

FREEDOM OF INFORMATION - PRACTICAL GUIDANCE NOTES, VERSION 3

CONTENTS

Introduction

1. Handling FOI requests – flowchart summary
 2. Summary of key points to remember
 3. Who is responsible for handling requests?
 4. What is the Publication Scheme?
 5. Your duty to provide advice and assistance to an applicant
 6. Receiving a FOI request
 7. What are the exemptions to FOI? How do I decide if an exemption applies?
 8. What charges can be made for providing information under FOI?
 9. Responding to a FOI request (and refusing requests)
 10. Reviews and Appeals
 11. How does FOI interact with Data Protection (DP) and the Environmental Information Regulations (EIR)?
 12. What is the role of the Scottish Information Commissioner?
 13. Using the FOI e-Form
- Annex A: Useful contacts
- Annex B: Sample wording for correspondence

INTRODUCTION

The Freedom of Information (Scotland) Act places a legal requirement on us to act in the spirit of openness which is already central to the Executive's Aim, Vision and Values. The Executive's [Information Management Principles](#) are also in place, setting out our responsibilities in managing and creating accurate information, making it accessible and meeting our legal requirements. Our [Publication Scheme](#) details what information is available and where it can be found.

The legislative requirements of the FOI Act include providing the information (unless exempt) within 20 working days, a duty to provide advice and assistance to applicants, and proactively publishing information in our Publication Scheme. Some requests for information need careful consideration, firstly whether an exemption to the Act applies, and then (in all but cases of 'absolute' exemption) whether it is nevertheless in the public interest to provide the information.

Requests for information about the environment are covered by the Environmental Information Regulations (EIRs) instead of FOI (see section 11 for an explanation of how the two pieces of legislation interact). Broadly speaking the system for handling EIRs is very similar to FOI - in particular you should advise the FOI Unit about any sensitive or complex cases – however the specific guidance on EIRs should always be consulted, at <http://www.scotland.gov.uk/library5/environment/aeig-00.asp>

This is the third version of step-by-step guidance to dealing with FOI requests within the Executive. The Guidance will continue to be improved and developed as we receive your feedback, however the basic principles remain clear;

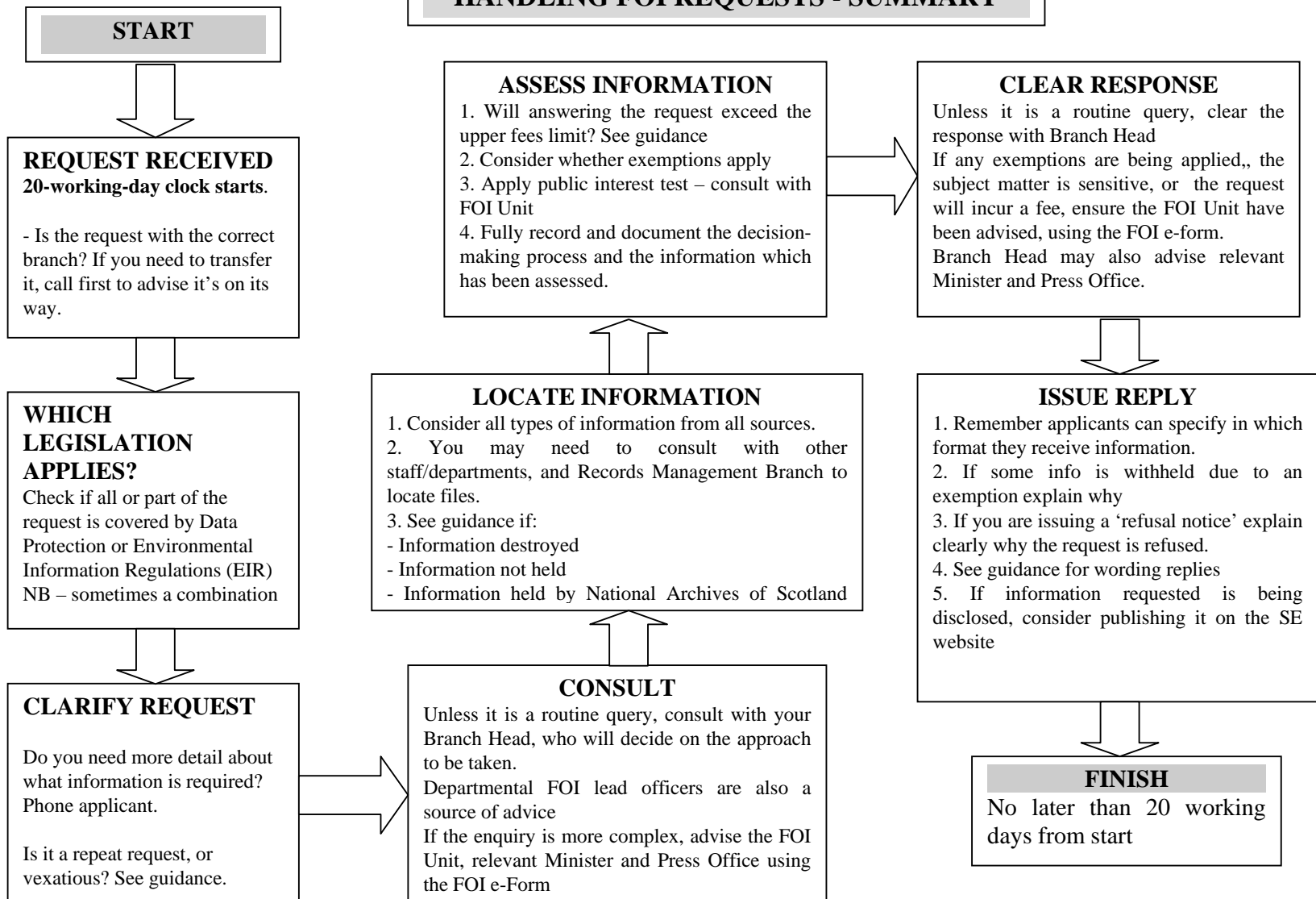
- Enquiries will continue to be received as previously, with some coming via the Central Enquiry Unit, some via Press Office and others directly to the relevant branch.
- FOI requests are answered by the staff with the relevant expertise, but Branch Heads are responsible for more complex cases, which should also be referred to the FOI Unit.
- The FOI e-form should be used for referring all but routine cases to the FOI Unit, and where appropriate the Press Office and the relevant Minister's Office.
- A network of departmental FOI lead officers has been developed, who have more detailed knowledge of FOI, and in some instances you may also need to consult OSSE on considering exemptions and the public interest test.

Information about all but the most routine cases is being collated by the FOI unit, and whether they have resulted in the release of information, or in a refusal

If you have any comments or suggestions about this guidance please contact the [Freedom of Information mailbox](#).

FOI Unit
February 2005

HANDLING FOI REQUESTS - SUMMARY



2. SUMMARY OF KEY POINTS

Responsibilities

- Make sure the enquiry is with the right branch
- Routine enquiries will be dealt with as normal
- Branch heads will be accountable for decisions made, so keep them informed
- Consult with senior staff, OSSE, and the FOI Unit where necessary

Publication Scheme

- We are committed to making information available through our Publication Scheme
- Keeping the Publication Scheme up to date will reduce the number of FOI requests
- Consider what information can be published
- See our Scheme at www.scotland.gov.uk/foi/publicationscheme

Duty to provide advice

- You have a statutory duty to provide advice and assistance to applicants
- Applicants do not have to cite the FOI Act when making a request
- Applicants do not have to explain why they want the information
- They should however clarify what information they need if this will help you locate it

Receiving a FOI request

- Remember a 20-working-day clock is ticking – record the date the request was received
- You can ask applicants to clarify what information they require
- Consider whether providing the information will exceed the upper limit of £600 (see section 8 of Guidance)
- Identify all possible sources of information
- Consider whether exemptions may apply
- Notify the FOI Unit about complex cases using the FOI e-Form
- Fully document your decisions as part of your normal records management processes, so that you can explain how they were reached

Exemptions

- The general presumption should always be in favour of releasing information where possible
- Most exemptions are not absolute and are therefore subject to a public interest test
- Seek advice from the FOI Unit/OSSE if applying exemptions to a request
- Advise relevant Minister's Office and Press Office about sensitive cases
- Document your decisions as part of your normal records management processes to ensure you can explain how they were reached, including a list of documents relevant to the request, and whether exemptions have been applied to them
- Detailed guidance on each of the exemptions is available on the FOI Unit's intranet pages

Responding to FOI requests

- Get the appropriate level of clearance – as agreed with Branch Head - before providing information
- Provide information in the format required by the applicant where possible
- Issue a 'refusal notice' if the information is to be withheld
- Record the date a response was sent
- If exemptions have been applied, explain this to the applicant
- Explain the applicant's rights to have a review carried out by us of the decision reached
- Consider publishing on the internet information which you release as the result of a request

