



SCOTTISH EXECUTIVE

Legal and Parliamentary Services

Constitution & Parliamentary Secretariat Freedom of Information Unit

To All Consultees

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December 2005

Dear Sir/Madam

ONE YEAR ON – A CONSULTATION ON THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

The Freedom of Information (Scotland) Act 2002 came into force in January 2005. The Act introduced important new rights for all to access information held by Scottish public authorities.

The Executive is currently undertaking a review of the operation of the Act following the first year in force. The review will provide an opportunity to assess the evidence and this consultation will feed in to the process by gathering views on specific aspects of the Act and how it is operating in practice.

Enclosed with this letter you will find:

- a short paper describing the areas for consultation and posing some questions for you to respond to
- a pack for respondents detailing how to respond to the consultation

What we would like you to do

We would be grateful for any general comments you may have on the operation of FOI(S)A during its first year in force and in particular your responses to any, or all, of the specific questions posed in the paper. It would be helpful if you could clearly indicate in your response on which aspect of the Act you are offering comments as this will aid the analysis of responses received. It is important that you forward with your response the completed "Respondent Information Form" which is provided in the pack for respondents.



Where to send your comments

Please send your responses to the consultation by **31 March 2006** by one of the following means

By e-mail to: foireview@scotland.gsi.gov.uk

By fax to: 0131 244 2582

By post to:

FOI Review - Consultation
FOI Unit
G-A(N)
Victoria Quay
Edinburgh
EH66 6QQ

If you have telephone queries about the consultation please contact Jane Mackenzie on 0131-244-4615.

If you would like this information in an alternative language or format please contact us on 0131 244 4615.

إذا أردتم الحصول على هذه المعلومات بلغة أو بصيغة بديلة، الرجاء الاتصال بنا على الهاتف رقم 0131 244 4615.

আপনি যদি এই তথ্য ভিন্ন ভাষায় বা ভিন্ন আকারে পেতে চান তাহলে আমাদের সাথে 0131 244 4615 নম্বরে যোগাযোগ করুন।

如欲獲得這份資料的另類語言版本或模式，請致電 0131 244 4615 與我們聯絡。

Ma tha thu airson an fhiosrachadh seo fhaighinn ann an cànan no dreach eile, cur fios thugainn air 0131 244 4615.

यदि आप यह जानकारी किसी दूसरी भाषा या प्रारूप में लेना चाहें तो कृपया हमें 0131 244 4615 पर संपर्क करें।

ਜੇ ਤੁਸੀਂ ਇਹ ਜਾਣਕਾਰੀ ਕਿਸੇ ਹੋਰ ਭਾਸ਼ਾ ਜਾਂ ਰੂਪਾਂਤਰ ਵਿਚ ਲੈਣਾ ਚਾਹੋ ਤਾਂ ਸਾਨੂੰ 0131 244 4615 'ਤੇ ਸੰਪਰਕ ਕਰੋ

اگر آپ کو یہ معلومات کسی دوسری زبان یا فارمیٹ (ترتیب) میں چاہیے تو برائے مہربانی ٹیلیفون نمبر 0131 244 0324 پر ہمارے ساتھ رابطہ قائم کریں۔

Should you have any comments about how this consultation exercise has been *conducted*, please send them to me at the same address noted above.

Yours sincerely

TIM ELLIS
Head of FOI Unit

Freedom of Information (Scotland) Act 2002 – One year on

A consultation on the operation of the Act after one year in force



SCOTTISH EXECUTIVE

Freedom of Information (Scotland) Act 2002 – One year on

A consultation on the operation of the Act after one year in force

Freedom of Information (Scotland) Act 2002 - One year on

A consultation on the operation of the Act after one year in force

Responding to this consultation paper

We are inviting written responses to this consultation paper by **31st March 2006**. Full information on responding to this consultation is available in the **“Pack for Respondents”**

Please send your response to:

Foireview2005@scotland.gsi.gov.uk

or by fax to: 0131-244-2582

or

FOI Review - Consultation
FOI Unit
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Victoria Quay
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If you have any queries please contact Jane Mackenzie on 0131-244-4615

This consultation, and all other Scottish Executive consultation exercises, can be viewed online on the consultation web pages of the Scottish Executive website at <http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

Copies of the consultation paper are available in large print and can also be made available on request in other formats and languages by contacting Jane Mackenzie at the address above.

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FOREWORD BY THE MINISTER FOR PARLIAMENTARY BUSINESS

January 2005 marked a new stage in openness and transparency in the Scottish public sector, as the Freedom of Information (Scotland) Act 2002 came fully into force. For the first time, individuals and organisations across the country have legal rights to access a wide range of information from almost 10,000 Scottish public authorities. That step-change may be a daunting one for some public authorities but it is clear that better informed individuals and communities are not only better placed to exercise their rights as citizens but also to play a more pro-active role in their local and national communities. Equally, the disciplines and rigour that FOI brings will lead to more accountable, professional and open public authorities.

It is, of course, too early to judge the overall impact of the Act – this can only be assessed in the long-term. However, it is already clear that there are some lessons that can be learned from the first year of practical operation of the Act. To ensure its continuing effectiveness we are, therefore, undertaking an early review of Freedom of Information in action which will enable us to consider any requirements for fine-tuning. This consultation invites you to feed into the review by providing your views on the topics covered in this consultation paper or indeed on any other aspect connected with your experience of Freedom of Information. I look forward to seeing your contributions.

A handwritten signature in cursive script that reads "Margaret Curran".

Margaret Curran

Background to the Consultation

1. The Freedom of Information (Scotland) Act 2002 (the Act) came into force on 1 January 2005. The Act provides a statutory right of access to information held by Scottish public authorities. These range from national bodies such as the Scottish Parliament, down to individual GPs. The right of access to information is subject to some exemptions, many of which can only be applied if the balance of the public interest allows. The Act also requires proactive publication of information and is promoted and enforced by an independent Scottish Information Commissioner. Similar UK legislation (the Freedom of Information Act 2000) applies to reserved and cross-border authorities.

2. The focus of the Executive for most of 2005 has been on ensuring that initial implementation of the Act was achieved effectively across the Scottish public sector. At a conference on Freedom of Information on 3rd October 2005 the Minister for Parliamentary Business announced that a review would be undertaken to identify any requirements for fine-tuning of the Act following its first year in operation. Issues arising from the first year of implementation were also discussed during a debate on Freedom of Information which took place in the Scottish Parliament on Wednesday 2nd November 2005. The review will not encompass a wholesale look at the legislation. It will in the main focus on areas where any agreed changes or outcomes would be achievable through use of subordinate legislation or amendments to the Act's Codes of Practice.

Purpose of the Consultation

3. As part of the overall review this consultation invites comments on the operation of the Act following its first year in force. The consultation is being specifically sent to organisations in Scotland or those with Scottish interests which have an interest in the effective operation of the Act. It is, however, open to all who have an interest in access to public sector information in Scotland. The responses received will be analysed and used to inform the review which will help Scottish Ministers in coming to a view on any required fine-tuning of the regime.

4. You are welcome to comment on any significant issues of concern to you which have arisen during the first year of operation of the FOI regime. The following sections of the paper provide summaries of the key aspects of the operation of the Act on which you may wish to comment. Where appropriate, further detail on the topics is provided in individual Annexes. Some of the topics and related questions in this paper are quite technical and are more relevant to the organisations who are required to comply with the Act than to those who wish to exercise their rights to request information. However it is important to emphasise that the consultation responses need not be confined to the topics summarised in this document.

