their scheme of charges for all requests for information.
- 3.4 There is a presumption in favour of disclosure under both regimes. However, the right of access is not absolute.
- 3.5 FOISA and the EIRs set out 'exemptions' and 'exceptions' respectively under which information may be withheld. If any information is withheld, the authority must explain why. Authorities are not obliged by either regime to apply exemptions or exceptions, even where they could be applied. This means they can disclose information through choice, unless prevented by other legislative provisions such as the Data Protection Act 1998.
- 3.6 Where information is subject to an exemption or exception, in many cases the authority must also decide whether it is more in the public interest to withhold the information than to make it available. There is an in-built presumption in the regimes that it is in the public interest to disclose information unless the authority can show why there is a greater public interest in withholding the information. Where competing public interests are evenly balanced, the information should be disclosed.
- 3.7 If the applicant does not receive a response or is dissatisfied with the response (e.g. because they have not received all of the information asked for or they disagree with the authority's reasons for withholding the information), they may ask the authority to review their decision within 40 working days of receiving the response (or, where no response has been received, within 40 working days of the deadline for the original request).
- 3.8 If the applicant is still dissatisfied after the internal review, or fails to receive a review response, they have six months to appeal to the SIC for a decision on whether the authority has appropriately handled their request. Thereafter the applicant and the authority may have a right of appeal to the Court of Session on a point of law.
- 3.9 The regimes encourage the publication of information. Public authorities subject to FOISA must have a Publication Scheme which is approved by the SIC. The Publication Scheme, and its supporting Guide to Information, specifies the information (including environmental information) that an authority will routinely publish.
- 3.10 Under FOISA, authorities have a duty to provide advice and assistance to any applicant who makes a request for information.

#### **4. The role of the SIC**

- 4.1 The SIC is responsible for enforcing and promoting Scotland's freedom of information laws. The SIC:
- investigates applications and issues legally enforceable decisions
  - promotes good practice amongst public authorities

- provides the public with information on their rights.
- 4.2 In addition, the SIC approves the Commissioner's publication scheme and Guide to Information and collects statistics about the operation of the FOISA regime.
- 4.3 The SIC has a numbers of powers to enforce FOISA and the EIRs.

## **5. Our role and responsibilities**

- 5.1 Ultimate responsibility for compliance with the regimes lies with the Commissioner.
- 5.2 In order that the Commissioner can meet this responsibility, all staff members must
- be able to identify an information request
  - be able to explain to applicants how to make such a request
  - be aware of the procedures for forwarding requests to those staff members with training in how best to respond.
- 5.3 The Business Manager acts as the Commissioner's information officer and is responsible for:
- recording all information requests received
  - monitoring whether responses are issued within the terms of the relevant legislation
  - providing advice to the Commissioner and other staff members about the regimes and on how to respond to requests for information
  - submitting statistical information to the SIC
  - providing the Management Team with statistics on FOI requests and reviews, highlighting any key issues and trends and flagging any lessons to be learned.
  - maintaining their knowledge of the regimes
  - maintaining the publication scheme and guide to information on an annual basis.
- 5.4 An Administrative Assistant (currently Amy Lowson) assists the Business Manager with these duties and provide cover for annual leave, etc.
- 5.5 The Management Team will review the effectiveness of the Commissioner's FOI procedures annually.
- 5.6 Line managers will identify whether the staff members for whom they are responsible have sufficient knowledge of the regimes and the Commissioner's procedures. Knowledge in this area will be examined during the staff member's annual appraisal and any specific training requirements identified. Issues arising during the year will be referred to the Business Manager who will arrange ad hoc training as necessary.

## 6. Training arrangements

- 6.1 The Commissioner will:
- provide training to ensure that all staff members have sufficient knowledge of the regimes
  - ensure that staff members with responsibility for responding to requests for information have undertaken appropriate training to ensure that responses meet statutory requirements
  - provide appropriate training for staff members responsible for conducting reviews
  - ensure that training is refreshed on a regular basis.
- 6.2 Arrangements will be flexible, allowing for ad-hoc training when necessary.

## 7. Staff contingency and cover

- 7.1 The Commissioner must respond to requests for information, and requests for review, within statutory timescales. Therefore, it is important that all requests for information are identified promptly.
- 7.2 Postal requests or those sent to general inboxes will be captured by the administration team. In addition, the Commissioner operates a dedicated FOI email inbox ([foi@ethicalstandards.org.uk](mailto:foi@ethicalstandards.org.uk)). Emails to this address are forwarded to the main 'investigations' mailbox and to the Business Manager.
- 7.3 Staff members should be aware that they may receive requests for information directly to their own mailbox. These still constitute valid requests and must be answered within 20 working days of the email **arriving** in the inbox.
- 7.4 Staff members should arrange for a colleague to check their email inbox if they are absent for any length of time in case any requests have been sent directly to them. This should be done even where an out of office alert has been activated – under the regimes, a request is still considered as received by the authority even if an out of office alert has been sent back to the requester.

## 8. Recording and reporting statistics

- 8.1 The Commissioner must submit a statistical return to the SIC each quarter. This is compiled by the Business Manager.
- 8.2 The return includes details about the number of requests received under FOISA and the EIRs, if they were processed within the statutory timeframe, whether and what exemptions were used, the fee charged, outcome of reviews and the number of appeals to the SIC.
- 8.3 The Commissioner will publish this information online.

8.4 The Business Manager will report the statistics quarterly to the Management Team, identifying any trends or issues and flagging up any lessons to be learnt.

## **9. Publication scheme**

9.1 The Commissioner has adopted the SIC's Model Publication Scheme and has created a guide to the information he makes available under the model scheme.

9.2 The publication scheme and guide to information are available on the Commissioner's website

### **9.3 Types of information the Commissioner publishes**

As a minimum, the Commissioner publishes information about:

- the functions of the office, how it operates (including decision-making processes) and performance
- finances, including funding allocation, procurement and the awarding of contracts.