Internal reviews

- Reviews should not be carried out by staff involved in the original decision
- Relevant Head of Department will allocate a person to carry out the review
- Record your decisions as part of normal records management processes so you can explain how they were reached

- Notify the FOI Unit using the FOI e-Form that a request for review has been received
- The review decision must be provided within 20 working days

FOI, Data Protection (DP) and Environmental Information Regulations (EIRs)

- Requests for information can be covered by more than one regime
- Requests from applicants for information about themselves will continue to be covered by DP
- EIRs cover a broad range of information
- Procedures for EIR requests will closely align with FOI

FOI e-form

- We will monitor all but the most routine cases (straightforward requests for information should be responded to as part of our normal business)
- All other cases – and particularly any sensitive or significant requests for information, and requests received from the media – should be notified to the FOI Unit
- The FOI e-form should be completed with details about the case
- The e-form can also be used to notify the relevant Minister's Office and Press about cases

3. Who is responsible for handling FOI requests?

KEY POINTS

- Make sure the enquiry is with the right branch
- Routine enquiries will be dealt with as normal
- Branch heads will be accountable for decisions made, so keep them informed
- Consult with senior staff and the FOI Unit where necessary

3.1 FOI requests should be dealt with by the branch which is leading on the subject in question. Its expert knowledge in an area will be vital in assessing the sensitivity of a particular issue and whether any exemptions apply.

3.2 Your section may be large enough to have designated staff who already deal with enquiries, or they might be answered on an ad hoc basis by whoever receives them. In either case, all staff should have a general understanding of the Freedom of Information regime. Many routine enquiries, such as those which can be answered by information included in the Publication Scheme, can be handled by any member of staff.

3.3 With more complex requests that appear to be covered by an exemption, cases will need to be considered on an individual basis and cleared by your Branch Head. The FOI Unit should be advised about these cases as early as possible using the FOI e-form (available in the e-forms library on the intranet). For guidance on using the e-form see section 13 of this Guidance. A network of Departmental FOI Lead Officers has been established, who can provide you with advice and guidance. (If you are unsure who your local Lead Officer is, a list is available on the FOI Intranet pages.) It may also be necessary to consult with senior staff and solicitors. Circumstances for each request will differ according to the size and make up of branches, but the general principle should be followed that the FOI Unit and senior staff should always be consulted, except where the request is routine. These include cases where the information requested is:

- Sensitive or occurs in sensitive circumstances
- Likely to be refused in whole or in part
- Will incur a fee, or involve such a significant amount of work as to exceed the upper fees limit of £600 – see section 8 on Fees
- Requested by the media

3.4 Sensitive cases might include those requesting advice to Ministers, cabinet papers or briefing, internal discussion or advice, environmental information, or personal information. Wherever there is doubt over issues of disclosure use the FOI e-form.

3.5 Notify the FOI Unit as early as possible, by completing the FOI e-Form and where appropriate copying it to the relevant Press Unit and Minister's office for information so they are aware at the earliest point of public interest in the matter. (Using the relevant tick boxes on the Form will generate an automatic email to them.)

3.6 At present, many enquiries are received via the Central Enquiry Unit who usually forward these on to the relevant department. This system will continue, and it is important to note that the 20-day time limit for responding to requests will start when the enquiry is received by the CEU, not when the enquiry is passed to the relevant business area.

3.7 Where Press Office receive enquiries from journalists, they will forward them to the relevant area as at present, who should then keep them informed about progress, agree the response to be provided, and forward the response to Press Office for issue.

4. What is the Publication Scheme?

KEY POINTS

- We are committed to making information available proactively through our Publication Scheme
- Keeping the Publication Scheme up to date will reduce the number of FOI requests
- Consider what information can be published
- See our Scheme at:
www.scotland.gov.uk/foi/publicationscheme

4.1 FOI isn't just about giving information out when we're asked for it. We have to pro-actively publish information too. It is a requirement of the FOISA that all authorities produce a 'Publication Scheme', which specifies –

- The classes of information the authority publishes or intends to publish
- How the information is published
- Whether the information is available free of charge or on payment of a fee

4.2 *What is the Publication Scheme for?*

The Schemes are intended to make authorities proactively release as much as information as possible, and to make it easy for the public to locate information they need. They also reduce the number of enquiries that are covered by the FOISA – if the information is already covered by the Scheme, it can be automatically released. Information that isn't covered by the Publication Scheme has to be treated as a FOI request (or covered by Data Protection and/or Environment Information Regulations where appropriate).

4.3 *The Scottish Executive's Publication Scheme*

The Scottish Executive has published its own Publication Scheme setting out these points, and describing the functions and structure of the organisation. It was approved by the Scottish Information Commissioner, and has been in force since the 1st June 2004. A full copy of the Scheme is available at www.scotland.gov.uk/foi/publicationscheme. The Publication Scheme is a very useful tool both for us and for the public, and it will be important to keep it up to date. If you identify any classes of information not currently described in the Scheme which you think could be made publicly available (including information released in response to an FOI request), contact the FOI Unit about updating the Scheme. **You should then ensure that the information is made publicly available in the usual manner – normally via the relevant pages of the SE website.** There is also a section in the Publication Scheme providing links to 'recently released information' – contact the FOI Unit if you wish to add to this.

4.4 *Information covered by the Scheme*

We are committed to providing any information listed in the Scheme, and the Scottish Information Commissioner may take enforcement action against us if we do not. There are classes of information described in the scheme which we have not previously published, so it's a good idea to be aware of what it covers.

As a general guide, the types of information which you should ensure are published are:

- Information published for external purposes (such as that already available on the website)
- Public consultations (such as consultation documents and responses)

- External guidance on existing grants and subsidies schemes
- Internal SE guidance (such as manuals on public finance, procurement, the staff handbook, guidance on dealing with Parliament, IT Code of Conduct etc)
- SE business planning (such as departmental business plans)
- Scotland's public authorities and public appointments (such as guides and directories)
- Minutes and papers of task forces and working groups (such as agendas, minutes and papers)
- Procurement (such as contracts awarded and policy notes).

Further detail on each of these categories and how each is available is included in the Publication Scheme www.scotland.gov.uk/foi/publicationscheme. Most of the information included in the Scheme will be available on the website, however where applicants do not have access to the internet or would rather receive a paper copy, they can request this. Contact details for the Central Enquiry Unit are given in the Scheme.

4.5 Accessing information in the Scheme

There is no charge to download information from the website, or for providing a hard copy of a document, but where applicants want multiple copies we are able to charge for the costs of printing and postage (not exceeding £1 per 10 pages). You should advise the applicant at the outset of any costs that might be incurred. In some instances there may be a charge for providing 'hard copies' of publications, which should be made clear in the Scheme.

Where can I find out more?

The Scottish Executive's Publication Scheme is available at;
www.scotland.gov.uk/foi/publicationscheme

See also paragraphs 10 -12 of the FOI Code of Practice;
<http://www.scotland.gov.uk/library5/government/sedfpa.pdf>

And Module 4 of the FOI Open Learning Workbook;
<http://www.scotland.gov.uk/library5/government/foisa-00.asp>

5. Duty to provide advice to applicants

KEY POINTS

- You have a statutory duty to provide advice and assistance to applicants
- Applicants do not have to cite the FOI Act when making a request
- Applicants do not have to explain why they want the information
- They should however clarify what information they need if this will help you locate it

5.1 The FOISA places a duty on public authorities to provide advice and assistance to applicants, which applies to all staff. Applicants cannot be expected to know the provisions of FOISA and may not realise they are making a request under the Act. You should be prepared to explain the key provisions of the Act, and advise what the process of responding to a request will be.

5.2 Throughout the process of responding to a request, make sure that the applicant is kept informed. This will especially apply with more complex requests that may take some time to complete.

5.3 **General advice** to give to applicants could include;

- If we don't hold the information, we will advise them as soon as possible and let them know if it might be held elsewhere.
- If we need to pass the enquiry on to another part of the Executive we will let the applicant know.
- A response will be given within 20 working days.
- They can specify what format they want the information in (see section 8.1 below)
- There are some exemptions to the Act, and if we're unable to answer their request because of an exemption we will explain why.
- They have the right to appeal a refusal. It will first be reviewed internally, and if the refusal is upheld, they have the right to appeal to the Scottish Information Commissioner.

5.4 Particular **points to remember** are;

- Applicants do not have to tell you *why* they need the information. You can however ask them to clarify exactly *what* they want if this would help locate the information.
- Sometimes applicants may not be sure exactly what information they need; if possible, advise them on the different options available.