5. If you are commenting on one of the specific topics or questions in the document it would be very helpful if you could clearly indicate in your response which questions and/or parts of the consultation paper you are responding to as this will aid our analysis of the responses received. The **Pack for Respondents** provides a full list of the questions raised in this consultation and may be a useful template for you to use when responding to this consultation.

Topic 1 - Coverage of the Act

6. The coverage of the Freedom of Information (Scotland) Act 2002 is already extensive. It covers over 9,000 public authorities including Scottish Ministers and the Scottish Parliament; the whole of the NHS (which includes health boards, hospitals, GPs and dentists); local government (including schools); universities and colleges; the police; and a host of other public authorities. The public authorities which are covered by the provisions of

the Act are listed in Schedule 1 to the Act. (For ease of reference a copy of Schedule 1 to the Act as currently amended by statute is provided in Annex B to this paper.)

7. Additional bodies may be added to Schedule 1 as they are created, for example, as legislation comes into force. This has already taken place in a number of cases for example Her Majesty's Chief Inspector of Fire and Rescue Authorities was added by way of the Fire (Scotland) Act 2005 and the Commissioner for Public Appointments in Scotland under the Public Appointments and Public Bodies etc. (Scotland) Act 2003. There is also primary legislation containing provisions that, once commenced, will result in the addition of other bodies to Schedule 1, such as, regional Transport Partnerships and the Public Transport Users' Committee for Scotland, under the Transport (Scotland) Act 2005.

8. However, the institutional landscape of Scotland is a dynamic one, with changing roles and responsibilities; new bodies are created; new partnership arrangements set up; and new contractual and other relationships developed. The Act recognises this by providing the powers under section 4 and section 5 for Scottish Ministers to:

- add to or remove from the entries in Schedule 1
- bring other bodies within the scope of the legislation where they are undertaking functions of a public nature, or providing public services under contract with a Scottish public authority.

To date Ministers have not used the powers under either of these sections.

9. There will, undoubtedly, be a range of views on which other bodies should or should not be brought within the coverage of the Act, and this consultation paper seeks to identify those views. However, no organisation will be added to Schedule 1 or designated under section 5 on the basis of this consultation alone. Each proposition will need to be considered on its own merit and may require further consultation.

10. This consultation, therefore, will enable us to collect views on which bodies you think should be brought within the coverage of the Act, or taken out, and for what reasons. This will help Ministers to establish objective criteria which will allow informed decisions on the use of section 5. As a starting point, Annex A sets out for consideration some of the background to potential criteria which Ministers might use when making their decisions on use of the section 5 power.

Topic 1 - QUESTIONS

Q1: Which bodies do you consider should be brought within the coverage of FOI(S)A? Please explain why you think the body should be covered.

Q2: Which bodies should be removed from the coverage of FOI(S)A? (For example bodies which have ceased to operate but not yet been removed from the list in Schedule 1.)

Q3: What are your views on the draft criteria for use of section 5 as set out in Annex A to this document? Do you think this is a helpful approach?

Q4: With regard to the detail in Annex A of the consultation paper are there any additional factors in considering use of section 5 which should be taken into account (or do you feel there are too many factors already)?

Q5: What are your views on the statement that "Persons should only be brought within the scope of the Act through use of section 5 where it will lead to a significant increase in transparency and public accountability for the services that they provide."?

Q6: Do you think there should be a threshold in terms of either the size of an organisation, or the levels of public funding received, in order for an organisation to be considered for coverage under the Act? If so what should the thresholds be?

Q7: Do you have any examples of being unable to obtain information from an organisation delivering “public services” but which is not subject to FOI(S)A?

Q8: Organisations which become newly subject to FOI(S)A will require time to prepare for compliance. Bearing in mind that the specific time allowed is likely to be decided case by case do you have a general view on the appropriate time period to be allowed?

Topic 2 - Discharge of duties under FOI(S)A by public authorities

11. Section 60 of the Act provides for Scottish Ministers, after consultation with the Scottish Information Commissioner, to issue a Code of Practice providing guidance on how public authorities should undertake their duties in complying with the Act. The draft Code of Practice was the subject of a public consultation in 2003. The current version, therefore, reflects a wide range of views. Similarly, section 61 of the Act provides for Scottish Ministers, after consultation with the Scottish Information Commissioner and the Keeper of the Records of Scotland, to issue a Code of Practice providing guidance to authorities on best practice for the keeping, management, and destruction of their records. We are not aware of any major concerns with the content of the Codes and the guidance they provide but we would welcome your views on the following questions. (Copies of the Codes are available from the Scottish Executive’s website FOI pages at <http://www.scotland.gov.uk/Topics/Government/FOI> or can be obtained in hard copy from the Executive’s FOI Unit).

Topic 2 - QUESTIONS

Q9: How well do the Section 60 and 61 Codes of Practice meet your requirements?

Q10a: Does the Section 60 Code provide sufficiently clear guidance to authorities on their responsibilities under FOI(S)A?

Q10b: Does the Section 61 Code provide clear and useful guidance on records management, and the transfer of records to archives?

Q11: Are there any other areas on which it would be helpful to provide guidance in either the Section 60 or Section 61 code?

Topic 3 – Fees/charging

12. The Act does not incorporate a mechanism for charging upfront access fees simply for making a request for information. In countries where this does happen, the intention has usually been to encourage responsible use of the Act and better reflect the cost to public bodies of complying with freedom of information. During the development of the Scottish Act the view was strongly expressed that information requests and any subsequent disclosures should be free of charge to applicants. For this reason no mechanism for an upfront access fee was included in the Act. However, Ministers, were also clear in their view that authorities should be able to make a charge to recover some of the costs incurred in providing information in response to requests, where appropriate. This position is reflected in the two statutory instruments covering the fees regime which are SSI 2004 No. 467 (Fees for Required Disclosure) and SSI 2004 No.376 (Fees for disclosure under Section 13). The first of these covers the fees structure where a Scottish public authority receives a request for information under the Act and is obliged to comply with it. The second instrument covers the fee structure where a Scottish public authority receives a request for information under the Act but is not obliged to comply with it because the costs of providing the information are projected to exceed £600 (the prescribed amount). The guidance on fees in Annex 3 of the

Section 60 Code of Practice explains how authorities should interpret and follow the regulations. (A copy of the guidance on fees is attached at Annex C to this document).

14. The current fees regime allows an authority to charge for 'projected costs', "whether direct or indirect, which a Scottish public authority reasonably estimates ...that it is likely to incur in locating, retrieving and providing such information". Costs which might be included in the projected costs include estimates of the staff time to locate and retrieve the information, the cost of postage to deliver the information to the requester or the cost of photocopying in order to provide it. An authority cannot, however, charge for the time and resources used to determine whether the authority actually holds the information e.g., through searches of catalogues and records holdings. It also cannot charge for any costs incurred in deciding whether the information can be released.

15. There are, at present, limited circumstances when an authority can aggregate costs (s12(2)(c)). The Fees for Required Disclosure Regulations state that an authority can aggregate the cost of responding to a section 1 request where an authority receives two or more requests from different persons which cover the same subject matter or which significantly overlap. In such cases, where the estimated aggregated costs of complying with the requests exceed the prescribed limit of £600, the authority is not required to comply with each individual request, providing it makes the information available to the public at large.