In addition, the Commissioner will publish:

- information which is regularly the subject of information requests
- information disclosed in response to FOI requests
- key information relating to the procurement process and contracts.

### **9.4 Maintenance of the publication scheme**

- The publication scheme will be updated at least annually by the Business Manager. The Business Manager will monitor the types of information which are frequently requested and consider adding them to the scheme. Additionally, the Business Manager will ensure that the commitments made in the scheme are being met.
- The publication scheme must be approved by the SIC. The Business Manager will seek approval for any changes made to the scheme.

## **10. Making information accessible**

10.1 Members of the public should be able to find published information easily.

10.2 The Commissioner will ensure that information is also available to people who cannot access the internet. This may be achieved by offering to print out information from the website on request.

10.3 Staff members should also have regard to our duties under the Equality Act 2010 in ensuring accessibility for all.

## PART 2: Procedures

### 11. Making a request for information

- 11.1 The Commissioner provides guidance for the public which explains how to make a valid information request, and the procedure that will be followed once a request has been received.
- 11.2 The guidance includes:
- an address (including an email address) to which applicants may direct their requests for information or ask for assistance
  - where possible, the telephone number of someone who can provide advice and assistance
  - procedures, and information about the charging regime
  - a link to the SIC's guidance for requesters.
- 11.3 This guidance will be referred to in the publication scheme and Guide to Information.
- 11.4 All staff must be aware that a request received by any individual staff member is, in terms of the legislation, received by the Commissioner.

### 12. Identifying an information request

- 12.1 All communications involve some exchange of information. Therefore, all staff members will respond to requests for information on a regular basis. However, it would be disproportionate to treat all requests for information as a formal request under FOISA or the EIRs. Some requests may be considered 'business as usual'.
- 12.2 A request may be treated as a 'business as usual' request if it is:
- simple and straightforward
  - all the information is released on time, **and**
  - it is unlikely that the applicant will be dissatisfied with the response.
- 12.3 In addition, the Commissioner considers the following to be 'business as usual' requests:
- requests for information from the Scottish Parliament or the Scottish Government
  - requests for information on how to make a complaint about
    - the conduct of local authority councillors, MSPs or members of public bodies
    - an appointment round
    - our performance.
  - requests for information from those involved in investigating a complaint (e.g. the local authority, legal advisors, etc.)
  - requests for information from those involved in an appointment round (e.g. the Public Appointments Advisor, etc.)
  - requests for our response to a consultation.

- 12.4 Staff members should be aware that valid requests for information may be contained within other correspondence e.g. where a request for information is made within a complaint letter or correspondence on a range of matters.
- 12.5 All formal requests for information should be referred to the information officers (currently Karen Elder and Amy Lawson) who will advise on the next steps.
- 12.6 Any request from an individual for the information the Commissioner holds about them is a subject access request under the Data Protection Act and is handled differently from an FOI request. Please refer to one of the information officers for further guidance. See also the Data Protection Policy.
- 12.7 Please refer any requests for environmental information to an information officer. The EIR regime is slightly different and the information officer will ensure that the request is handled in line with the EIRs and any applicable case law.
- 12.8 If staff members are at all concerned about whether a request should be considered a 'formal' FOI request, please contact one of the information officers.
- 12.9 **Examples of 'business as usual' requests:**
- How many complaints about local authority councillors have you investigated in the past 5 financial years?
  - What is your annual budget?
  - What is your address?
  - How do I make a complaint about a councillor?
  - How do I make a complaint about your service?
  - I've been asked to run an appointment round, what do I do?
  - Please let me have a copy of your annual report
  - When are your accounts published?
  - Are your IT services managed inhouse?
  - XX shouldn't have been appointed as Chair; they have a conflict of interest. How do I raise this?
  - How many staff do you have?
- 12.10 **Examples of requests for information to be handled under FOISA:**
- How many women have sat on boards in each of the past 3 years?
  - How many complaints have you received about xx Council in the past 15 years?
  - What is your average salary?
  - Is anyone paid below the 'living wage'?
  - How many disabled people do you employ?
  - Please supply all the documents used in preparing xx consultation response
  - Please supply all the information used and generated in preparing xx FOI response.



#### 12.11 Examples which could be either

- How many complaints have you investigated in the past 5 years?
- When is the hearing about case xx?
- Please provide details about the length and value of your IT services contract?
- How much do you spend on overseas travel each year?

**NB:** Requests stating they are being made under FOISA and press enquiries must be assessed on their individual content.

### 13. Providing advice and assistance

- 13.1 Under FOISA, the Commissioner has a duty to provide advice and assistance to anyone making a request for information.
- 13.2 The Commissioner will take into account the circumstances of each individual applicant; for example private individuals may be more likely to need assistance than large organisations or other public authorities. Staff members should also have regard to their duties under the Equality Act 2010 in ensuring accessibility for all.
- 13.3 There is a duty to give advice at all stages. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.
- 13.4 The aim of assisting the applicant is to give them the opportunity to discuss their application and help them describe the information being sought reasonably clearly, so that it can be identified and located. Applicants should not be given the impression that they are obliged to disclose the intent behind their request or that they will be treated differently if they do so.

### 14. Is the request valid?

- 14.1 A request for information has to be valid. That is:
- it is in writing (electronic and legible) or is in a format that can be used for subsequent reference (e.g. an audio recording).
  - states the name of the applicant and an address for correspondence
  - describes the information requested.
- 14.2 If the request is not 'valid', the staff member should contact the requester and advise them how to make the request valid. If the request remains 'invalid' and is rejected on that basis, the staff member must still advise the applicant of the right to request a review of this decision and, if the applicant remains dissatisfied, the right to make an application to the SIC for a decision on the handling of their request.

