

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

Guidance Note for Scottish public authorities which may be required to deal with requests for information where Security and Intelligence Agency information and/or information related to national security issues are involved

Key Point

Where a Scottish public authority is in possession of information which has been supplied in confidence by one of the Security and Intelligence Agencies (or any other UK department) or which should otherwise be protected from disclosure for the purpose of national security, the Scottish public authority should consult the relevant Agency as soon as possible. The relevant Agency will advise how the request should be handled, but generally the following approach should be followed.

Purpose of guidance

1. As the Freedom of Information (Scotland) Act 2002 (“FOI(S)A”) is now in force this guidance has been produced to help Scottish public authorities which are in the position described in one or other of the following scenarios:

- Scenario 1 - the public authority receives information supplied in confidence from Security and Intelligence Agencies (The Security Service, the Secret Intelligence Service and GCHQ) and other UK departments **i.e. information Not Held for the purposes of FOI(S)A 2002 – see Section 3(2)(a) (ii) of Act. See paragraphs 2-6 below.**
- Scenario 2 - the public authority holds information related to national security issues or is handling requests for information they hold which they consider to be exempt for the purposes of national security **i.e. information which is held for the purposes of FOI(S)A but which may be exempt under Section 31 of the Act. See paragraphs 7-11 below.**

Scenario 1

Information supplied in confidence from Security and Intelligence Agencies or any other UK department

2. Information is not held by a Scottish public authority for the purposes of FOI(S)A and is wholly excluded from the scope of the Act, if it has been supplied in confidence by a UK Government Minister or UK Government Department. “Department” for these purposes includes the Security and Intelligence Agencies: the Security Service, SIS and GCHQ. **If a request for information relates to such information the Scottish public authority should refuse to provide the information, relying on the fact that it does not “hold” the information for the purpose of the Freedom of Information (Scotland) Act 2002 (section 3(2)(a)(ii)).**

3. Scottish public authorities should be aware that public authorities in England, Wales and Northern Ireland have been advised not to pass to a Scottish public authority information

which has been supplied to them by one of the Agencies without the prior consent of the relevant Agency and the express prior authorisation by the Agency of the transmission of the information on its behalf to the Scottish public authority. Any such authorisation should also make it clear that the information is being transmitted in confidence to the Scottish public authority and is subject to a similar constraint against any further onward transmission. If SPAs receive Security and Intelligence Agencies information indirectly and are not clear on the authority for transmission then they should clarify the position with the relevant Agency before taking a decision to retain the information.

4. If the process outlined in paragraph 3 has been followed, it is likely that even in those cases where a public authority other than a UK Department has transmitted the information to the Scottish public authority, the information has nevertheless been supplied (even if indirectly) to the Scottish public authority by the Agency (i.e. a UK Department) whose information is involved. There will be no difficulty in arguing this if, in such a case, the relevant Agency had supplied the information direct to the Scottish public authority.

5. Where the Scottish public authority relies on section 3(2)(a)(ii), it should give notice to this effect under section 17 and simply say that it does not hold the information. There is no obligation to go beyond this and refer the requester to the appropriate UK Department or even to explain that the information is not held for the purposes of section 3(2) because it was supplied by a UK Government Department. Indeed, it is highly desirable that where Agency-produced and national security information is concerned the Scottish public authority should exercise all due caution in responding and not indicate that it is in possession of information supplied by a UK Government Department.

6. If a straightforward (albeit justifiable) denial under section 17 that any information were “held” would itself give rise to concerns about the existence or otherwise of the information (i.e. Neither Confirm nor Deny (NCND) concerns), then a refusal notice under section 18 may possibly be called for i.e. a refusal notice expressing the authority’s consideration that to reveal whether the information is held or not would itself be contrary to the public interest.

Scenario 2

Information held by Scottish Public Authorities which may be considered to be exempt information for the purpose of safeguarding national security

7. Scottish public authorities may **hold**, for the purposes of FOI(S)A, information whose disclosure could have an impact on national security. Where they consider that the disclosure of that information could be damaging to national security it is *prima facie*, subject to the balance of the public interest, exempt for the purposes of safeguarding national security. (*NB This excludes any information supplied to them by or on behalf of one of the Intelligence Agencies or other UK Government Department as discussed in paragraph 2.*) On occasions when this information is requested, the Scottish public authority should rely on the specific exemption for national security in the FOI(S)A (section 31) and on any other exemptions which may be applicable. In some cases it may be necessary – as in paragraph 6 above – for the Scottish public authority to give a refusal notice under section 18, i.e. which will not reveal whether or not it actually holds the information.

8. In the event that, following consultation with the relevant UK Government Department(s) and/or Security and Intelligence Agencies, the Scottish public authority decides to refuse a request in reliance on the exemption in section 31 (for the purpose of safeguarding national security) the Scottish public authority should send a description of the request which it has refused under Section 31 to the Scottish Executive's FOI Unit for information. (NB This will not be regarded as a request for a Section 31 certificate – see next section on Certificates).

Section 31 Certificates

9. Section 31(1) of the FOI(S)A provides that information is exempt information if exemption is required for the purpose of safeguarding national security. Section 31(2) then provides that –

“A certificate signed by a member of the Scottish Executive certifying that such exemption is, or at any time was, required for the purpose of safeguarding national security is conclusive of that fact.”

10. This effectively provides for a certificate to be signed by a Minister which would establish conclusively that the information in question is exempt in terms of section 31. This would mean that a public authority holding information to which the certificate applies would not have to consider, let alone defend to an applicant or the Commissioner, its view that the exemption applies to that information. The Act provides for two types of certificate:

- a certificate may identify information to which it applies by means of a general description with **prospective** effect
- an **ad hoc** certificate can be drafted to cover specific information in response to a particular case

11. In certain cases it may be thought more appropriate to issue a prospective certificate, where the information that is exempt can be clearly identified in advance of the receipt of any request. This should ensure certainty and may help to reduce the risk of information being released inappropriately.

12. It is important to note that each decision by an authority in response to a request to which a certificate applies must be taken on its own merits in light of prevailing circumstances. In particular the exemption under section 31 is not absolute, so the assessment of the public interest in disclosure must be carried out anew each time a relevant request is received. This is to ensure both that the certificate covers the information sought and to satisfy the requirement to assess the public interest on a case by case basis. (So, even where the information is exempt it should still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure).

13. Where a Scottish public authority has made an early identification of categories of information they hold for which a Section 31 (2) certificate might be relevant a **prospective** certificate might be appropriate. In these instances advice on procedures should be sought from the **Scottish Executive's FOI Unit**.

14. Alternatively authorities could consider making a request to Scottish Ministers for an **ad hoc** Section 31 certificate at certain trigger points which may include:

- The point at which an applicant requests a review of a refusal relying on the Section 31 exemption
- The point at which (i) the applicant whose request for information has been refused complains to the Scottish Information Commissioner and (ii) it appears that the Commissioner is minded to pursue the complaint and embark on the enforcement procedure under the Act.

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