- There may be various types of information which would answer a request; consider which one would best suit the applicant.
- Sometimes there might be an index which could be provided to the applicant to help identify what information they need.
- A verbal request for information over the telephone does not constitute a FOI request, however in the interests of assisting the applicant, particularly if he/she has a disability or communication difficulties which mean providing a written request is difficult, you could offer to make a note of the request and forward it to the applicant with a stamped addressed envelope for them to sign and return.
- If providing a full answer to an enquiry would mean exceeding the upper cost limit of £600, advise the applicant and explain what can be provided (see guidance on Fees below).
- Advise the applicant if his/her request has been passed to another department for answering.

Where can I find out more?

See paragraphs 2-6, 17-22 and Annex 3 of the FOI Code of Practice;
www.scotland.gov.uk/library5/government/sedfpa.pdf

And Module 8 of the FOI Open Learning Workbook;
<http://www.scotland.gov.uk/library5/government/foisa-00.asp>

6. Receiving a FOI request

KEY POINTS

- A 20-working-day clock is ticking
- You can ask applicants to clarify what information they require
- Consider whether the cost of providing the information will exceed the upper fee limit of £600
- Identify all possible sources of information
- Consider whether an exemption may apply
- Fully document your decisions so that you can explain how they were reached

Written or verbal request?

6.1 Remember that if you receive an enquiry which you can answer quickly and easily as normal – for example on the phone – there is no need to engage the following procedures or refer it to your Branch Head, although the 20 working-days deadline will still apply. Continue to respond to these requests as you would normally.

6.2 To constitute a formal request under the FOI system, an enquiry must be in a recorded form – for example letter or email – and must provide a contact name and address (email address is sufficient). The SE's voicemail system is such that a message left on your voicemail does not constitute a FOI request, however given our duty to provide advice and assistance, you should try and contact the enquirer to explain that a written request should be sent in.

NB: A request made under the Environmental Information Regulations (EIRs) does not have to be in recorded form, and so a verbal telephone request is sufficient.

If you are absent from work

6.3 Make sure that colleagues have access to your inbox in Outlook so that it can be checked for requests received in your absence. If you know you are going to be away from the office set up an out-of-office reply which includes an alternative contact with a detailed email address.

Information covered by Publication Scheme

6.4 Remember that if the information requested is included in the Publication Scheme it is classed as being already accessible, and so the enquiry is not considered to be a FOI request. It will not therefore need a detailed or formal response, and in many instances you may just need to refer the applicant to where the information can be accessed on the SE website, or post the information out to them. In these instances the following process will not apply.

Receiving a FOI request

6.5 First make sure that the request is with the right branch – are you responsible for this particular topic? Remember that providing a response to many requests will need a thorough knowledge of the subject, particularly when considering the sensitivity of the information. **If the request does need transferring, forward it to the correct branch without delay and contact them first to advise it is on its way. Remember the 20-working day time limit.**

What type of query?

6.6 You should then consider whether the request is covered by Freedom of Information, Data Protection, or Environmental Information Regulations (see section 11). Some requests may incorporate more than one regime and so they will need to be broken down into each strand and dealt with accordingly.

20-day deadline

6.7 Replies to FOI requests must be given within 20 working days. It's therefore important that all requests are tracked to ensure this happens, firstly by **recording the date of receipt** by date-stamping the request. Remember that requests from anyone – whether in Scotland or not – are covered by FOI.

Clarifying request

6.8 If it is unclear exactly what information is requested, you can ask the applicant to clarify this, however you should not specifically ask why the information is needed. The 20-day clock will not start until the applicant has provided clarification.

UK FOI Act

6.9 Information which we hold in confidence from UK Ministers or Departments will not be subject to the Scottish FOI Act. (Any information marked restricted or above should be treated as being in received in confidence from the relevant Whitehall department.) You should instead suggest that the applicant contacts the relevant Whitehall Department directly. However, routine and non-sensitive information which we have received from Whitehall is subject to the Scottish FOI Act. You should normally consult the relevant Whitehall Department before you respond to requests for this sort of information.

Pre-devolution files

6.10 A Guidance Note (available on the FOI intranet pages) has been developed on an agreement between the SE and the Scotland Office on how to deal with pre-devolution records of the Scottish Office. Information in records which were held or used in connection with the exercise of devolved functions are covered by the Scottish FOI Act, with the exception of information which is 'held in confidence' having been supplied by a UK Minister or government department, which is covered by the UK FOI Act. If there is any doubt about whether information is 'held in confidence', or if you are applying the public interest test, the Scotland Office should be consulted. The situation with records held or used in connection with the exercise of reserved functions is more complicated, and you should refer to paragraph 11 of the Guidance Note. For further advice contact Stephen Bruce in the Public Records Policy Branch of the FOI Unit. If you establish that the information is covered by the UK Act instead of FOISA, you should issue the enquirer with a 'refusal notice' explaining this, and providing contact details for the Scotland Office.

Vexatious or repeat requests

6.11 In some instances an applicant might send in repeat requests or requests which you consider to be **vexatious**. Section 14 of FOISA makes provision for an authority not to comply with a vexatious request, however the definition of what actually constitutes a 'vexatious' request is not specified. Each case must be considered individually, however irritation or nuisance caused by the applicant is not sufficient grounds to classify a request as vexatious. If a request is not a genuine endeavour to access information for its own sake, but is aimed at disrupting your work or harassing individuals, then it is probably vexatious. Consult with the FOI Unit if you consider a request to be vexatious. If an applicant makes a repeated request which has already been answered, there are grounds not to comply with the repeat unless a reasonable period of time has lapsed. Remember that any refusals to comply may have to be justified to the Scottish Information Commissioner. If a request is refused on the grounds of being either vexatious or a repeat request, we are not obliged to comply with a request from the enquirer for a review.

Sensitive subject matter

6.12 If the request is about a politically sensitive matter or is a matter which is the subject of a high level of media and public interest the Branch Head should ensure that the FOI Unit, the relevant

Minister's Office and Press Office are advised by using the FOI e-Form. The completed forms are retained in a public folder in Outlook by the FOI Unit, and you can check these for an indication of whether similar information has already been released or not.

Locate information

6.13 The next step is to **locate the information** which is needed. You may require the assistance of another part of the Executive in locating the information, in which case contact them as soon as possible explaining when the reply is due by. You should consider all types of information from every source – this may include searching files held locally, email, the IMPReS records management system, and consulting with other staff and branches. You may need to contact the applicant to clarify which information would best answer the query.

Information destroyed

6.14 If the information requested has already been routinely destroyed as per the department's retention schedule, explain this to the applicant in writing – see section 9 on refusing requests and the sample wording in section 14. For further information on retention schedules see the Records Management Branch Manual on the intranet. **NB: the deliberate destruction, defacement, alteration or concealment of information to avoid response to a FOI request is an offence.** If the applicant requests information on the destruction of particular records (for example when destruction was carried out, and on what authority) contact the Corporate Records Manager, Ken Glasgow in the Records Management team.

Information not held

6.15 If the information is not held but is likely to be with another authority, explain this to the applicant in writing (see guidance on refusing requests), giving contact details for the correct authority where possible (remembering the duty to provide assistance). If the information is held by an Executive agency or non-ministerial office holder forward the request on without delay and advise the applicant accordingly.

Information at the National Archives of Scotland

6.16 If the information has been transferred to the National Archives of Scotland (NAS) the relevant file may already be open to the public and therefore already accessible. In this instance you can direct the applicant to NAS and proceed no further. If the file however is 'closed' it is for you, and not NAS, to make a decision whether the information can be released. If the enquiry was received by you, and not NAS, you must deal directly with the applicant. Files held by NAS can be temporarily returned to the Executive for reviewing. Requests for NAS files should be made via Records Management Branch who will track the location of the file. Files which have been transferred to NAS will be noted as such on the records management IMPReS system, and you can also access NAS' own detailed catalogue at <http://195.153.34.3/dservea/>.

Sometimes applicants will go direct to NAS - if the file is already 'open' they will make it available to the enquirer in their public search room. If the files is still 'closed', NAS will contact you asking you to review the information and consider whether any exemptions apply. In these cases, NAS will issue the response to the enquirer, and the maximum response time is increased to 30 working days (but cases should still be dealt with as promptly as possible)

Guidance on reviewing old files which are held by NAS is available on the FOI intranet pages.

Assess information

Assessing exemptions

6.17 Once you have located the information, it will need to be assessed to see whether any exemptions apply. This may involve examining it in some detail. Written guidance on each of the exemptions is available on the FOI Unit intranet pages. Questions to ask when considering exemptions include;

- Is the information marked as confidential?
- Is the information personal?
- Is it information that will have to be released at a future date anyway?
- If you think an exemption may apply, is it to the whole of the information or just sections?
- Is there more than one exemption that may apply?
- Are the exemptions non-absolute, so a public interest test will be needed?
- Are there any other legal restrictions on the information's release?