16. The current Fees for Required Disclosure Regulations do not introduce the provisions in the Act to aggregate costs where two or more requests are made by one person (s12(2)(a)) or by different persons who appear to be acting in concert or whose requests appear to have been instigated for a purpose other than obtaining the information itself (s12 (2)(b) of the Act).

Topic 3 - QUESTIONS

Q12: Do you think the current fees regulations are generally correct? Are they effective?

Q13: A cap is placed on costs in that an authority does not have to comply at all with a request for information if the projected costs of doing so are above an amount specified by Scottish Ministers. This is referred to in the fees regulations as the "prescribed amount" and is currently £600. In your view is this the correct amount?

Q14: Are the elements allowed for in estimating the "projected costs" appropriate?

Q15: Staff time costs which can be charged for is subject to the maximum rate of £15 per hour. In your view is this the correct amount? Is this the correct approach?

Q16: The regulations did not introduce the provisions in the Act to aggregate costs where 2 or more requests are made by one person or by 2 or more different parties acting in concert. Is there evidence in light of experience, of a requirement to incorporate these provisions in future revised fees regulations?

Q17: Do you have any other comments on the content of the current fees guidance (Annex 3 to the Section 60 Code of Practice)

Q18: Do you have any evidence of the resource implications/general impact of FOI(S)A on your organisation?

Q19: Is the operation of the FOI(S)A fee charging regime working effectively with the charging regime for the Environmental Information Regulations (EIRs)?

Q20: How many times have you issued a fees notice?

Q21: How many times have fees notices which you have issued not been paid?

Q22: Are there any other issues on fees/charging which you wish to raise?

Topic 4 – Timescales

17. The Act sets time limits within which public authorities must respond to requests (20 days) and to requests for reviews (20 days). Although FOI legislation in some other countries allows for response time to be extended in prescribed circumstances, the FOI (Scotland) Act makes very limited allowance for this. The intention behind this was that procedures for dealing with requests should be user-friendly, easy to understand and speedy. During the development of the Act a clear steer was given that dealing with requests and reviews should not be long drawn-out procedures. The Act does, however, provide a power under section 10(4) for Ministers to vary the time limits, should they prove impracticable in light of experience.

Topic 4 - QUESTIONS

Q23: Can you provide us with evidence of any significant difficulties arising from the 20-day response time requirements?

Q24: Are there any other time limits provided for in the Act which are giving rise to concern?

Topic 5 – Prohibitions to disclosure of information

18. Prohibitions on disclosure of information currently exist in other legislation as is recognised in section 26(a) of the Act. Section 64 of the Act provides a power by which these prohibitions might be amended or repealed. (A similar power is conferred on UK Ministers by section 75 of the Freedom of Information Act 2000.)

19. At the UK level some 200 statutory provisions have been identified which prohibit the disclosure of information under section 1 of the Freedom of Information Act 2000. Further detail is available in a report by the Department for Constitutional Affairs, entitled "Review of Statutory Prohibitions on Disclosure". To date one order has been made under section 75 of the UK FOI Act. (SI 2004 No.3363 The Freedom of Information (removal and relaxation of Statutory Prohibitions on Disclosure of Information) Order 2004).

20. It is not possible to use a single process to disapply or amend all identified bars to disclosure to bring them into line with the Freedom of Information regime. Some of the bars may be required to fulfil an EU Directive or other international obligation, or may otherwise serve a useful purpose.

21. To enable us to take forward any requirement to use the section 64 power we would welcome evidence of where statutory prohibitions to disclosure have caused difficulties for public authorities or applicants.

22. In considering use of the powers of section 64 it may be useful to consider the following instances where it is possible that a provision prohibiting disclosure should be retained. This would include instances:

- where the provision fulfils an international obligation; or
- where the provision applies also to organisations which are not subject to Freedom of Information legislation, and it might not be practical or appropriate to have differing rules applying to disclosure
- where the provision protects information collected under compulsion; or

- where the provision applies to information which is protected as part of a specific and partial access regime.

In some cases the effect of provisions is to prohibit disclosure of information in perpetuity. It might be possible to retain the statutory bar but amend the provision to reduce the prohibition period so, for certain pieces of legislation, it may be worth considering the introduction of some form of time limit on the prohibition.

Topic 5 - QUESTIONS

Q25: Do you have any examples of occasions where statutory provisions in other legislation are in practice preventing the release of information through FOI(S)A by Scottish public authorities?

Topic 6 – FOI(S)A section 31 Guidance

23. In May 2005 we issued a Guidance Note for Scottish public authorities dealing with requests for information where Security and Intelligence Agency information and/or information related to national security issues are involved. (See Annex D). The guidance is relevant for those occasions when authorities are considering whether or not requested information is exempt under section 31 of the Act. It also provides advice on procedures involved if it is considered that certification by Scottish Ministers is required to withhold information for the purpose of safeguarding national security. We would welcome comments on this guidance which would help us to ensure that it is fit for purpose.

^{NB} One s31 certificate has been issued to date. It was issued in April 2005 for certain categories of G8-related information. We are not aware of any instance of it being deployed. Consideration of this certificate is not part of the FOI(S)A consultation/review as the continued requirement for or rescinding of the certificate is being considered by Scottish Ministers in conjunction with the UK Government.

Topic 6 - QUESTIONS

Q26: Do you have any comments on the Guidance Note on handling requests for national security related information?

Q27: Do you have any views on the length of time certificates made under s31(2) of FOI(S)A should remain in place?

The next sections of the paper are Annexes which provide further background on some of the topics covered in this consultation. Information on how to respond to the Consultation is contained in the Pack for Respondents.

ANNEX A TO CONSULTATION PAPER

This Annex provides further information for those wishing to comment on Topic 1 of the Consultation – Coverage of the Act

Development of gateway criteria to inform use of Section 5 of FOI(S)A

BACKGROUND TO SECTION 5 OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

1. Section 5(1) of the Freedom of Information (Scotland) Act 2002 provides that the Scottish Ministers may by order designate as a Scottish public authority for the purposes of the Act any person who is neither listed in Schedule 1 to the Act nor capable of being added to that Schedule by an order under section 4(1) and is neither a public body nor the holder of any public office, but who –

- appears to the Scottish Ministers to exercise functions of a public nature, or
- is providing under a contract made with a Scottish public authority any service whose provision is a function of that authority.

2. Any order made must specify the functions of a public nature which appear to be exercised or the service being provided. Before making an order under section 5 Scottish Ministers are also required to consult with any persons to whom the order would relate (or relevant representative bodies). In addition to this formal consultation a Regulatory Impact Assessment will have to be carried out in respect of any private company who may be designated.

3. Paragraphs 28 and 29 of the policy memorandum to the Freedom of Information (Scotland) Bill outlined the policy behind section 5 as follows:-

“ A body which appears to the Scottish Ministers to exercise functions of a public nature” or which is providing “under contract made with a Scottish public authority, any service whose provision is a function of that authority” can be designated as a Scottish public authority by order under section 5. It is intended that this provision will be used to bring within the scope of FOI private companies involved in significant work of a public nature, for example private companies involved in major PFI contracts. Under section 7, any order under section 5 would apply only to a company’s involvement in the work of a public nature, and consequently FOI would not apply to any other areas of the company’s business.”