- 14.3 **Validity of requests submitted through social media**  
Staff members should be aware that valid requests for information may be submitted through any social media sites we operate (currently Facebook and LinkedIn only). Staff members responsible for maintaining these sites on the Commissioner's behalf should ensure that any potential requests submitted via those sites are identified.
- 14.4 It is good practice to ensure that any social media site/account is monitored on a daily basis for information requests. Alternatively, where available, notification emails should be enabled, with the emails sent to [foi@ethicalstandards.org.uk](mailto:foi@ethicalstandards.org.uk).
- 14.5 **Validity of voice mail requests**  
Requests for information left on a voicemail will only be valid if the voicemail can be transferred, accessed and retained as a permanent record. The Commissioner's telephone system does not allow the transfer of voicemail into the main system. Therefore any request submitted in this form is not valid. If a voicemail request is received, a staff member should contact the applicant and advise them how to submit a valid request.
- 14.6 However, a request made by voicemail for environmental information is valid regardless of whether the voicemail can be permanently stored or not. This is because the EIRs allow for requests to be made verbally in an unrecorded state.
- 14.7 **Provision of an applicant's full name and pseudonyms**  
Under FOISA, an information request must include the applicant's full name. Using first or given names alone will not be sufficient. The use of a surname plus a title, e.g. Mrs Jamieson, will generally be sufficient. There should be a presumption that any full name provided is genuine, unless there is a clear and demonstrable reason to believe otherwise.
- 14.8 Where an applicant has not given a sufficient name, or where it is clear that an applicant has used a pseudonym, the request will not be valid. In such cases, the staff member should advise the applicant that their full name or a request in their own name is required. The staff member should explain that the SIC would not be able to accept any appeal arising from a request if a pseudonym or insufficient name had been used by the applicant.
- 14.9 **Requests on behalf of other people**  
Information requests can be made by a third party on behalf of an applicant. The request must contain the name of the person on whose behalf the request is being made, often referred to as the "true applicant". If the request appears to have been made on behalf of an unnamed person, the staff member should contact the applicant to explain what needs to be done in order for a valid request to be made.

#### 14.10 [Requests for documents or copies of documents](#)

FOISA provides a right of access to information and not a right of access to copies of specific documents. However, the Commissioner will not refuse a request for a copy of a document (e.g. a report, a minute or a contract) as long as it is reasonably clear from the request that it is the information recorded in the document that the applicant wants.

### 15. **Sending an acknowledgement**

- 15.1 The information officer or staff member responding to the request should acknowledge receipt of the request within three working days.
- 15.2 This acknowledgement should state their name and that they are dealing with the request on behalf of the Commissioner. It should also state when a response is likely to be issued and give contact details for the person handling the request.
- 15.3 The information requested should also be re-iterated. If it is unclear what information is required then clarification should be sought at this stage.

### 16. **Seeking clarification**

- 16.1 If it is unclear what information the applicant wants, the staff member should obtain clarification but also offer reasonable advice and assistance to the applicant. Where a request is not reasonably clear, advice and assistance could include:
  - providing an outline of different kinds of information which might meet the terms of the request
  - providing a general response to the request setting out options for further information which could be provided on request
  - contacting the applicant to discuss what information the applicant wants.
- 16.2 Applicants cannot reasonably be expected to always possess identifiers such as file reference numbers or the description of a particular record. Applicants should not be expected to always have the technical knowledge or terminology to identify the information they seek.
- 16.3 Clarification should be sought as soon as reasonably possible and normally as part of the acknowledgement of receipt of the request – i.e. within three working days. **The statutory 20 working-day deadline for responding to a request will not start until clarification has then been received from the applicant.**
- 16.4 The SIC is likely to be critical if the Commissioner takes an unreasonable length of time to provide advice and assistance or clarify the request.

- 16.5 **When sufficient clarification is not provided**  
If, after seeking clarification and all reasonable assistance has been given, the applicant still cannot describe the information requested in a way which enables it to be identified and located, then the Commissioner is not required to proceed with the request.
- 16.6 In these circumstances, the staff member should explain to the applicant why their request cannot be taken any further and provide details of the review procedure and the applicant's right to apply to the SIC for a further review.
- 16.7 Where clarification is sought from the applicant but no response is received, the staff member should issue a reminder to the applicant after 20 working days explaining that the Commissioner cannot proceed until the applicant responds. After 40 working days the applicant's right to review expires, at which point you should write to the applicant explaining that the case is now considered to be closed.

## **17. Locating and retrieving information and record keeping**

- 17.1 **Checking the Commissioner's records**  
Staff members have access to the majority of the Commissioner's records. This allows information to be located and retrieved easily and response issued promptly.
- 17.2 The Commissioner operates a series of rules for managing records in a structured way. This provides reassurance that all relevant locations where the requested information might be held can be and has been checked. Please refer to the Commissioner's Folder Structure and Retention Schedule for details.
- 17.3 Searches should be proportionate and focus on systems where staff members with a working knowledge of the records relating to the request consider information might be held. Reference to "systems" do not relate only to IT systems but may include any other system, including paper records, informal systems such as notes and temporary records. Staff members handling a request should think beyond conventional places where information might be held to satisfy themselves that a full and robust search has been undertaken.
- 17.4 Where appropriate, for example in responding to a request for a complex set of information, the staff member should maintain a record of searches conducted, including details of who carried out the searches and the systems that were checked. Records of searches provide helpful evidence to reviewers and, in the event of an appeal, to the SIC.

17.5 **Consulting third parties**

17.6 *Making third parties aware of authorities' duties*

The Commissioner will ensure that third parties such as contractors and suppliers are aware of his duty to comply with the regimes and that information will have to be disclosed upon request unless an exemption under FOISA or an exception under the EIRs applies. Normally, this information will be provided during any tender process.

17.7 The Commissioner will exercise caution about making any confidentiality agreements with third parties in relation to information they are to supply. For example, when inviting consultation responses, the Commissioner cannot provide an undertaking that all responses will be treated as confidential.