Ensure that the FOI Unit, Minister's Office and Press Office have already been alerted – through completing and submitting the FOI e-Form - if the case is politically sensitive, of public interest or importance.

Applying exemptions

6.18 Remember that you should fully record the decision-making process through your normal record-keeping procedures, and include the reasoning behind your application of the public interest test. If the applicant decides to appeal against your decision, you will need to be able to justify and explain how you reached it. In some instances only part of the information requested might be covered by an exemption, or releasing it in its entirety may result in a breach of the Data Protection principles. You should still make efforts to release what information you can to the applicant. This may involve blanking out certain sections (such as personal information) which is known as '**redacting**', or information may have to be extracted. (Remember if you are redacting information in an electronic version of a document you should provide the document in pdf format to the enquirer and not a Word version, from which redacted information can be retrieved.) You should explain to the applicant why you have had to do this and under which exemption, and advise them of their right to appeal against your decision. When recording your decisions internally, include details of the information that you have withheld and why.

Recording your work

6.19 It is good practice to keep a schedule of all documents within the scope of the request, logging against each one whether the material is exempt from disclosure in full or part, or whether the material can be released.

Assessing fee

6.20 Some requests may need such a large amount of time to answer or be so expensive to produce that to do so would **exceed the upper limit** of £600 set by the Fees Regulations (see section 8 for guidance on **Fees**). It's important therefore to carefully consider at the outset what work will be involved in providing an answer. You are not for example expected to undertake analysis of data; you can only provide information which we already hold.

If a fee is to be charged, the applicant has 3 months to provide this, during which time the 20-day 'clock' is stopped and re-starts on the day the fee is received.

Where can I find out more?

See the FOI Code of Practice;

www.scotland.gov.uk/library5/government/sedfpa.pdf

And Modules 8 and 9 of the FOI Open Learning Workbook;

www.scotland.gov.uk/library5/government/foisa-10.asp

www.scotland.gov.uk/library5/government/foisa-11.asp

See also the Guidance on reviewing old files, on the FOI Unit intranet pages.

7. What are the exemptions to FOI? How do I decide if an exemption applies?

KEY POINTS

- The general presumption should always be in favour of releasing information where possible
- Most exemptions are not absolute and are subject to a public interest test
- Seek advice from the FOI Unit on applying exemptions to a request
- Advise relevant Minister's Office and Press Office of sensitive cases
- Document your decisions to ensure you can explain how they were reached, including a list of documents relevant to the request, and whether exemptions have been applied to them
- Detailed written guidance on each of the exemptions is available on the FOI Unit intranet pages

Whilst the 'exceptions' under the Environmental Information Regulations (EIRs) are similar to the FOI exemptions, you should always consult the EIR Guidance when considering requests for environmental information.

7.1 Part 2 of the FOISA specifies the types of information that are exempt from FOI requests. Some of these are 'absolute' exemptions, but most exemptions are 'conditional' – this means that you must weigh up whether it would be in the public's best interest to release the information, despite it being exempt from FOI. This is known as the 'public interest test' (see below). Remember when deciding to release information that in the spirit of openness the presumption should always be in favour of disclosure.

7.2 When you are assessing whether an exemption applies and considering the public interest test, ensure that the FOI Unit is consulted, and advise the relevant Minister's Office and Press Office that the case is possibly sensitive and that exemptions may apply. (This should be done by completing the FOI e-Form.) The Branch Head should exercise discretion when considering whether this is necessary. In some cases it may also be necessary to take legal advice. Where information is exempt because it is already accessible – for example it is already published, or on open access at the National Archives of Scotland, there is no need to consult the FOI Unit.

7.3 The exemptions under the Environmental Information Regulations are broadly similar to the FOI exemptions, although there are no 'absolute' exemptions and so the public interest test needs to be applied in all cases. For more information on the EIR exemptions see the guidance at <http://www.scotland.gov.uk/library5/environment/aeig-00.asp>, and for information on the differences between FOI and EIRs see section 11.

7.4 The main categories of information that are covered by **absolute exemptions** are;

- Information that is already available, such as information included in the Publication Scheme
- Information that cannot be released because of other prohibitions (such as legislation or risk of contempt of court)
- Confidential information obtained from another person, the release of which would constitute an actionable breach of confidence
- Court records

- Personal information that is requested by the subject, and therefore comes under Data Protection law.

When an absolute exemption applies the information does not have to be released, however it is not compulsory to withhold the information, and in some instances a decision may be taken not to withhold. This should only be taken forward by senior staff, in consultation with the FOI Unit, relevant Minister and Press Office.

7.5 The **conditional exemptions** to which the public interest test must be applied are;

- Information intended for future publication
- Information about relations within the UK
- Formulation of Scottish administration policy
- Prejudice to effective conduct of public affairs
- National security and defence
- International relations
- Commercial interests and the economy
- Investigations by Scottish public authorities
- Law enforcement
- Health, safety and the environment
- Audit functions
- Communications with Her Majesty and honours

7.6 FOI requests that apply to information covered by any of the conditional exemptions above need to be subject to the '**public interest test**'; in other words, you should consider whether it would be in the public's best interests to release the information, or to withhold it. Bear in mind that the general presumption should always be in favour of releasing information where possible. Each case will differ as it will depend on the type of information concerned; one example of possible release would perhaps be the release of figures relating to the incidence of a serious illness in a particular region. The conclusion reached about the public's interest may also change over time, and so subsequent requests about the same information may need a re-assessment of the public interest test.

7.7 There is no simple definition of 'public interest' as it will depend on the particular circumstances, however it has been described as something that is of serious concern or benefit to the public, not merely of personal interest. It is therefore 'in the interests of' the public, not what the public is interested in. The types of questions that you should ask about the information when applying the public interest test are:-

- would disclosure of the information requested enhance public scrutiny of our decision making processes and therefore our accountability?
- would disclosure contribute to the administration of justice and enforcement of the law or would it prejudice the prevention or detection of crime or the apprehension or prosecution of offenders?
- would disclosure affect the economic interests of the whole or part of the United Kingdom?
- would disclosure contribute to ensuring there is effective oversight of expenditure of public funds and that the public obtain value for money?
- would disclosure ensure the public are kept adequately informed of any danger to public health or safety, or to the environment?
- would disclosure have an adverse impact on national security or international relations?
- would disclosure help ensure that any public authority with regulatory responsibilities is adequately discharging its functions?
- would disclosure contribute to a debate on a matter of public interest?
- would disclosure prejudice the protection of an individual's right to privacy?

7.8 Things to consider;

- Each case will have to be considered on its own merits, as the circumstances surrounding the types of issue in the questions above will change with time. Many will not have an easy answer, and you may need to consult with senior staff, the FOI Unit, and take legal advice.
- Some exemptions will not apply forever but will fall away with time, for example after 30, 60 or 100 years.
- Files which have a security classification (such as 'restricted' and 'secret') are not automatically exempt from FOI, although the file marking may indicate that the file contains sensitive information and so an exemption could apply. Requests for information in restricted files should be considered in the same way as any other FOI request.
- The risk of causing embarrassment, even to Ministers or senior officials, should not be taken into account when considering whether information can be released.
- Sometimes an exemption will only be applicable to part of the information requested, and you should provide as much information as is possible. In some instances this may require 'redacting' (deleting or blanking out) sections of a document. If this is done in an electronic document, remember to provide a pdf version, not a normal word version from which past deletions and changes can be extracted.

7.9 Guidance is being developed on how to treat certain categories of information under FOI (for example whether they will, in general, be releasable). This will be available on the FOI Unit's intranet pages.

7.10 Remember that whenever exemptions are being applied, keep a full record of the decision-making process so that you can justify the action taken. The applicant may request a review of your decision, and the Information Commissioner may subsequently be involved if the applicant remains unsatisfied. Keep records of all the documents you have considered and the exemptions applied.

Where can I find out more?

There is a detailed description of each of the exemptions in modules 12 – 14 of the FOI Open Learning Workbook, each with practical case studies
www.scotland.gov.uk/library5/government/foisa-14.asp.

Written guidance on each exemption is available on the FOI Unit intranet pages.

Guidance on Environmental Information Regulations (EIRs) is at
<http://www.scotland.gov.uk/library5/environment/aeig-00.asp>

8. What charges can be made for providing information under FOI?

KEY POINTS

- The Executive will **not** charge applicants for information where the costs of doing so are less than £600 (approximately 5 working days' staff time)
- Above the £600 limit there is no requirement to provide all the information but limited charges can be made where you decide to comply with the request
- Any charges above the £600 limit need to be agreed in advance with the applicant
- In calculating costs only a limited range of tasks can be taken into account

Charging under Freedom of Information

8.1 The FOI regime only allows for limited recovery of costs associated with providing information. The Fees regulations set out the discretionary framework for charging. These provide for the first £100 of costs to be provided free of charge, and from thereon only 10% of costs to be recovered up to an upper cost limit which is £600.