4. Section 5(5) provides that before any section 5 order is made, the Scottish Ministers must consult the company or other person concerned. The Scottish Executive recognise the need for proper scrutiny of companies delivering important public services, but are clear that companies should only be brought within the scope of FOI(S)A when it is appropriate to do so. As a result, detailed consideration will be given before any section 5 order is made. Consideration will be given in due course as to which companies will be appropriate for designation under FOI(S)A. In addition, under section 6, a private company will automatically be subject to FOI(S)A if it is wholly-owned by a Scottish public authority listed in schedule 1, or by two or more such authorities”.

5. The question of which persons would be suitable for designation as a public authority for the purposes of FOI(S)A was extensively discussed during the passage of the Bill through Parliament. No firm commitments were made by Ministers with regard to persons who may be added to the scope of the Act under section 5 given the requirement formally to consult with such persons but indications were given that Ministers would use the powers afforded to them under section 5.

6. Given the ever increasing diversity in the way that public services are provided it is not possible, or indeed desirable, to designate all service providers as public authorities. Best Value encourages local authorities to consider alternative methods of delivering services. It would be perverse to encourage such alternative arrangements and then seek to designate all such service providers as public authorities. That is not to say that there is not a need for public accountability for these services – that is important. The Local Government (Scotland) Act 2003 requires local authorities to take account of published codes of best practice when entering into non contractual arrangements with other service providers. These include a “Code of Practice on funding external bodies and following the public pound”. Amongst other requirements this Code seeks to ensure that provisions are made for local authorities and their external auditors to have access to the records of funded bodies. Such arrangements should generally provide for the necessary transparency with regard to council services provided by funded bodies. If the necessary transparency and availability of information was not provided then the Scottish Ministers could consider whether the funded body was appropriate for inclusion in a section 5 order.

7. The policy of the Scottish Ministers with regard to section 5 orders is clear. The Scottish Ministers do intend to use the section 5 order making power where there is a need for proper scrutiny of persons who are carrying out significant work of a public nature. They however are conscious that such persons should only be brought within the scope of FOI(S)A, and made subject to all of its provisions, if it is appropriate to do so. It is important therefore that detailed consideration is given before any persons are included in an order. In order to assist this consideration and ensure that there is a measure of consistency in the persons included in orders it is necessary to set out clear criteria which Ministers can follow in making decisions. This paper sets out proposed criteria. **It should be noted that this Annex does not set out which persons fall under the proposed criteria. These will be determined once the criteria have been settled.**

DISCUSSION OF CRITERIA

Functions of a public nature

8. The term “functions of a public nature” is potentially a very wide definition which could describe the activities of a large number of bodies who would not be appropriate for designation as a public authority. Charities, churches and other private institutions could be said to carry out a function of a public nature. The mere fact that an organisation carries out functions of a public nature cannot therefore in itself mean that that organisation is suitable for inclusion in an order. It will be necessary therefore to draw up a set of identifying factors which can be used to determine whether the “public functions” carried out by a body are such to merit its being placed under public scrutiny through FOI(S)A.

9. For each case it will be necessary to examine closely the functions that the body carries out. It will also be necessary to look at how close the relevant activities of the body are with those of a public authority. The purpose of the examination would be to determine how appropriate it would be to designate a private body as a public authority for the purposes of FOI(S)A. To do this one has to consider the most common features that apply to public authorities and the functions undertaken and see whether these apply to a particular private body and the functions it undertakes. Commonly, functions carried out by public authorities are underpinned by statute or are activities which Government consider

should be carried out. The functions carried out by public authorities are also of course publicly funded. Even if those factors are not present it will also be necessary to examine whether all other features of the activities of the body provide those features with a public character.

10. Therefore we believe that the following factors are relevant. One factor alone may not determine the case for or against inclusion - it may be a combination of factors:

- Are the powers and duties or “public functions” of the body derived from or underpinned by statute?
- The extent of public funding of the activity may well be an indicator of the public purpose of the activity. This might relate either to the scale of the funding or more likely to the proportion of funding. (For example, a function which receives 80% of its funding from the public purse may be perceived to be more of a public function than one for which 20% of funding is public.)
- Does the body provide public functions which would be carried out by government if the body did not exist?
- Are there features or combinations of features which impose a public character, such as the carrying out of a regulatory function or something being done under statutory authority?
- Is the activity subject to regulatory powers administered by a Scottish public authority; and if so are these powers sufficient to provide the necessary level of openness and transparency with regard to the activities being carried out?
- How closely enmeshed are the activities of the body with those of a public authority?

Contractors providing a service which is a function of a Scottish public authority

11. This category which is set out in section 5(2)(b) of the Act is very specific and any bodies deemed suitable for inclusion in a section 5 order will obviously have to match the provisions as set out in the legislation. There are a number of components, all of which will have to be satisfied. These are:

- It must be a service which is being carried out;
- It must be a service which is being provided under contract with a Scottish public authority; and
- It must be a service which is a function of a Scottish public authority.

12. It is considered that a contractor providing a Scottish public authority with a service such as the cleaning of its office windows or providing catering services would not be a candidate for a section 5 order. This is because cleaning windows or catering services to a Scottish public authority is not a core public function of that authority. However it is clear that if a contractor is carrying out under contract a service (which must be specified in the order) for a Scottish public authority and that service is a **core** public function of that authority then such a contractor is potentially a candidate. It will be necessary therefore to examine the functions of a public authority in order to determine what its core public functions are and whether these are being carried out by a private sector provider under contract.

13. The Scottish Ministers will also have to take into account the term and costs of any contracts for the provision of service. It would not be practicable to designate any contractor who was carrying out a service and whose contract was only due to last for a couple of

years. Designating persons as public authorities for such a short period might not, therefore, be an efficient way of proceeding.

Contracts for the provision of services

14. In addition there will have to be some examination of whether a contract for the service does provide for the disclosure of information which will meet the aims of FOI(S)A. The Scottish Ministers will wish to take account of whether such information is available from the public authority responsible for the contract before designating any contractor. If information about the service provided under the terms of the contract is already available (either from the public authority or the contractor) it will therefore not be necessary for Scottish Ministers to use the section 5 route to ensure that the aims of FOI(S)A in relation to more openness and transparency in this area are achieved.

15. The Code of Practice on the Discharge of Functions of Scottish Public Authorities under FOI(S)A ("the section 60 Code") contains guidance on the procurement of services relating to an authority's functions. That guidance (para. 51) sets out that it is good practice for Scottish Public Authorities to advise potential contractors (i.e. those who may wish to tender to provide services which are a function of the public authority) that they may wish to propose to Scottish Ministers that the contractor be designated under section 5 as a public authority in respect of the information held by them in respect of the services.

16. The Code of Practice also provides guidance to Scottish Public Authorities on the implications of FOI(S)A with regard to information held by them in respect of contracts placed for the provision of services. Most importantly the Code states that public authorities should refuse to include in contracts "terms which restrict the disclosure of information held by the authority and relating to the contract beyond the restriction permitted in the Act." In applying this however public authorities have to ensure that they will not damage the legitimate interests of companies.

17. The Code suggests that provisions included in contracts could make clear the need to comply with FOI(S)A and to account for public expenditure. The guidance also makes clear that any confidentiality provisions in contracts should only be accepted on exceptional grounds and be capable of being justified to the Scottish Information Commissioner. In addition any confidentiality provisions should contain the proviso that information which is not, in fact, exempt under the terms of FOI(S)A may in the event have to be disclosed.

18. The Code states (at para. 49) that the general aim is to facilitate more effective access to information about the procurement of public services. The Scottish Ministers will therefore use the guidance in the Code of Practice on Discharge of Functions to help determine whether a contract with a service provider provides such access and the necessary transparency. If not, then there may be a stronger case for designation.