17.8 *Consultation with the third party*

There is no definitive list of circumstances in which consultation would be appropriate, and much depends on the facts and circumstances of the particular case. Consultation is likely to be appropriate where a third party's interest in the handling of a request will be significant, for example because they are the primary focus of the information (e.g. as a business or an individual) or because disclosure would significantly affect them.

17.9 The Commissioner will identify interested third parties as soon as possible to give them the sufficient time in which to respond to consultation.

17.10 Consultation is recommended in all cases where:

- the views of the third party may help the Commissioner to determine whether an exemption or exception applies to the information requested. For example, if disclosure would cause substantial prejudice to that third party's interests or constitute a breach of confidentiality
- the views of the third party may help the Commissioner determine where the public interest lies.

17.11 Consultation is less likely to be necessary where:

- the Commissioner already has evidence from the third party that disclosure would, or would not, prejudice their interests
- the views of the third party can bear no influence on our decision (for example where there is other legislation either preventing or requiring disclosure).

17.12 Consultation may not be appropriate where:

- in the Commissioner's view there is no basis for withholding the information
- the cost of consulting third parties would be disproportionate (for example, because many third parties are involved)
- where the Commissioner holds evidence of earlier consultation on the status and sensitivity of the information and nothing (including the views of the third party) has changed.

- 17.13 In such cases, the Commissioner will consider what is the most reasonable course of action to take in light of the requirements of the regimes, the potential effects of disclosure and the public interest. It will usually be appropriate to notify the third party about the disclosure of information.
- 17.14 *Meeting statutory deadlines*  
Meeting the statutory deadline for responding to a request must always take priority over consulting third parties. This will often mean that the Commissioner can only allow third parties a short time to respond; this time should not be extended if that will prevent the Commissioner responding on time.
- 17.15 If the Commissioner does not identify the need to consult third parties until near the deadline, instead of consulting, he will notify third parties at the same time as responding to the applicant.
- 17.16 *Inviting views from third parties*  
When inviting third parties for their views, the Commissioner will focus the invitation on the information that has been requested. It should always be made clear to the third party that their consent is not being sought and they do not have a veto on release. It is for the Commissioner, not the third party (or representative of the third party), to determine whether or not information should be disclosed. A refusal by a third party to consent to disclosure does not, in itself, mean that information should be withheld.
- 17.17 If the applicant is an individual their identity should almost always remain withheld from third parties as this is personal data and its disclosure is likely to be in breach of the Data Protection Principles. There may be occasions when the identity of the applicant is relevant to the request but it should not be shared with third parties unless permission is sought and granted, or the request was made in the public domain (e.g. via [whatdotheyknow.com](http://whatdotheyknow.com)).
- 17.18 *When a response from a third party is not received*  
The fact that the third party has not responded to consultation does not relieve the Commissioner of his duty to make information available, or his duty to reply within the statutory timescales.
- 17.19 *Notifying third parties about the release of information*  
When the Commissioner has made a decision to release information he may, as a courtesy, notify any third parties who have a material interest that information relevant to them has been released in response to a request, regardless of whether they have been consulted. This ensures that the release does not come as a surprise. Notification is at the discretion of the Commissioner and would depend on the individual circumstances surrounding the information released and what is judged to be a material interest.
- 17.20 Please refer to the Code of Practice and the SIC's website for further guidance on disclosing information relating to contracts or procurement processes.

#### 17.21 *Is a fee payable?*

The Commissioner is entitled to charge for the direct and indirect costs incurred in locating, retrieving and providing information. Full details of what can and cannot be charged for are contained in the Fees Regulations. However, authorities are not entitled to charge for:

- any costs incurred in determining whether it actually holds the information
- any costs incurred in determining whether information should or should not be disclosed
- the time spent deciding what parts of a document/report should be redacted (although the actual process of redacting can be charged).

17.22 Costs which might be charged include estimates of the staff time to collate information or redact documents, the cost of postage to deliver the information to the applicant or photocopying.

#### 17.23 *Calculating staff costs*

The Fees Regulations cap the amount which can be charged per hour per member of staff at £15.00. Further details about what can be charged and how costs are calculated is available in the Code of Practice and on the SIC's website.

#### 17.24 *Costs for providing information in a particular format*

Applicants have the right to request information in a particular format. For example, the applicant may prefer to receive a summary or digest rather than the whole document in which the information is recorded. The Commissioner must give effect to these preferences, so far as is reasonably practicable. The Commissioner is entitled to charge the applicant for the costs of carrying out this work. As already noted that there may be duties to the applicant in terms of the Equality Act 2010. The Commissioner may not charge for any costs likely to be incurred in fulfilling any such duty.

#### 17.25 *How much can be charged?*

The Commissioner is not entitled to recoup costs in full. The Fees Regulations limit the chargeable amount to a proportion of the actual cost incurred. Where the cost to the public authority of responding to the information request:

- is less than £100, then no charge can be made
- is above £100, then the authority is allowed to make a charge of 10% of those costs up to £600
- exceeds £600, the public authority does not have to provide the information.

#### 17.26 *Where excessive costs apply*

The Commissioner is not required to provide information where the cost of the responding to the request exceeds £600. However, the Commissioner has a duty to provide reasonable advice and assistance to applicants. This means that where the estimated cost of responding to a request will exceed £600, it is good practice to discuss the request with the applicant to find out if the scope of their request could be narrowed to bring it under the £600 limit. Any narrowed request would be a separate, new request and should be responded to accordingly.

17.27 If the cost of dealing with the request is more than £600 and the scope of the request has not been narrowed the staff member should issue a notice stating that the Commissioner does not plan to supply the information as the estimated cost of complying would exceed the maximum amount in the fees regulations. The staff member should also:

- confirm they are responding under the terms of FOISA on behalf of the Commissioner
- explain that the applicant has the right to request a review of this decision within 40 working days
- explain how to make that request
- highlight that the applicant must state why they are dissatisfied with the response
- give the name of the reviewer and provide contact details
- explain that the applicant, if still dissatisfied following the outcome of the review, may make an application for decision to the SIC within six months of the response
- include a link to the SIC's website or, where appropriate, contact details for the SIC's office.