8.2 The Executive has decided not to charge applicants where the cost of locating and providing the information is less than £600. The regulations limit the hourly rate for staff time to a maximum of £15 - this means that unless it is clear that more than approximately 5 working days' staff time is involved in responding to requests then no charge should be made. The £15 is a maximum charge and not a flat rate – generally, staff of A4 grade and lower cost less per hour, and so if they could carry out the necessary work to respond to a request your calculations should take this into account.

8.3 Where the costs of meeting a request exceed £600 there is no obligation to provide the information. We can however take a view that the information should be provided anyway, either with no cost to the applicant, or with the applicant agreeing to meet the allowable costs above £600. If for any reason staff are unsure about what to charge or which aspects of work can be included in assessing charges, contact the FOI Unit on the numbers below.

8.4 In considering whether or not associated work might breach the upper cost limit there are a number of factors to consider. Not all costs can be taken into account. For example, we cannot charge for the time spent in considering whether or not we hold the information or indeed whether the information is exempt or not. In considering staff time associated with responding to requests the maximum of £15 per hour for staff time is attributed. Charges can only be made for locating and providing the information, and for giving effect to any preferences expressed by the applicant, for example requesting a summary of information in a particular format. Any costs incurred in fulfilling our duties under the Disability Discrimination Act (such as providing information in the format required by the applicant, eg Braille or audio) cannot be charged to the applicant.

Providing information above the £600 limit

8.5 It is expected that most requests for information will not exceed the £600 ceiling. However some requests may require extensive work and searching. Because of that an initial view needs to be taken locally about the scale of work involved and whether or not it should be undertaken. We have a duty to provide advice and assistance, and even if it is considered that the scale of information sought is excessive we need to consider what information we might be able to provide at no cost to the applicant (i.e. within the £600 limit). Contact the applicant to discuss whether he/she wishes to revise their request to bring it below the £600 limit.

8.6 Where it is decided to provide the information, despite associated work exceeding the upper cost limit of £600, the fee charged needs to be notified to the applicant and agreed with him/her prior to providing the information. Any such fee needs to be justified in terms of the staff time, copying, and other costs associated with responding to the request. The applicant should be advised of the charge and how that has been arrived at in writing or by e-mail. **It should be explained to the applicant at this point that no money should be sent until an invoice has been issued.** Once the applicant has agreed to pay the charge an invoice should be raised in the normal way; see <http://intranet/content/corporate/systems/seas/operations/ar/index.asp>

8.7 Where the decision is made not to provide the information, because the associated work will exceed the upper cost limit, a response should be issued to the applicant within the 20 day statutory period. Any information that can be provided within the £600 limit should also be provided within the 20 day period.

8.8 Where the decision is made to provide the information even though the associated work exceeds the £600 limit then the information does not need to be provided within the 20 day period. However the applicant should still receive confirmation within the 20 day period that the information sought will be provided in due course notwithstanding the fact that the upper cost limit is breached.

Where can I find out more?

The fees regulations are in two parts because there were different parliamentary procedures associated with those above and below the upper cost limit.

www.scotland-legislation.hms.gov.uk/legislation/scotland/ssi2004/draft/20049237.htm

www.scotland-legislation.hms.gov.uk/legislation/scotland/ssi2004/20040376.htm

Guidance on applying the fees regulations form part of the section 60 Code of Practice which can be accessed here:

<http://www.scotland.gov.uk/library5/government/sedfpa-01.asp#a3>

Should you require further advice on charges under FOI contact the FOI Unit on Ext 44613 or Ext 45189.

9. Responding to a request (and refusing requests)

KEY POINTS

- Get appropriate level of clearance before providing information
- Provide information in the format required by the applicant
- Issue a 'refusal notice' if the information is to be withheld
- Record the date a response was sent
- If exemptions have been applied, explain this to the applicant
- Explain the applicant's rights to request that we carry out a review of our decision
- Notify the FOI Unit about refusals of requests for information by using the FOI e-Form.
- If information is released, consider publishing it on the SE website and adding a link to the 'recently released information' section of the Publication Scheme

If an enquiry is passed to you by the Press Office, your response should be agreed with them, and then passed to them for issuing (the response though will be in your name). If you are responding to a request made by a journalist direct to you and not via Press Office, ensure you still agree the response with Press Office, and when issuing the response copy them in.

9.1 *Format of information*

Remember that **applicants can specify which format** they wish to receive information in. They may for example need a paper copy, request that it is saved to disk or CD-Rom, ask for a summary, or wish to view the relevant file itself. In cases where it is reasonably practicable to do so, you should comply with their wishes. When providing electronic versions of documents, do this in pdf version where possible – this is particularly important in instances where some information has been redacted due to an exemption, because word versions allow retrieval of deleted information and past alterations to be traced. In instances where it is not possible to provide information in the format requested, you should explain why (an example may be where an applicant requests to see an original file, however it contains exempt information as well as releasable information, or it is in a particularly fragile condition, which is the case with many files at the National Archives of Scotland). Remember that under the Disability Discrimination Act (DDA) we have a duty to provide services, including making information physically accessible when providing it. This may for example involve producing it in a larger script or different format where it is practicable to do so. The costs of complying with the DDA cannot be passed on to the applicant.

9.2 *Providing information*

Before issuing the information ensure that the appropriate clearance has been granted – Branch Heads are responsible for decisions about releasing information. Where exemptions have been applied, the FOI Unit should have been consulted and the relevant Minister's Office and Press Office notified, at the Branch Head's discretion. When replying, include an explanation of any exemptions that may have been applied and the public interest test, and present the information clearly. **Details of how a complaint or review can be requested should also be given.** (Even in cases where you are providing information requested, the applicant may believe there is further information available, or be unhappy with how their request has been processed.) If the response time has exceeded the 20 working day limit, your reply should include an apology and explanation.

Remember – where you have provided information in response to a request, consider publishing it on the Executive's website so that it is made publicly available. You may also wish to add a link to the 'recently released information' section of the Publication Scheme (contact the FOI Unit). Please notify the FOI Unit if you are publishing a new class of information not already

described in the Publication Scheme. If you do intend to publish, advise the applicant when responding to the request (sample wording is available in Annex B).

9.3 **Copyright**

Information that is supplied may also be subject to copyright protection; this will be Crown Copyright if the information was produced by the Executive, or if it was supplied by an external body the copyright will belong to that body. The applicant may infringe the copyright if he/she makes multiple copies or issues copies to the public. Your reply should include a warning to this effect, for example;

'The supply of documents under FOI does not constitute permission for their re-use in such a way that would infringe copyright. You should obtain permission from the copyholder before any such use'.

9.4 **Recording request**

Make sure you record the details of the case as part of your normal record-keeping practices. This should include the date on which information was provided so that you have a record of **completing the request** within the 20 day time-frame. If you have exceeded the 20 days, the applicant has the right to complain firstly to the Executive and then to the Information Commissioner, and so you should fully document the reasons why this may have occurred. It is good practice to also keep a schedule of all documents within the scope of the request, logging against each one whether the material is exempt from disclosure in full or part, or whether the material can be released.

9.5 **Information not held**

Some requests may be for information which we do not hold – in these cases you must notify the applicant as soon as possible (and no later than 20 working days) by issuing a refusal notice (see section 14 for sample wording for letters). If you are aware of any other possible sources of information, you should advise the applicant accordingly and provide contact details if you have them. If the information has been routinely destroyed as part of normal records management procedures this should be explained. **NB: the deliberate destruction, defacement, alteration or concealment of information to avoid response to a FOI request is an offence.**

9.6 **Request exceeds upper fees limit**

In some instances answering the request may exceed the upper threshold of £600 set by the Fees Regulations. (See section 8 for guidance on fees.) Make sure the FOI Unit is advised about such cases by completing the FOI e-Form. Advise the applicant in writing that the request is being refused on these grounds, explaining how the estimate of costs has been arrived at. It may be possible to provide similar information more easily, or a sample of what is requested; in the interests of offering advice and assistance, you should explain this to the applicant and offer to provide what information you can. They may be able to modify their request to reduce the costs involved.

If the applicant believes the estimated costs to be excessive he/she has the right to request a review of your decision, and this right should be explained in your refusal letter giving contact details for the relevant Head of Department.

9.7 **An exemption applies**

If a request is refused because an exemption has been applied, you must explain this in writing (which the Act calls a 'refusal notice') within 20 working days, detailing;

- That the information is held
- Which exemption applies
- Why the exemption applies
- Why application of the public interest test has found in favour of withholding the information (in cases where the exemption isn't absolute)

- You are not obliged to provide an explanation of why the exemption applies in instances where this would itself entail divulging some of the withheld information.