DRAFT CRITERIA

19. From the discussion in the preceding sections the following general principles with regard to the setting of criteria for determining a suitable person(s) for designation as a Scottish Public Authority for the purposes of FOI(S)A can be set out as below: These general principles would be considered first and as a gateway before considering whether the other criteria can apply to a private body or person carrying out services under contract.

General points

- The term “persons “ will generally be taken to include all legal persons;
- Wholly owned public companies are already covered by the scope of FOI(S)A so cannot be included in a section 5 order;
- “Persons” should only be designated under section 5 where their designation will lead to a significant increase in transparency and public accountability for the services/ functions that they provide.

Persons exercising functions of a public nature –section 5(2)(a)

- Are the functions carried out derived from or underpinned by statute?
- The extent of public funding of the activity (although this alone cannot determine whether the function is a “public” one).
- Are there features or combinations of features which impose a public character or stamp on the function, such as a regulatory function or something done under statutory authority?
- How closely enmeshed are the functions with the activities of a public authority? The functions may be more likely to be of a public nature the more that they are enmeshed with those of a public authority.
- Are the functions of a nature which would be carried out by Government if the “person” did not perform them?

Persons providing under contract with a Scottish Public Authority any service whose provision is a function of that authority

- Is this a **service** which is being carried out? and if so
- Is it being carried out under **contract** with a **Scottish Public Authority** and if so
- Is the provision of the service a **function** of that authority and if so is it a **core public** function?
- Is the duration of the contract for a long period?
- Does the contract with the Scottish public authority provide sufficient scope for the publication of information relating to the services carried out which would meet the policy aims of FOI(S)A? In applying this particular criterion the Scottish Ministers would take into account the guidance contained in the section 60 Code of Practice on Discharge of Functions by public authorities under FOI(S)A).

ANNEX B TO CONSULTATION PAPER

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

SCHEDULE 1 - SCOTTISH PUBLIC AUTHORITIES – as currently amended

Public Authority	Amendment	Enactment which made the change
PART 1 - MINISTERS, THE PARLIAMENT		
1 The Scottish Ministers.		
2 The Scottish Parliament.		
3 The Scottish Parliamentary Corporate Body.		
PART 2 - NON MINISTERIAL OFFICE HOLDERS IN THE SCOTTISH ADMINISTRATION		
4 The Chief Dental Officer of the Scottish Administration.		
5 The Chief Medical Officer of the Scottish Administration.		
6 Her Majesty's Chief Inspector of Constabulary.		
7 Her Majesty's Chief Inspector of Prisons for Scotland.		
8 Her Majesty's Inspector of Anatomy for Scotland.		
9 Her Majesty's Inspector of Fire Services for Scotland.	Has been substituted by: Her Majesty's Chief Inspector of Fire and Rescue Authorities	Fire (Scotland) Act 2005, asp 5 (Scottish Act) Sch. 3 para. 22
10 Her Majesty's inspectors of schools (that is to say, the inspectors of schools appointed by Her Majesty on the recommendation of the Scottish Ministers under the Education (Scotland) Act 1980 (c.44)).		
11 The Keeper of the Records of Scotland.		
12 The Keeper of the Registers of Scotland.		
13 A procurator fiscal.		
14 The Queen's and Lord Treasurer's Remembrancer.		
15 The Queen's Printer for Scotland.		
16 The Registrar General of Births, Deaths and Marriages for Scotland.		
17 The Registrar of Independent Schools in Scotland.		
18 A rent officer appointed under section 43(3) of the Rent (Scotland) Act 1984 (c.58).		
19 A social work inspector (that is to say, an officer authorised as such an inspector		

under section 6 of the Social Work (Scotland) Act 1968 (c.49)).		
PART 3 - LOCAL GOVERNMENT		
20 An assessor appointed under section 27(2) of the Local Government etc. (Scotland) Act 1994 (c.39).		
21 A council constituted by section 2 of that Act.		
22 A joint board, within the meaning of section 235(1) of the Local Government (Scotland) Act 1973 (c.65).		
23 A licensing board constituted in accordance with the provisions of section 1 of the Licensing (Scotland) Act 1976 (c.66).		
24 The Strathclyde Passenger Transport Authority.		
24A A Transport Partnership created under the Transport (Scotland) Act 2005 (asp 12).	Entry inserted	Appointed day for commencement 3rd April 2006 Transport (Scotland) Act 2005 asp 12 Sch. 1 para. 20
PART 4 - THE NATIONAL HEALTH SERVICE		
25 The Clinical Standards Board for Scotland.		
26 The Common Services Agency for the Scottish Health Service.		
27 A Health Board, constituted under section 2 of the National Health Service (Scotland) Act 1978.		
28 The Health Education Board for Scotland.		
29 The Health Technology Board for Scotland.		
30 A local health council, established under section 7 of the National Health Service (Scotland) Act 1978.		
31 A National Health Service trust.		
32 NHS 24.		
33 A person providing general medical services, general dental services, general ophthalmic services or pharmaceutical services under Part II of the National Health Service (Scotland) Act 1978, but only in respect of information relating to the provision of those services.	Has been substituted by: A person providing primary medical services under a general medical services contract (within the meaning of the National Health Service (Scotland) Act 1978) or general dental services, general ophthalmic services or pharmaceutical services under Part II of that Act, but only in respect of information relating to the provision of	Primary Medical Services (Scotland) Act 2004 asp 1 (Scottish Act) Sch. 1 para. 5(a)(i)&(ii):

	those services.	
34 A person providing personal medical services or personal dental services under arrangements made under section 17C of that Act, but only in respect of information relating to the provision of those services.	Has been substituted by: A person providing primary medical services or personal dental services under arrangements made under section 17C of that Act but only in respect of information relating to the provision of those services.	Primary Medical Services (Scotland) Act 2004 asp 1 (Scottish Act) sch. 1 para. 5(b)
35 A person providing, in Scotland, piloted services within the meaning of the National Health Service (Primary Care) Act 1997 (c.46), but only in respect of information relating to the provision of those services.		
36 The Post Qualification Education Board for Health Service Pharmacists in Scotland.		
37 The Scottish Advisory Committee on Distinction Awards.		
38 The Scottish Advisory Committee on the Medical Workforce.		
39 The Scottish Ambulance Service Board.		
40 The Scottish Council for Post Graduate Medical and Dental Education.		
41 The Scottish Dental Practice Board.		
42 The Scottish Health Advisory Service.		
43 The Scottish Hospital Endowments Research Trust.	Entry deleted	Smoking, Health and Social Care (Scotland) Act 2005 asp 13 (Scottish Act) Sch. 3 para 1
44 The Scottish Hospital Trust.	Entry deleted	Public Appointments and Public Bodies etc. (Scotland) Act 2003 asp 4 (Scottish Act) Sch. 4 para 17(a)(i)
45 The State Hospitals Board for Scotland.		
46 The Scottish Medical Practices Committee.	Entry deleted	Public Appointments and Public Bodies etc. (Scotland) Act 2003 asp 4 (Scottish Act) Sch. 4 para 17(a)(ii)
PART 5 - EDUCATIONAL INSTITUTIONS		
47 The board of management of a college of further education (expressions used in this paragraph having the same meaning as in section 36(1) of the Further and Higher Education (Scotland) Act 1992 (c.37)).		
48 A central institution within the meaning of the Education (Scotland) Act 1980.		
49 An institution in receipt of funding from the Scottish Higher Education Funding Council other than any institution	Has been substituted by: An institution in receipt of funding from the Scottish	Further and Higher Education (Scotland) Act 2005 asp 6 (Scottish Act)