17.28 Alternatively, the Commissioner can provide the information free of charge or can, with the agreement of the applicant, make a charge for responding to the information request.

## 18. Issuing a request for payment

18.1 Where a fee is payable the Commissioner will notify the applicant as soon as possible and within the 20 working day time limit. The notice will set out the projected costs of handling the request. The projected costs should be a reasonable estimate of the costs likely to be incurred. **The statutory 20 working-day deadline for responding to a request pauses when the fee notice is issued and will resume once the applicant has paid the fee.** The Commissioner will inform the applicant that they must pay the fee within three months of the date of the fees notice (60 working days under the EIRs) or there will no longer be any obligation to give the applicant the information.



- 18.2 The staff member should also:
- confirm that they are responding under the terms of FOISA on behalf of the Commissioner
  - advise the applicant of their right to request a review of this decision
  - give the name of the reviewer and details of how to request a review
  - advise the applicant of their ultimate right to request the SIC to review the matter
  - provide a link the relevant section of the SIC's website.
- 18.3 Upon payment of a fees notice, the timescale for responding resumes from the point when the fees notice was issued. If 10 working days had passed between receipt of the request and the issuing of the fees notice, this means that only 10 working days remain to respond once the fee has been paid. It is therefore both good practice and common sense to issue a fees notice as soon as possible after receiving the request.
- 18.4 Further guidance about when and how to charge are available in the Code of Practice and on the SIC's website

## 19. Responding to the request

- 19.1 This section explains how to respond to a request. Further guidance and up-to-date advice are available on the SIC website in the section entitled 'Responding to a request'. Staff members should refer to the SIC's website and to the Code of Practice when responding to a request for environmental information.
- 19.2 The staff member responsible must respond to the request within 20 working days of receipt.
- 19.3 All responses should be reviewed by a peer or the Commissioner to check for accuracy and quality before they are issued. Please bear in mind that whoever checks the initial response, cannot act as a reviewer if the applicant then requests a review of the decision to release or withhold the information.
- 19.4 [When the Commissioner does not hold the information requested](#)  
If the information is not held, advise the applicant of this and explain why the Commissioner does not hold the information. This makes a request for review less likely.
- 19.5 Remember your duty to advise and assist. If you know who does hold the information, tell the applicant or, *exceptionally*, transfer the case.
- 19.6 The staff member should also:
- confirm they are responding under the terms of FOISA on behalf of the Commissioner
  - explain that the applicant has the right to request a review of this decision within 40 working days
  - explain how to make that request

- highlight that the applicant must state why they are dissatisfied with the response
- give the name of the reviewer and provide contact details
- explain that the applicant, if still dissatisfied following the outcome of the review, may make an application for decision to the SIC within six months of the response
- include a link to the SIC's website or, where appropriate, contact details for the SIC's office.

19.7 Further guidance on handling requests for environmental information which is not held is available in the Code of Practice and on the SIC's website.

#### 19.8 [Withholding information \(applying an exemption\)](#)

Under FOISA, certain information may be considered exempt from the requirements of the act and so does not have to be released. There follows a summary of the exemptions that can be used. Please refer to FOISA itself, the Code of Practice and to the SIC's website for further details.

19.9 Certain exemptions can be applied absolutely others are subject to the public interest test.

#### 19.10 *Public Interest Test*

The test requires authorities to undertake a balancing exercise to consider the public interest in disclosing information and the public interest in maintaining the exemption. Some exemptions are absolute (see list below). In these cases, the public interest test is not applied.

19.11 Where the public interest in maintaining the exemption outweighs the public interest in the disclosure of the information, then the information can be withheld. If the public interest in disclosing the information is equal to or greater than the public interest in maintaining the exemption, then the information must be disclosed.

19.12 Please refer to the SIC's briefing paper on the public interest test for more information.

#### 19.13 *The Exemptions*

Please note the numbering refers to the sections of FOISA.

- 25 Information otherwise accessible (**ABSOLUTE**) – see section below
- 26 Prohibitions on disclosure (**ABSOLUTE**) – information is exempt if its disclosure (otherwise than under FOISA) is prohibited by or under another enactment or would constitute a contempt of court.
- 27 Information intended for future publication – see section below
- 28 Relations within the United Kingdom – information is exempt if its release is likely to prejudice substantially relations with any other UK administration
- 29 Formulation of Scottish Administration policy etc. – information is exempt if it refers to the development of Scottish Government policy

- 30 Prejudice to effective conduct of public affairs – information is exempt if its release is likely to prejudice substantially the free and frank exchange of views
- 31 National security and defence – information is exempt if its release is likely to prejudice substantially the defence of the British Islands, etc.
- 32 International relations – information is exempt if its release is likely to prejudice substantially relations between the United Kingdom and any other State or international organisation, etc.
- 33 Commercial interests and the economy – this exemption applies if the information constitutes a trade secret or its disclosure would prejudice substantially the commercial interests of any person (including another Scottish public authority).
- 34 Investigations by Scottish public authorities and proceedings arising out of such investigations. **Section 3 (a) is particularly relevant to the Commissioner** - information held by a Scottish public authority is exempt information if it was obtained or recorded by the authority for the purposes of investigations which are, by virtue of powers conferred by or under any enactment, conducted by the authority for any purpose specified in section 35(2) - see below
- 35 Law enforcement – information is exempt if its release is likely to prejudice substantially the prevention or detection of crime, etc. **Sections 35 (1)(g), (2)(b) and (2)(c) are particularly relevant to the Commissioner** - information is exempt if its disclosure under FOISA is likely to prejudice substantially the exercise by any public authority of its functions for the purposes of ascertaining whether a person is responsible for conduct which is improper or whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
- 36 Confidentiality (**36(2) ABSOLUTE**) – information is exempt if its disclosure would constitute an actionable breach of confidence.
- 37 Court records, etc. (**ABSOLUTE**) - information is exempt if it is contained in a court record.
- 38 Personal information (**38(1) ABSOLUTE**) - information is exempt if it constitutes personal data. Please note that this exemption covers the interrelation with the Data Protection Act.
- 39 Health, safety and the environment - information is exempt if its disclosure would endanger the physical or mental health or the safety of an individual.
- 40 Audit functions – information is exempt if its release is likely to prejudice substantially the audit of accounts of Scottish public authorities or the examination of the economy, efficiency and effectiveness with which resources are used in discharging their functions.
- 41 Communications with Her Majesty etc. and honours – information is exempt if it relates to communications with Her Majesty, etc.