- Remember that if an exemption is being applied the FOI Unit should have been consulted, and the relevant Minister's Office and Press Office advised (at the Branch Head's discretion).
- Details of cases referred to the FOI Unit using the FOI e-Form will be collated in a public folder by the FOI Unit..
- Your letter must include advice on how the applicant can request a review of the decision or make a complaint to the Scottish Information Commissioner. It should include contact details for the Head of Department, to whom requests for reviews should be sent. See section 14 for sample wording of letters.

Where can I find out more?

See Part II of the FOI Code of Practice;

www.scotland.gov.uk/library5/government/sedfpa.pdf

And Module 8 of the FOI Open Learning Workbook;

<http://www.scotland.gov.uk/library5/government/foisa-00.asp>

For more information on copyright issues see paragraphs 13 and 14 of the Section 60 Code of Practice at www.scotland.gov.uk/library5/government/sedfpa.pdf

10. Reviews and Appeals

KEY POINTS

- Reviews will not normally be carried out by staff involved in the original decision
- Relevant Head of Department will allocate a person to carry out the review
- Record your decisions so you can explain how they were reached
- Notify the FOI Unit that a request for review has been received by using the FOI e-Form
- The review decision must be provided within 20 working days
- Contact the FOI Unit if the Commissioner advises an applicant has appealed to him about a review decision

10.1 **Notify the FOI Unit about all requests for reviews by completing details of the case on the FOI e-Form.** In most cases the details of the original request will already have been submitted to the Unit if it was refused, and it will be a case of updating the existing FOI e-Form, which you can access in the Freedom of Information I Casework public folder on Outlook. The e-Form can only be updated by its original creator (see below).

What is the review process?

10.2 If an applicant is dissatisfied by the way a FOI request has been dealt with and wishes to complain or have it reconsidered, he or she can request a review is carried out. The applicant can only take their case to the Scottish Information Commissioner for appeal once this avenue has been exhausted and the applicant remains dissatisfied with the result of a review.

10.3 The applicant must apply in writing (or other permanent form such as email) to the relevant Head of Department within 40 working days asking for a review and specifying the nature of their complaint. **A response must be issued by us within a further 20 working days.** In cases where the information is held at the National Archives of Scotland (NAS) they will ask the Executive to carry out the review.

10.4 The Head of Department's details should be provided to the applicant in your response to their original request (see standard wording in Annex B). However if the applicant writes to you requesting a review instead of the Head of Department, you should still forward it on so that a suitable reviewer can be allocated.

10.5 The Head of Department will select an officer to carry out the review, and the PS/Department should inform the lead division which handled the original application about the review request. The lead division, as owner of the FOI e-form, should then update the form (kept in the FOI Casework public folder in Outlook) to indicate that the review has been received. This involves simply selecting the 'review requested' box on the form. Similarly, when the review has been completed, the lead division is responsible for checking that the review has been completed and entering the necessary data on the form.

10.6 The allocated reviewer should write to the applicant when the case is passed to them, explaining that they will be carrying out the review, and if the applicant has not already made it clear

why they require a review, asking for clarification of this. If clarification is needed, the 20-day timescale will start when the applicant has provided this. (See Annex B for sample wording for review letters.)

When are reviews likely to be requested?

10.6 In most instances, a request for a review will be received where an applicant is unhappy that an exemption has been applied and so the information requested has not been provided. There may also be instances where an applicant believes that information is available when they have been advised that this is not the case. Where an applicant has failed to receive a reply, or has not received one within 20 working days, there are also grounds for requesting a review of how their request was handled. If a FOI request was refused on the grounds that it was a repeated or vexatious request, a review does not have to be carried out, however your refusal letter should advise the applicant of his/her right to appeal direct to the Scottish Information Commissioner.

Who should carry out reviews?

10.7 When an applicant requests a review of a decision to withhold information, the relevant Department Head will allocate the case to a suitable staff member, who was not responsible for the original decision and has sufficient knowledge of the subject. In most instances the case will be passed to a more senior staff member. In cases where the original decision was taken by a Minister, the case will remain with that Minister, who must seek advice from different officials. In all instances the FOI Unit should be informed that there has been a request for review by completing the FOI e-form

10.8 What should be considered when carrying out a review?

- The review must be fair and impartial, and the case considered completely afresh
- Establish on what grounds the applicant is requesting a review – reasons may include; because exemptions have been applied; because they believe there is further information available; or they have a complaint about how the request was handled
- Obtain all paperwork about the original request explaining how it was processed, how exemptions were applied and the public interest considered, and demonstrating that the statutory timescales were met. This should include a schedule of all documents which were within the scope of the original request and a note of whether material was considered to be exempt or releasable.
- Discuss the case with the staff who originally handled it and establish why the request was refused or timescales not met, etc.
- Establish whether procedures were properly followed when the original request was dealt with – were timescales met, was a full explanation provided of any application of exemptions and the public interest test, and was the duty to advise and assist met?
- The reviewer may need to look again at whether all possible sources of information were considered
- The reviewer should consider afresh whether any exemptions apply – does the information requested genuinely fall within the exemptions cited?
- Have there been any developments since the original response was made that should alter the reviewer's approach?
- What weight should be given to any additional points made by the applicant when registering their complaint?
- Is it possible to provide any additional information? For example not all the information may be covered by exemptions, and it may be possible to redact documents to remove sensitive

information. It may also be possible to provide alternative information that would help the applicant.

- Is there a public interest in overriding the exemption that has been applied, and disclosing the information?
- The reviewer may need to seek further advice from OSSE
- If the reviewer reverses the original decision he should highlight any problems with internal processes with the area that originally dealt with the enquiry – for example staff might need to track requests more closely to ensure timescales were met, or might need a clearer understanding of applying the public interest test

Issuing results of reviews

10.9 The response to a request for review should come from the reviewer, and not the staff who dealt with the original request. Your reply should set out the decision reached following the review, explaining why the original decision has been upheld or reversed, and giving the reasons for such a decision (e.g. that the exemption(s) had been properly applied and that on balance the public interest lay in withholding the information, or in cases where information is to be released, why this is the case). The reply must also explain the applicant's right to appeal to the Scottish Information Commissioner (see standard wording in Annex B). If the review has found that the request was not properly handled an apology should be made and steps taken to avoid a recurrence.

10.10 Where the review has reversed the original decision and is now providing information previously withheld, the information should normally be enclosed with the review decision. If this is not practicable, indicate when the enquirer will receive it, which must be no later than 20 working days after receipt of the request for review. If it is decided on review to supply information which we are not required to – for example the cost of providing it may exceed the upper cost limit of £600 – the information should be provided as soon as reasonably practicable.

Recording reviews

10.11 The review process should be as transparent as possible. It will be necessary to demonstrate that a request has been fully reconsidered (and the original decision not just 'rubber stamped') and how conclusions have been reached. When recording a review process you should include the factors taken into consideration when deciding on what exemptions may apply, and when carrying out a public interest test. If the applicant subsequently appeals to the Scottish Information Commissioner, the Commissioner will require to see all the relevant paperwork.

Appeals to the Commissioner

10.12 If an applicant is dissatisfied with the result of a review, or has had no response after 20 working days, they then have the right to take their complaint to the Scottish Information Commissioner (which must be done within 6 months). The Commissioner will then try to resolve the case. He may require details from you about the case, which he will do by issuing an 'information notice'. If he decides that we are not complying with our duties under the Act he can issue an 'enforcement notice' stating what needs to be done. His final decision will be issued in the form of a 'decision notice'.

In all cases where the Commissioner contacts the Executive about an appeal, you must advise the FOI Unit.

Where can I find out more?

See Part III of the FOI Code of Practice at;

<http://www.scotland.gov.uk/library5/government/sedfpa.pdf>

Also Module 19 of the FOI Open Learning Workbook;

<http://www.scotland.gov.uk/library5/government/foisa-00.asp>

The Commissioner's website contains information on the appeals process

<http://www.itspublicknowledge.info>

11. How does FOI interact with Data Protection (DP), and the Environmental Information Regulations (EIR)?

KEY POINTS

- Requests for information can be covered by more than one regime
- Requests from applicants for information about themselves will continue to be covered by DP
- EIRs cover a broad range of information
- Procedures for EIR requests will closely align with FOI

11.1 The Freedom of Information (Scotland) Act is not the only legislation that covers information access – there are also the Data Protection Act (DPA), and Environmental Information Regulations (EIR). Requests for information that are covered by each of these must be dealt with in slightly different ways and so you need to be aware of each. Some requests may also be covered by more than one, and so you should be aware of how to recognise this so that the different rules for each can be applied.