whose activities are principally carried on outwith Scotland.	Further and Higher Education Funding Council other than any institution whose activities are principally carried on outwith Scotland.	Sch. 3 para. 12(a)
PART 6 - POLICE		
50 A chief constable of a police force in Scotland.		
51 A joint police board constituted by an amalgamation scheme made or approved under the Police (Scotland) Act 1967 (c.77).		
52 The Police Advisory Board for Scotland.		
PART 7 - OTHERS		
53 The Accounts Commission for Scotland.		
54 The Advisory Committee on Sites of Special Scientific Interest.		
55 The Ancient Monuments Board for Scotland.	Entry deleted	Public appointments and Public Bodies etc. (Scotland) Act 2003 asp 4 (Scottish Act) Sch. 4 para 17(b)(i)
56 An area tourist board established by virtue of section 172(1) of the Local Government (Scotland) Act 1994 (c.39).		
57 Audit Scotland.		
58 The Auditor General for Scotland.		
59 The Board of Trustees for the National Galleries of Scotland.		
60 The Board of Trustees of the National Museums of Scotland.		
61 The Board of Trustees of the Royal Botanic Garden, Edinburgh.		
62 The Central Advisory Committee on Justices of the Peace.		
62A The Commissioner for Public Appointments in Scotland	Entry inserted	Public Appointments & Public Bodies (Scotland) Act 2003 (asp4)) Sch. 4 para 17(c)(i)
63 The Crofters Commission.		
64 The Deer Commission for Scotland.		
65 The Fisheries Committee continued in existence by paragraph 5 of Schedule 9 to the Electricity Act 1989 (c.29).		
66 The General Teaching Council for Scotland.		
67 Highlands and Islands Enterprise.		
67A The Historic Environment Advisory Council for Scotland	Entry inserted	Public appointments and Public Bodies etc. (Scotland) Act 2003 asp 4 (Scottish Act) Sch. 4 para

		17 (c)(ii)
68 The Historic Buildings Council for Scotland.	Entry deleted	Public appointments and Public Bodies etc. (Scotland) Act 2003 asp 4 (Scottish Act) Sch. 4 para 17(b)(ii)
69 A justice of the peace advisory committee.		
70 Learning and Teaching Scotland.		
71 The Local Government Boundary Commission for Scotland.		
72 The Mental Welfare Commission for Scotland.		
73 A National Park authority, established by virtue of schedule 1 to the National Parks (Scotland) Act 2000 (asp 10).		
74 The Parole Board for Scotland.		
75 A person appointed for Scotland under section 3(1) of the Local Government and Housing Act 1989 (c.42).		
76 The Royal Commission on the Ancient and Historical Monuments of Scotland.		
77 The Scottish Agricultural Wages Board.		
78 The Scottish Arts Council.		
79 The Scottish charities nominee, appointed under section 12 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40).		
80 The Scottish Children's Reporter Administration.		
81 The Scottish Commission for the Regulation of Care.		
82 The Scottish Conveyancing and Executry Services Board.	Entry deleted	Public Appointments and Public Bodies etc. (Scotland) Act 2003 asp 4 (Scottish Act) Sch. 4 para 17(b)(iii)
83 The Scottish Criminal Cases Review Commission.		
84 Scottish Enterprise.		
85 The Scottish Environment Protection Agency.		
85A The Scottish Further and Higher Education Funding Council	Entry inserted	Further and Higher Education (Scotland) Act 2005 asp 6 (Scottish Act) Sch. 3 para. 12(b)
86 The Scottish Further Education Funding Council.	Entry deleted	Further and Higher Education (Scotland) Act 2005 asp 6 (Scottish Act) Sch. 3 para. 12(c)
87 The Scottish Higher Education Funding Council.	Entry deleted	Further and Higher Education (Scotland) Act 2005 asp 6 (Scottish Act) Sch. 3 para. 12(c)

88 Scottish Homes.		
89 The Scottish Industrial Development Advisory Board.		
90 The Scottish Information Commissioner.		
91 The Scottish Law Commission.		
92 The Scottish Legal Aid Board.		
93 Scottish Natural Heritage.		
94 The Scottish Prison Complaints Commission.		
95 The Scottish Public Services Ombudsman.		
96 The Scottish Qualifications Authority.		
97 The Scottish Records Advisory Council.		
97A The Scottish Road Works Commissioner	Entry inserted	Transport (Scotland) Act 2005 asp 12 (Scottish Act) Sch. 2 para. 4
98 Scottish Screen.		
99 The Scottish Social Services Council.		
100 The Scottish Sports Council.		
101 The Scottish Tourist Board.		
102 Scottish Water.		
103 Social Inclusion Partnerships.		
104 The Standards Commission for Scotland.		
105 The Trustees of the National Library of Scotland.		
106 The Water Industry Commissioner for Scotland.		

ANNEX C TO CONSULTATION PAPER

This Annex contains a copy of the current fees guidance (Annex 3 of the Section 60 Code of Practice) for those wishing to comment on Topic 3 of the Consultation.

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

GUIDANCE TO SCOTTISH PUBLIC AUTHORITIES ON CHARGING FEES FOR PROVIDING INFORMATION. (Annex 3 of the Section 60 Code of Practice)

The fees regulations apply only to formal requests for information under section 1(1) of the Act. They do not apply to any charges for documents available through publication schemes, such as priced publications.

Background

1. Sections 9, 12 and 13 of the Freedom of Information (Scotland) Act 2002 ("the Act") allow the Scottish Ministers to make regulations enabling Scottish public authorities to charge for providing information. Charging under FOI is not compulsory. Much of the information which authorities will make available will fall below the level for incurring a fee and, in practice, will be made available free of charge. While the fees regime is not intended to permit full cost recovery, authorities should bear in mind that many applicants may be on low incomes. In line with their general responsibilities to provide advice and assistance¹, authorities should consider how best to provide the information in the most cost effective way.

2. The regulations set out the legal framework that Scottish public authorities must comply with when they are charging for information under the Act. This guidance sets out how authorities should interpret the regulations and should be carefully followed by authorities when charges are to be applied.

The Regulations and what they do.

3. There are **two Statutory Instruments** covering the fees regime:-

(a) *The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the sections 9 and 12 regulations) ; and*

(b) *The Freedom of Information (Fees for disclosure under Section 13) (Scotland) Regulations 2004 (the section 13 regulations).*

(a) The first and more important instrument covers the fees structure where a Scottish public authority receives a request for information under the FOI Act and is obliged to comply with it.² It sets out the maximum concessionary rates that an authority can charge those who request information, if indeed the authority chooses to charge at all. However, a cap is placed on costs in that the authority is relieved of the obligation to comply at all with the request for information if projected costs are above an amount specified by Scottish Ministers. This is referred to in the regulations as the prescribed amount and is currently £600.

(b) The second instrument covers the fee structure where a Scottish public authority receives a request for information under the FOI Act but is not obliged to comply with it because the costs of providing the information are projected to exceed £600 (the prescribed amount).³ In such a situation the authority may, nevertheless, be willing to comply with the request and the regulations set out the provisions for doing that. If it complies, the authority is again restricted to charging at the concessionary rates for projected costs up to £600 (i.e. what it would have charged had the projected costs not exceeded the cap of £600). For the

projected costs above the £600, the authority may recoup all those costs, bearing in mind that staff time remains subject to the maximum rate of £15 per hour.