***When considering applying an exemption, please refer to the legislation and SIC's website for the latest advice and guidance.***

#### 19.14 **Informing the applicant the information is held but is exempt**

If the information is held, but an exemption is to be applied restricting the release of all or some of the information, respond as follows:

- Disclose that the Commissioner holds the information
- State that the information is exempt
- Specify the exemption in question
- State why (if not otherwise apparent) the exemption applies
- If the exemption is subject to the public interest test, state why the public interest is in favour of maintaining that exemption.

#### 19.15 The staff member should also:

- confirm they are responding under the terms of FOISA on behalf of the Commissioner
- explain that the applicant has the right to request a review of this decision within 40 working days
- explain how to make that request
- highlight that the applicant must state why they are dissatisfied with the response
- give the name of the reviewer and provide contact details
- explain that the applicant, if still dissatisfied following the outcome of the review, may make an application for decision to the SIC within six months of the response
- include a link to the SIC's website or, where appropriate, contact details for the SIC's office.

19.16 FOISA makes it clear that there is nothing in the Act to stop public authorities from disclosing information which falls within one of the exemptions. However, public authorities should be aware that there may be other legislation which will prevent them from releasing the information - see section 26(a).

#### 19.17 **Informing the applicant the information is exempt but not whether it is held**

On occasion, the Commissioner may consider that to reveal whether the information exists or is held would be contrary to the public interest.

19.18 If the information is held but considered exempt under one of the exemptions in sections 28-35, 39(1) or 41 and the Commissioner considers that it would not be in the public interest to admit whether the information is held or not, issue a notice under section 18 of FOISA.

- State that the information, if it existed or was held by the Commissioner, would be exempt
- Specify the exemption in question
- State why (if not otherwise apparent) the exemption applies
- If the exemption is subject to the public interest test, state why the public interest is in favour of maintaining that exemption.

#### 19.19 The staff member should also:

- confirm they are responding under the terms of FOISA on behalf of the Commissioner
- explain that the applicant has the right to request a review of this decision within 40 working days

- explain how to make that request
- highlight that the applicant must state why they are dissatisfied with the response
- give the name of the reviewer and provide contact details
- explain that the applicant, if still dissatisfied following the outcome of the review, may make an application for decision to the SIC within six months of the response
- include a link to the SIC's website or, where appropriate, contact details for the SIC's office.

#### 19.20 Information otherwise accessible (Section 25 exemption)

The Commissioner is unlikely to use a section 25 exemption, preferring instead to simply provide a link to the information or re-issue it.

19.21 However, there may be an occasion, where the Commissioner will refuse a request on the grounds that the information is otherwise accessible. The staff member must send the applicant a refusal notice which acknowledges that we hold the information and explain why the exemption applies.

19.22 The staff member should also:

- confirm they are responding under the terms of FOISA on behalf of the Commissioner
- explain that the applicant has the right to request a review of this decision within 40 working days
- explain how to make that request
- highlight that the applicant must state why they are dissatisfied with the response
- give the name of the reviewer and provide contact details
- explain that the applicant, if still dissatisfied following the outcome of the review, may make an application for decision to the SIC within six months of the response
- include a link to the SIC's website or, where appropriate, contact details for the SIC's office.

19.23 The Commissioner should not assume that the applicant will know where and how the information can otherwise be obtained. If the information is already publicly available (e.g. on the Commissioner's website) the staff member should tell the applicant how to access it and provide adequate signposting, for example, providing direct links to online information. In all cases bear in mind the general duty to provide advice and assistance to applicants.

#### 19.24 Information intended for future publication (Section 27 exemption)

The Commissioner may refuse to disclose information if it will be published within 12 weeks from the date of the request. When citing this exemption in a refusal notice, the staff member should provide the intended date of publication and offer to forward the information when available.

19.25 There may be occasions where the Commissioner is then unable to publish the requested information on the planned date of publication. In this case, the staff member should contact the applicant and explain the reason for the delay and give the revised date of publication if this is known.

19.26 While an applicant has no automatic right to receive the information as soon as a delay in publication exceeds the 12 week time limit, any significant delay would make it more difficult for the Commissioner to continue to claim that it is reasonable to withhold the information.

19.27 If the applicant did not challenge the Commissioner's earlier decision to withhold the information, they may have missed the 40 day deadline for asking for a review of the original decision. If the applicant then seeks a review in such circumstances, the Commissioner will carry out a late review.

#### 19.28 [When all the information can be released](#)

If the information is held and is not exempt, the application is not vexatious or repeated and there are no issues with fees, the staff member should send the information.

19.29 The staff member should also:

- confirm they are responding under the terms of FOISA on behalf of the Commissioner
- explain that the applicant has the right to request a review of this decision within 40 working days
- explain how to make that request
- highlight that the applicant must state why they are dissatisfied with the response
- give the name of the reviewer and provide contact details
- explain that the applicant, if still dissatisfied following the outcome of the review, may make an application for decision to the SIC within six months of the response
- include a link to the SIC's website or, where appropriate, contact details for the SIC's office.