FOI

11.2 From 1 January 2005 everyone has a right of access to the information held by public authorities. Some information is exempt, such as material that might endanger national security, or information which is already published (which is described in the authority's Publication Scheme), and some information will fall instead under DPA or EIR. (Detailed written guidance on each of the exemptions is available on the FOI Unit intranet pages.)

EIRs

11.3.1 Information requests concerning the environment are governed by Environmental Information Regulations (EIR). These regulations are already in existence, however they are being revised for January 2005 to ensure compliance with our current European commitments. They will align with the FOI regime as much as possible to help Scottish public authorities administer the two regimes and make it easier for the public to understand. 'Environmental information' covers a broad spectrum of issues - not only the obvious subjects such as pollution and conservation, but also the built environment such as developments, planning, and anything affecting health.

11.3.2 There are many similarities between the FOI and EIR regimes. From 2005, both make use of the public interest test in determining whether information should be released. Both require a duty to provide assistance and advice to applicants, there are broadly similar exemptions applying to both, both are fully retrospective, and the Scottish Information Commissioner is responsible for considering appeals by applicants against decisions.

11.3.3 *Main differences between FOI and EIRs*

	FOI	EIRs
Response time	20 working days	20 working days, but can be increased to 40 if complex and voluminous request
Format of requests	Requests must be made in recorded form	Requests can be made in any form, including telephone
Exemptions	Some exemptions are absolute, so a public interest test is not applied	A public interest test must always be applied
Fees	An upper and lower limit applies	No upper and lower limits, although can be aligned with FOI practice
Bodies covered	All public authorities (as per Schedule 1 of Act)	All public authorities (as per Schedule 1 of FOISA) plus persons/bodies carrying out public functions relating to the environment – so can include private businesses

DPA

11.4.1 Information requests concerning personal data are affected by the Data Protection Act (DPA). The DPA provides living individuals with legal rights in respect of personal data held about them by others including rights to gain access to their own information. . The following provides some basic pointers on how DPA interacts with a variety of FOI requests, but for more detailed guidance on DP see the SE intranet.

11.4.2 If individuals make requests for information that is held about themselves, these are 'Subject Access Request' under Data Protection, and so exempt from FOI. There is a £10 charge for providing the information and a maximum of 40 days to respond. Requests should be sent to the SE Data Protection Unit for processing (see DP guidance on Intranet).

11.4.3 If the request is for information about another living individual, the request will fall under FOI but disclosure must not breach the Data Protection principles (see list below) or cause the release of sensitive personal data which may lead to damage or distress to the individual. If it is decided to disclose the information, then the third party should be informed and account taken of their wishes, although you are not bound to follow them.

11.4.4 If the request is for information which contains incidental references to living people, you should again make sure that releasing it will not breach the Data Protection principles (see list below). References to people in a professional capacity, such as their name in minutes etc, does not breach DP. If the references contain personal information of a sensitive nature – such as health, sexuality, etc – this information may have to be removed (known as 'redacted') before releasing it, to avoid breaching DP.

11.4.5 The Data Protection Principles say that data must be:

1. fairly and lawfully processed
2. processed for limited purposes
3. adequate, relevant and not excessive
4. accurate
5. not kept for longer than is necessary
6. processed in line with an individual's rights
7. secure
8. not transferred to other countries without adequate protection.

NB: Data Protection remains a reserved matter, and the UK Information Commissioner is responsible for it, not the Scottish Information Commissioner.

Where can I find out more?

See the SE intranet for more guidance on data protection issues.

For more information on EIRs see the Executive's guidance at <http://www.scotland.gov.uk/library5/environment/aeig-00.asp>

12. What is the role of the Scottish Information Commissioner?

12.1 The Commissioner is a fully independent public official, and has two main roles; to ensure the public are aware of their rights under FOI, and to enforce the obligations that public authorities have under FOI to ensure the public's rights of access. He is also responsible for promoting and enforcing the Environmental Information Regulations (Scotland) 2004. The first Scottish Information Commissioner is Kevin Dunion, who was appointed in February 2003 by Her Majesty the Queen for an initial period of 5 years.

Appeals

12.2 If applicants are dissatisfied with the way we have dealt with their request, they have the right to request that we review the decision we've reached, or the way we handled the request (for example the 20 day time limit may have been breached). If they are dissatisfied with the outcome of the review they can then appeal directly to the Commissioner. The Commissioner will issue a 'decision notice' explaining his decision. If he needs further information from us in order to reach a decision, he will issue an 'information notice'. If the Commissioner decides we must take specific steps to achieve compliance he will issue an 'enforcement notice' detailing these, and the timescale within which we must comply. If we believe we have grounds, we can appeal against his decision but failure to comply can lead to us being in contempt of court.

Codes of Practice

12.3 If we are not meeting the requirements of either of the two Codes of Practice issued under the FOI Act (the Section 60 Code on the discharge of functions by public authorities under FOI, or the Section 61 Code on Records Management) the Commissioner can issue a 'practice recommendation' setting out what improvements should be made.

NB: Data Protection remains a reserved matter, and the UK Information Commissioner is responsible for it, not the Scottish Information Commissioner.

Where can I find out more?

See the Scottish Information Commissioner's website at www.itspublicknowledge.info, which includes links to the Codes of Practice.

13. Using the FOI e-Form

KEY POINTS

- The FOI Unit is required to monitor all but the most routine cases (straightforward requests for information should be responded to as part of our normal business)
- All other cases – and particularly any sensitive or significant requests for information, and requests received from the media – should be notified to the FOI Unit
- The FOI e-form should be completed and updated with details about the case as it progresses
- The e-form can also be used to notify the relevant Minister's Office and Press about cases
-

General Approach

13.1 We do not monitor every request for information received by the Scottish Executive. Many requests are straightforward to deal with and are mainstreamed as part of our normal business. Increasingly, much of what we want to publish will form part of the Executive's publication scheme.

13.2 An e-form is available to enable divisions to notify the FOI Unit about all but routine cases – and particularly any which are significant or sensitive. The form can also be used to make ministerial private offices and press desks aware of such cases. In addition to providing guidance on cases the FOI Unit will report on how these have been dealt with. (Please note this is in addition to any local monitoring systems which your department or division may have created, and which are not connected to the FOI Unit's processes.)

13.3 Sensitive cases might include those requesting advice to Ministers, cabinet papers or briefing, internal discussion or advice, environmental information, personal information, or enquiries from the media. Wherever there is doubt over issues of disclosure use the e-form.

13.4 The e-form should always be used where the lead division considers that the information requested is:-

- sensitive or occurs in sensitive circumstances
- likely to be refused in whole or in part
- likely to incur a fee (or involve such a significant amount of work as to exceed the upper limit of £600 – approximately one week of staff time) or
- has resulted in a request for a review or in an appeal being made to the Scottish Information Commissioner.

Using the e-form

13.5 The form is accessed via **e-forms** on the SE intranet (Systems – e-forms). Where you have a request that you consider falls into one of the above categories simply complete the form.

13.6 Some of the fields will be automatically populated (for example the reference number, the response due field, the author and the branch details). Others will need to be completed by you. However, these are intended to provide straightforward details of the case, the name and address of the applicant, a short description of the request, when it was received, and the category of information sought (this is a simple subject list that corresponds to the government category list used in eRDM).

13.7 You should then indicate which of the recipients shown in the form you need to notify of the request. In all cases where the form is being used you should select the FOI Unit, either for information, or (where you need advice) for action. You can decide on a case by case basis whether press colleagues or Ministers need to be aware. **By selecting the appropriate box an e-mail will automatically be generated notifying the chosen recipient.**

13.8 If the information requested will incur a fee enter the amount in the relevant box. Note that a fee will only be charged in limited circumstances where it is decided to provide the information despite the upper cost limit being exceeded. In such cases the fee would need to be notified and agreed with the applicant - see the guidance in section 8 on fees.

13.9 You are now ready to submit the form. When you submit the form it is sent to the FOI Casework public folder for tracking and an email alert is sent to those recipients that you selected above, informing them of the existence of the request.

13.10 Once you have received the guidance sought and/or you are in a position to respond to the applicant you should access the request by selecting it from the public folder, located at <All public folders/freedom of information/casework>. Once the form is loaded you should then click the EDIT button to unlock the fields on the form. Then select the appropriate decision box on the form (either 'provide', or 'partial answer' if some information has been withheld because it is exempt, or 'refusal' where all the information sought has been withheld as being exempt). You can save the updated information by then choosing the SAVE button at the bottom of the form. When a request is updated the requesting officer and FOI unit is notified of the update. To exit the form choose the EXIT button.

13.11 If at any time the applicant decides not to proceed with the request then you can indicate that the request has been cancelled by simply selecting the 'Request Withdrawn' box on the form. Remember you will need to select EDIT before making changes to a request.