Concessionary Rates

4. In terms of the charging structure, the authority works out the "projected" costs of complying with the request. If the request is to be complied with, either because the projected costs will be below £600, or because the authority is willing to comply despite the projected costs overrunning the £600 cap, the first £600 of costs are scaled down as regards the figure recoverable from the applicant, as follows.

- the first £100 of costs are provided free of charge. **(regulation 4(2) of the sections 9 and 12 regulations)**
- Where projected costs include the cost of staff time in locating and retrieving the information, the cost of staff time is not to exceed £15 per hour for each member of staff engaged on the task. **(regulation 3(b))**. This is a maximum rather than a standard rate to be applied in every case, particularly where staff costs prove to be lower.
- For projected costs above £100, authorities may make a charge of 10% of those costs up to the prescribed amount **(regulation 4(3))**.
- The prescribed amount is £600. Authorities may charge for provision of information above that limit based on concessionary recovery (as set out above) up to £600 and full recovery of amount by which the projected costs exceed £600 - but are not obliged to do so. **(regulation 4 of the section 13 regulations)**

Projected Costs

5. The reason for having "projected" rather than actual costs as the lynchpin of the charging structure is to provide maximum flexibility for both the person requesting the information and the authority providing it. Via the fees notice the authority offers the applicant a binding quote based on how much it estimates the work will cost. If the applicant does not want to proceed with the request they may decline the quote. By proceeding in this way the authority will avoid abortive work being carried out where applicants subsequently decide they do not wish to proceed with the request for information.

6. "Projected" costs have to be a reasonable estimate of the costs likely to be incurred and based only on the estimated actual costs to the public authority. This will include direct outlays like postage and the cost of paper. If the cost to the authority for photocopying material is 10 pence per A4 sheet, it would be unacceptable to include a greater charge for this element in estimating the fee. Charges for storage media on which information may be provided (e.g. CDs) should not exceed the purchase price of the materials themselves. Projected costs will also include reasonably attributable overheads such as the managerial or supervisory costs (indirect costs) of responding to an FOI request. However, from the applicant's point of view, there is a safeguard built in, insofar as staff time, including for supervisory or management staff, cannot be charged out at more than £15 per hour. Charges for a person's time should not be rounded up to the hour, but expressed as a fraction of an hour if only a fraction is worked.

7. The fee may not be increased if the actual costs of locating and retrieving the information and then supplying it turn out to exceed the level originally estimated. There may be occasions when actual costs fall below the original estimate. In these circumstances, the authority should consider issuing a refund of any overpayment. Authorities will also need to be prepared to justify the level of fee if subsequently required to do so by the applicant or ultimately by the Scottish Information Commissioner. For these reasons, authorities should ensure that their estimated charges are based on reasonable assumptions about the resources likely to be required to comply with a request.

8. The fees notice itself should include advice about the authority's procedure for dealing with complaints about its handling of requests and also about the rights of appeal conferred by sections 20 (1) and 47 (1) of the Act.

Authorities may charge for:

- direct and/or indirect costs incurred in locating, retrieving, and providing the information in accordance with the Act; (**regulation 3(1)**)
- giving effect to a preference expressed by the applicant for receiving the information. (Applicants may express such a preference as to the format in which the information is presented to them under section 11 of the Act and authorities should give effect to that so far as it is reasonably practicable to do so.

Authorities may not charge for:

- any costs incurred in determining (a) whether an authority actually holds the information and (b) any costs incurred deliberating about whether or not to provide the information; (**regulation 3(2)**)
- any costs likely to be incurred by the authority in fulfilling any duty under or by virtue of s21 of the Disability Discrimination Act 1995 in giving effect to the means by which an applicant wishes to receive the information. (**section 11(5) of the Act**) (See **Annex 1** to this Code of Practice)

Example 1

The authority estimates that locating and retrieving the information will take 2 members of staff 4 hours to complete.

Actual cost of staff time:	£8.50 per hour x 4	= £34
	£14.00 per hour x 4	= £56
Photocopying :	50 x A4 sheets at 10p per sheet	= £5
		=£95

Therefore, the information will be provided to the applicant at no charge as the total falls below £100.

Example 2

The authority estimates that locating and retrieving all the information will take the same two members of staff 2 full days to complete.

Actual cost of staff time:	£8.50 per hour x 15	= £127.50
	£14.00 per hour x 15	= £210.00
Cost of converting info into tape for an applicant with sight impairment	£50	= £0
		= £337.50

**The charge to the applicant £337.50 minus
will be: £100 = £237.50 x 10% = £23.75
 £237.50**

Non-payment of fee

9. Section 9 of the Act provides that if the authority has issued a fees notice to the applicant, it is not obliged to provide the information unless the fee is paid. The fee should be paid

within 3 months of the fees notice being issued. Where the fee is not paid within the three month period, authorities will be entitled to treat the request for information as withdrawn, but should write to the applicant confirming that.

Aggregation of Costs

10 **Regulation 6** addresses the aggregation of costs where an authority receives two or more requests from different persons which cover the same subject matter or which significantly overlap.⁴ In such cases, where the estimated aggregated costs of complying with the requests exceed the prescribed limit of £600, the authority is not required to comply with each individual request providing it makes the information available to the public at large.

11. Where, in such cases, the authority elects to make the information widely available to the public rather than responding to the individual requests, the authority is still obliged to act within the statutory time scale. That is, the authority must either respond to the individual requests or publish the information and inform each applicant of where the information can be found, and they must do this within 20 working days of receiving the first request.

12. How this information is made available to the public will be a matter for the authority. One method would be to provide this information electronically via the authority's website and supply each applicant with a link. However, supplying an electronic link will not be appropriate in every case and authorities may have to provide hard copy in instances where applicants do not have access to the internet.

Section 27 Exemption – Information intended for future publication

13. Authorities should note that if their decision to publish information is taken after or in the light of receipt of the first of the two or more requests which they are aggregating, then they must publish the information within 20 days (regulation 6(d)). Such information cannot attract the exemption at section 27 and therefore be published within the longer timescale of 12 weeks. (This is because section 27 requires the information to be already held with a view to imminent publication at the time the request is received (see section 27(1)(b))).

Projected costs which exceed the prescribed amount

14. Although under no obligation to comply with a request for information which would exceed £600, an authority should consider what information could be released free of charge or below the prescribed amount, particularly in circumstances where it is apparent that the applicant has a low income or is in receipt of state benefits. Alternatively, an authority can decide to provide the information anyway and can make a charge for doing so. The fee payable is set out in regulation 4 of the section 13 regulations. The example below sets out how the costs are derived in these circumstances.

Example 3

An authority receives a complex request and estimates that it will take 3 members of staff varying lengths of time to locate and retrieve the information. This will take the estimated cost limit over the upper cost. Where an authority is prepared to supply all the information sought the estimate will be calculated as follows:

Actual cost of staff time:	£8.50 per hour x 20	= £170
	£14.00 per hour x 25	= £350
	£15.00 per hour x 10	= £150
Photocopying	200 x A4 paper @ 10p	= £20
		= £690

The cost to the applicant is calculated as follows:

First £100	Free
10% of £500	£50
Costs over £600	£90

The charge to the applicant would be £140.