#### 19.30 [Handling vexatious or repeat requests](#)

If the Commissioner considers that the request is vexatious or repeated, the staff member should issue a notice stating that the Commissioner is not obliged to comply with a request for information because, after due consideration, he consider the request is vexatious or repeated.

19.31 Please refer to the Code of Practice or the SIC's website for the latest guidance when considering whether a request is vexatious or repeated.

19.32 The staff member should also:

- confirm they are responding under the terms of FOISA on behalf of the Commissioner
- explain that the applicant has the right to request a review of this decision within 40 working days
- explain how to make that request
- highlight that the applicant must state why they are dissatisfied with the response
- give the name of the reviewer and provide contact details
- explain that the applicant, if still dissatisfied following the outcome of the review, may make an application for decision to the SIC within six months of the response
- include a link to the SIC's website or, where appropriate, contact details for the SIC's office.

### 19.33 [Using standard wording](#)

Standard wording to include in acknowledgements and responses is available. Please ask an information officer for more details.

### 19.34 [Creating new information](#)

There is no requirement under the legislation for the Commissioner to create new information in response to a request. The compilation of information, e.g. in order to respond to a request for statistics, will not generally be considered as creating new information.

19.35 The duty to provide advice and assistance does not extend to providing additional information which falls outside the scope of the information request, or locating information held by other public authorities. However, in some situations it may be helpful to provide context to a response to avoid the information disclosed being misunderstood or misinterpreted.

### 19.36 [Deciding on the format in which to provide the information](#)

Under FOISA, as far as is reasonably practicable, the Commissioner must provide the information requested in the applicant's preferred format (if the applicant has indicated a particular format).

19.37 If the information is not yet held in the preferred format, the Commissioner must consider whether it would be reasonably practicable to convert the information into that format. In considering what is "reasonably practicable", the Commissioner should have regard to all the circumstances applicable to the request. Where the Commissioner considers providing the information in the requested format is not "reasonably practicable", the applicant should be informed of the reasons for this decision.

19.38 In deciding whether a response to a request for information can be provided in a particular format, the Commissioner must take into account the requirements of the Equality Act 2010 as there may be a further requirement under the Equality Act to make a reasonable adjustment, for example, by providing a copy of a document on audio tape.

#### 19.39 Informing applicants about copyright issues

There is a waiver for the copyright provisions in the Copyright Designs and Patents Act 1988. This permits the Commissioner to disclose information which contains third party copyright in response to a request. However, this waiver does not apply to the person who receives the information. It is therefore good practice to explain where third party copyright may lie within information that is released. Reference to copyright rules should only be included in responses where it is appropriate to do so and should not be included as a standard reference in all responses.

#### 19.40 Providing details of review procedures

The Commissioner will provide details of the rights to request a review and to make an appeal in all response notices.

#### 19.41 In the notice, the staff member should:

- confirm they are responding under the terms of FOISA on behalf of the Commissioner
- explain that the applicant has the right to request a review of this decision within 40 working days
- explain how to make that request
- highlight that the applicant must state why they are dissatisfied with the response
- give the name of the reviewer and provide contact details
- explain that the applicant, if still dissatisfied following the outcome of the review, may make an application for decision to the SIC within six months of the response
- include a link to the SIC's website or, where appropriate, contact details for the SIC's office.

#### 19.42 Responding to requests via Twitter

While it is theoretically possible for a valid request for information to be made within the 140 character limit of Twitter, it is not possible for a full response which complies FOISA to be given within such a limit. Therefore, when responding to a request made through Twitter, the staff member should either:

- upload a full response letter (and requested information, if appropriate) to the website, then send the applicant a link to the full response
- ask the applicant for an email or postal address to which the full response (and information, if appropriate) can be sent.

#### 19.43 Communicating with the applicant about the progress of a request

If there is likely to be any delay to responding to the request an apology should be provided to the applicant together with an estimated response date. Bear in mind that, even if an apology is given, the deadlines under both regimes are absolute and failure to comply is a breach of the legislation. The applicant will still have the right to seek a review of the failure to give a substantive response within 20 working days.



## 20. Handling reviews

### 20.1 Receiving requests for review

A request for review is made to the office, not to an individual officer. It is therefore important that all staff can recognise a request for review and ensure that it receives an appropriate response.

### 20.2 Determining whether a request for review is valid or invalid

A request for review is not valid if the applicant requests a review before the original 20-working day timescale has expired and the Commissioner has not yet responded. In such a case, the staff member should advise the applicant that:

- the response to the request will be provided within the timescale for compliance (if this is the case)
- if, following issue of the response, they are still dissatisfied (or in the event the response is not provided by the deadline) then the applicant may make a new request for review.

### 20.3 A request for review must:

- be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference
- state the name of the applicant and an address for correspondence
- specify the request for information to which the requirement for review relates
- specify the matter which gives rise to the applicant's dissatisfaction.

20.4 If an applicant writes to the Commissioner expressing dissatisfaction with the way in which the office has dealt with their request following a response, the Commissioner should treat this as a formal request for review - the applicant does not need to specifically ask for a review.

20.5 If the request for review is not clear, or the request fails to comply with the requirements of the regimes, the Commissioner has a duty to advise and assist the applicant in making a valid review request. The statutory timescale will not begin until a valid review request is received by the Commissioner.

### 20.6 Has the review request been made in time?

Applicants have 40 working days from receipt of the Commissioner's response to their request for information to request a review.

20.7 If the request for review is made after more than 40 working days, the Commissioner can choose to carry out a review if appropriate to do so.

### 20.8 Responding to a request for review

The review must be **carried out** within 20 working days of receipt of a valid request for review.