Note. All staff have access to the public folder holding the data on FOI requests, but only the officer creating the original data and the FOI Unit will have permissions to alter the information held in the public folder. For all other users, the EDIT button will remain disabled.

Reviews and Appeals

13.12 Where applicants are unhappy at the way in which we have dealt with their request for information, they are entitled to ask the Executive to review the decision. Requests for reviews are addressed to the **Head of Department** who will select an officer to carry out the review. In these circumstances PS/Department should inform the lead division which handled the original application of the review request. The lead division, as owner of the case form, can then update the public folder to indicate that the review has been received. This involves simply selecting the 'review requested' box on the form. Similarly, when the review has been completed, the lead division is responsible for checking that the review has been completed and entering the necessary data on the form.

In all instances where you are unsure how to use the form or need advice on FOI issues contact the FOI Unit (Ext 44613 or Ext 45189).

ANNEX A. Useful contacts

Freedom of Information Unit

The FOI unit should be informed about complex or sensitive requests for information and can provide advice on considering exemptions, the public interest test, and carrying out reviews.

Email the FOI mailbox ([Freedom of Information Unit](#)), or telephone 0131 244 4615

Web-pages including the Open Learning Workbook, FAQs, Section 60 Code of Practice and Publication Scheme are at www.scotland.gov.uk/Topics/Government/FOI

National Archives of Scotland (NAS)

Records of the Scottish Executive, Parliament and courts which are selected for permanent preservation as historical records are transferred to NAS.

To view NAS' online catalogue see: <http://195.153.34.3/dservea/>

Telephone: 0131 535 1407

Records Management Branch

To view the IMPReS records management catalogue see: <http://10.10.128.54/netimpres/default.asp>

For advice on records management procedures, telephone: 0131 244 4328

Scottish Information Commissioner (SIC)

The SIC is responsible for enforcing and promoting the Freedom of Information (Scotland) Act. See the website at www.itspubliknowledge.info

Data Protection

The UK Information Commissioner is responsible for enforcement of the Data Protection Act. See www.informationcommissioner.gov.uk

There is also guidance available on the SE intranet at:

<http://intranet/content/corporate/guidance/information/openness/dataprotection/dpr-00.asp>

Scottish Executive Library

If you are looking for a past SE publication the library may be able to help.

<http://intranet/content/corporate/guidance/information/library/index.asp> Phone: 44556

ANNEX B. Sample wording for correspondence

The following are examples of text you may wish to use when responding to enquiries in different circumstances. **Remember that in all responses you should include advice on how an enquirer can request a review is carried out – this includes cases where information is provided, not just cases where an exemption has been applied.** (The only exception to this is where requests have been refused on the grounds of being vexatious or repeat request, when the applicant can appeal direct to the Commissioner without having a review carried out.)

1. Suggested response when **providing information**

“Thank you for your recent request for information under the Freedom of Information (Scotland) Act. We have now completed our search for the information you request, and a copy is enclosed [in the format you require].

If you are unhappy with this response to your request, you may ask us to carry out an internal review, by writing to [Department Head, and address]. Your request should explain why you wish a review to be carried out, and should be made within 40 working days of receipt of this letter, and we will reply within 20 working days of receipt. The review will be undertaken by staff not involved with your original request. If you are not satisfied with the result of the review, you then have the right to make a formal complaint to the Scottish Information Commissioner.”

‘The supply of documents under FOI does not constitute permission for their re-use in such a way that would infringe copyright. You should obtain permission from the copyholder before any such use’.

2. Suggested response if the **information requested has been routinely destroyed**

“Thank you for your recent request for information under the Freedom of Information (Scotland) Act. Following a search of our paper and electronic records, I have established that the information you requested was routinely destroyed in accordance with our standard records management practice, and so I am unable to assist with your request in this instance.

I am sorry we are unable to assist with your enquiry. If you are unhappy with this response to your request, you may ask us to carry out an internal review, by writing to [Department Head, and address]. Your request should explain why you wish a review to be carried out, and should be made within 40 working days of receipt of this letter, and we will reply within 20 working days of receipt. The review will be undertaken by staff not involved with your original request. If you are not satisfied with the result of the review, you then have the right to make a formal complaint to the Scottish Information Commissioner.

3. Suggested response if the **information is not held** (and may be with another authority)

“Thank for your for your recent request for information under the Freedom of Information (Scotland) Act. The information you require is not held by the Scottish Executive,[however you may wish to contact [name of authority] at [address] who may be able to help you further.]

I am sorry we are unable to assist with your enquiry. If you are unhappy with this response to your request, you may ask us to carry out an internal review, by writing to [Department Head, and address]. Your request should explain why you wish a review to be carried out, and should be made within 40 working days of receipt of this letter, and we will reply within 20 working days of receipt. The review will be undertaken by staff not involved with your original request. If you are not satisfied with the result of the review, you then have the right to make a formal complaint to the Scottish Information Commissioner.

4. Suggested responses where exemption(s) have been applied

If absolute exemption;

"Thank you for your recent request for information under the Freedom of Information (Scotland) Act. We do endeavour to provide information whenever possible, however in this instance an exemption under section [] of the Act applies to [some of] [all of] the information requested. [Provide description of the exemption is and why it applies]."

I am sorry we are unable to assist with your enquiry. If you believe that our decision not to release the information is wrong, you do have the right to request us to review it. Your request should be made within 40 working days of receipt of this letter, and we will reply within 20 working days of receipt. If our decision is unchanged following a review and you remain unsatisfied with this, you then have the right to make a formal complaint to the Scottish Information Commissioner.

If you require a review of our decision to be carried out, please write to [Department Head, address], explaining why you wish a review to be carried out.. The review will be undertaken by staff not involved in the original decision making process... "

If conditional exemption;

"Thank you for your recent request for information under the Freedom of Information (Scotland) Act. We do endeavour to provide information whenever possible, however in this instance exemption under section [] of the Act applies to [some of] [all of] the information requested. [Provide description of the exemption is and why it applies]."

In reaching our decision about releasing the information we have applied the 'public interest test', where we carefully weigh up the balance between whether it would be in the public's best interest to either release or withhold the information.

I am sorry we are unable to assist with your enquiry. If you believe that our decision not to release the information is wrong, you do have the right to request us to review it. Your request should be made within 40 working days of receipt of this letter, and we will reply within 20 working days of receipt. If our decision is unchanged following a review and you remain unsatisfied with this, you then have the right to make a formal complaint to the Scottish Information Commissioner.

"If you require a review of our decision to be carried out, please write to [Department Head, address], explaining why you wish a review to be carried out. The review will be undertaken by staff not involved in the original decision making process... "

5. Copyright declaration – to be used when providing information to applicants.

'The supply of documents under FOI does not constitute permission for their re-use in such a way that would infringe copyright. You should obtain permission from the copyholder before any such use'.

6. Where information is to be publicly released

"In keeping with the spirit and effect of the Freedom of Information (Scotland) Act, all information is assumed to be releasable to the public unless exempt. We will therefore be releasing to the public the information you requested [by publishing it on our website], together with any related information that will provide a key to its wider context."

7. Acknowledging receipt of a request for review (to be sent to the applicant by the allocated reviewer)

"I have been requested by [name of Head of Department] to carry out a review of our response to your request for information under the Freedom of Information (Scotland) Act regarding [subject of request]. I have been asked to carry out the review because I was not involved in handling your original request, and I will be looking at the case impartially to establish whether [the original response should be upheld or reversed] [your request was handled in accordance with our procedures and legislative requirements]."

[If the applicant has not specified the reason for the review]

"You wrote to us on [date] asking that we carry out a review, however before I begin to reconsider the case I would be grateful if you will clarify what aspect of our actions and decisions you are dissatisfied with. Once I have received clarification from you I will review the case and contact you within 20 working days."

[If it is clear why the applicant has requested a review]

"I will review the case on the basis of your request for review and contact you within 20 working days with my decision."

8. Providing the result of a review (to be sent by the reviewer)

"Further to my letter of [date of acknowledgement letter] I have now completed my review of our response to your request made under the Freedom of Information (Scotland) Act for [description of request]. I have concluded that our response to your request should be [upheld] [reversed]."

[Provide explanation of decision and how it was reached]

[If exemptions have been reconsidered and the public interest test reapplied explain your reasoning]

[If information is now to be provided, include a description of this]

[If the review has found that the request was not properly handled provide an apology for this, explaining steps will be taken to avoid a recurrence]

"If you are unhappy with the outcome of this review you have the right to appeal to the Scottish Information Commissioner about our decision within 6 months of receiving this letter. You can contact the Commissioner at:

*Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS
Email: enquiries@itspublicknowledge.info
Tel: 01334 464610"*