- 20.9 The reviewer should be a person who did not respond to or advise on the original request (where possible or practicable). The reviewer will have been identified and their name given in the original response to the request for information. Currently, the Commissioner, the Senior Investigating Officer and one Investigating Officer (Ian Mackay) act as reviewers.
- 20.10 The aim of a review is to allow the Commissioner or the nominated reviewer to take a fresh look at the response, to confirm the decision (with or without modifications) or, if appropriate, to substitute a different decision. The review must therefore be fair and impartial and allow decision makers to look at the request afresh. It should also enable different decisions to be taken.
- 20.11 The applicant must be advised of the outcome of the review within 20 working days of receipt of request for review. This notice must:
- advise the applicant what steps the Commissioner has taken to investigate their request for review
  - advise the applicant of the result of the review
  - advise the applicant why it has taken these steps
  - if appropriate, provide any additional information relating to the original request for information
  - advise the applicant about their right to make an application to the SIC within six months of the notice and their right to appeal to the Court of Session. The details provided must include the postal address of the SIC's office, along with contact telephone number and email address.
- 20.12 *Requests for review of a failure to respond to the original request*  
An applicant may complain to the Commissioner if they have not received a response to their request within the statutory timescales. This should be treated as a formal request for review of a failure to respond. In such cases, and where appropriate to save any further delay, the reviewer may be the same person who was assigned the original request.
- 20.13 Where the Commissioner accepts that he has failed to respond on time, the reviewer should apologise for the failure and provide the decision on the original request to the applicant. The review response must set out the applicant's right to appeal to the SIC. There is no opportunity for the Commissioner to invite a further request for review.
- 20.14 The reviewer should also identify the reasons for the procedural failure and, where appropriate, make recommendations for action to prevent recurrence.
- 20.15 **Learning lessons from reviews**  
Requests to review FOI responses will be added to the agenda for the next Management Team meeting with a view to identifying and acting on any lessons learned.

## 21. Appeals to the Scottish Information Commissioner

21.1 Where an appeal has been made to the SIC regarding the Commissioner's handling of an information request, the SIC will provide the Commissioner with an opportunity to comment on the application. This opportunity also allows the Commissioner to present submissions on his handling of the request and to include additional reasoning in support, for example, of his position that the information requested is not held, or the arguments put forward in support of the decision not to disclose information.

21.2 The Commissioner will take the following steps to help ensure appeals are handled efficiently and cost-effectively:

- provide a copy of the withheld information to the SIC within the timescales requested
- provide a schedule of documents and number documents individually, and clearly identify which exemptions/exceptions are applied to each piece of withheld information
- provide clear explanations of why exemptions/exceptions apply, including (where applicable) why the balance of the public interest lies in favour of withholding the information. These explanations should be specific to the information being withheld. The burden of proof is always on the Commissioner to demonstrate that the exemptions/exceptions apply, and the SIC is unlikely to agree that exemptions/exceptions apply where only generic reasons have been provided
- provide a clear robust response to any questions asked by the SIC
- provide background information and any other relevant information that the authority believes will support its case
- provide a clear indication of what information has been disclosed already.

21.3 If the Commissioner finds new information during an appeal investigation, he will disclose it to the applicant immediately and inform the SIC. Or, inform the SIC and the applicant if the Commissioner does not plan to release it, giving reasons and citing exemptions/exceptions.

## APPENDIX ONE: Standard Wording

### Clarifying a request

Dear [Name]

Thank you for your request for information about [insert brief description of information requested]. Your request was received on [insert date received].

I am dealing with your request on behalf of the Commissioner for Ethical Standards in Public Life in Scotland, under the terms of the Freedom of Information (Scotland) Act 2002.

I have reviewed your email/letter [delete as appropriate] and, in order to identify and locate the information you have requested, I require further details/some clarification [delete as appropriate]. [Provide details of the clarification required]. Please note that I cannot proceed further with your request until I hear back from you.

If you have any questions, please contact me on [telephone number] or [email address].

*Please note the response must come from a named member of staff. Therefore, contact details must be specific to that staff member.*

### Acknowledging a request (either immediately or after clarification)

Dear [Name]

Thank you for [clarifying] your request for information about [insert brief description of information requested]. Your request/clarification [delete as appropriate] was received on [insert date received].

I am dealing with your request on behalf of the Commissioner for Ethical Standards in Public Life in Scotland, under the terms of the Freedom of Information (Scotland) Act 2002.

Formally, the Act allows us 20 working days, from receipt of the request/clarification [delete as appropriate], to respond. This gives a deadline of [insert final response date]. However, we aim to have this information to you before then.

Depending on the work involved in compiling this information a fee may be payable. If that is the case, I will contact you with further details and advice on alternative ways to proceed.

If you have any questions in the meantime, please contact me on [telephone number] or [email address].

*Please note the response must come from a named member of staff. Therefore, contact details must be specific to that staff member.*

## Responding to a request

Thank you for your request for information about **[insert brief description of information requested]**. I am responding to your request on behalf of the Commissioner for Ethical Standards in Public Life in Scotland, under the terms of the Freedom of Information (Scotland) Act 2002.

**[INSERT RESPONSE]**

I hope this information has been useful but if you require any clarification or further details please get back in touch.

If you are unhappy with how your request has been handled you should write to **[insert name of reviewer]**, Commissioner for Ethical Standards in Public Life in Scotland, Thistle House, 91 Haymarket Terrace, Edinburgh EH12 5HE or at [foi@ethicalstandards.org.uk](mailto:foi@ethicalstandards.org.uk). Your request for review should be made within 40 working days and should explain why you are dissatisfied with our response.

If you are not content with the outcome of our review, you may apply directly to the Scottish Information Commissioner for a decision. Generally, the Commissioner cannot make a decision unless you have exhausted the review procedure provided by the Commissioner for Ethical Standards. More information can be found on the Scottish Information Commissioner's website: [www.itspublicknowledge.info/yourrights](http://www.itspublicknowledge.info/yourrights).

*Our response to a request for review must contain further information, including specific contact details for the Scottish Information Commissioner.*