VAT

15. Authorities should note that VAT should not be added to the estimated costs.

Footnotes

¹ The Freedom of Information (Scotland) Act 2002, section 15

² This instrument is subject to affirmative procedure in the Scottish Parliament. That means that a draft must be subject to debate first in the Parliament and it must receive an affirmative resolution of the Parliament before the instrument can be brought into force.

³ This instrument is subject to the simpler Parliamentary negative procedure in which there is no mandatory prior debate and vote.

⁴ The regulations do not introduce the provisions in the Act to aggregate costs where two or more requests are made by one person (Section 12(2)(a)) or by different persons who appear to be acting in concert or whose requests appear to have been instigated for a purpose other than obtaining the information itself (section 12 (2) (b) of the Act. This approach will be reviewed in due course and if it appears that requests of this nature are presenting difficulties the provision can be included in future revised regulations.

ANNEX D TO CONSULTATION PAPER

This Annex contains a copy of the current version of the s31 guidance for those wishing to comment on Topic 6 of the Consultation.

SE Guidance for SPAs dealing with national security related information requests

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.

Scottish Executive FOI Unit
May 2005

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Freedom of Information (Scotland) Act 2002 - One year on

A consultation on the operation of the Act after one year in force

PACK FOR RESPONDENTS

This pack contains:

1. Information on how to respond to the consultation
2. A full set of the questions raised in the consultation document and a template which you might find helpful for feeding in your comments
3. A Respondent Information Form (this **must** be completed and sent to us with your input to the consultation)
4. Further details on the Scottish Executive's Consultation process

Responding to this consultation paper

We look forward to receiving your comments. Responses are sought by **31st March 2006**

Any comments submitted earlier than this would be particularly appreciated. You may find it helpful to input your response by completing the template provided in this pack. However, please note, that you are very welcome to provide comments only on individual topics or on any other issues related to the operation of FOI(S)A. Please also feel free to simply email or write to us if this is easier for you. At a minimum, it would be helpful if, where appropriate, responses could refer to the relevant question and/or paragraph number of the consultation paper.

Responses should be sent to:-

Foireview2005@scotland.gsi.gov.uk

or

By fax to: 0131 244 2582

or to:

FOI Review - Consultation
FOI Unit
G-A(N)
Victoria Quay
Edinburgh
EH6 6QQ

If you have any queries please contact Jane Mackenzie on 0131-244-4615

Paper copies of any of the documents mentioned in this paper and the consultation paper are also available from the FOI Unit should you not be able to access them electronically.

Thank you for taking the time and effort to offer comments.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** enclosed with this pack as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Executive are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public (see the Respondent Information Form), these will be made available to the public in the Scottish Executive Library by 2nd May 2006. We will check all responses where agreement to publish has been given for any potentially defamatory material before logging them in the library or placing them on the website. You can make arrangements to view responses by contacting the SE Library on 0131 244 4565. Responses can be copied and sent to you by the Library, but a charge may be made for this service.

What happens next ?

Following the closing date, all responses will be analysed and considered along with any other available evidence to feed into the review which will help Ministers to reach a decision on any required fine-tuning of FOI(S)A. We aim to issue a report on this consultation process by mid-June 2006. The overall review will continue through July 2006 when Ministerial decisions will be taken on the way forward. As previously explained the review is not encompassing a wholesale look at the legislation. It will in the main focus on areas where any agreed changes or outcomes would be achievable through use of subordinate legislation or amendments to the Codes of practice.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to:

Name: Tim Ellis
Address:
FOI Unit,
Scottish Executive
G-A (N)
Victoria Quay
Edinburgh
EH6 6QQ

E-mail: tim.ellis@scotland.gsi.gov.uk

Getting involved in Executive Consultations

The Scottish Executive now has an email alert system for consultations ([SEconsult: http://www.scotland.gov.uk/consultations/seconsult.aspx](http://www.scotland.gov.uk/consultations/seconsult.aspx)). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SE distribution lists, and is designed to allow stakeholders to keep up to date with all SE consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register. A general summary of the Scottish Executive Consultation process is provided in this pack.

TEMPLATE FOR RESPONSES

This template provides a list of all the questions asked in the consultation paper with space for you to provide your views. The template is split into different topic sections so that you can just comment on the topics you are interested in. If you do not find this approach helpful please feel free to respond to the consultation by just emailing or writing to us.

QUESTIONS ON TOPIC 1 – Coverage of the Act

Q1: Which bodies do you consider should be brought within the coverage of FOI(S)A? Please explain why you think the body should be covered.

Q2: Which bodies should be removed from the coverage of FOI(S)A? (For example bodies which have ceased to operate but not yet been removed from the list in Schedule 1.)

Q3 What are your views on the draft criteria for use of section 5 as set out in Annex A to the consultation paper?

Do you think this is a helpful approach? Yes/no

Q4: With regard to the detail in Annex A of the consultation paper, paper are there any additional factors in considering use of section 5 which should be taken into account (or do you feel there are too many factors already)?

Q5: What are your views on the statement that “Persons should only be brought within the scope of the Act through use of section 5 where it will lead to a significant increase in transparency and public accountability for the services that they provide.”?

Do you agree/disagree? Any other comments?

Q6: Do you think there should be a threshold in terms of either the size of an organisation, or the levels of public funding received, in order for an organisation to be considered for coverage under the Act? If so what should the thresholds be?

Q7: Do you have any examples of being unable to obtain information from an organisation delivering “public services” but which is not subject to FOI(S)A?

Q8: Organisations which become newly subject to FOI(S)A will require time to prepare for compliance. Bearing in mind that the specific time allowed is likely to be decided case by case do you have a general view on the appropriate time period to be allowed?

QUESTIONS ON TOPIC 2 – Discharge of Duties

Q9: How well do the Section 60 and 61 Codes of Practice meet your requirements?

Q10a: Does the Section 60 Code provide sufficiently clear guidance to authorities on their responsibilities under FOI(S)A?

Q10b: Does the Section 61 Code provide clear and useful guidance on records management, and the transfer of records to archives?

Q11: Are there any other areas on which it would be helpful to provide guidance in either the Section 60 or section 61 code?

QUESTIONS ON TOPIC 3 - Fees/Charging

Q12: Do you think the current fees regulations are generally correct? Yes/No

Are they effective? Yes/no

Any other comments?

Q13: A cap is placed on costs in that an authority does not have to comply at all with the request for information if projected costs are above an amount specified by Scottish Ministers. This is referred to in the regulations as the prescribed amount and is currently £600. In your view is this the correct amount? Yes/No

Any other comments?

Q14: Are the elements allowed for in estimating the “projected costs” appropriate? Yes/No

Any other comments?

Q15: Staff time costs which can be charged for are subject to the maximum rate of £15 per hour regardless of the actual costs. In your view is this the correct amount? Yes/No

Is this the correct approach? Yes/No

Any other comments?

Q16: The regulations did not introduce the provisions in the Act to aggregate costs where 2 or more requests are made by one person or by 2 or more different parties acting in concert. Is there evidence in light of experience, of a requirement to incorporate these provisions in future revised fees regulations? Yes/No?

What is the evidence?

Q17: Do you have any other comments on the content of the current fees guidance (Annex 3 to the Section 60 Code of Practice – attached as Annex C to the Consultation paper.)

Q18: Do you have any evidence of the resource implications/general impact of FOI(S)A on your organisation?

Q19: Is the operation of the FOI(S)A fee charging regime working effectively with the charging regime for the Environmental Information Regulations (EIRs)? Yes/No

Any other comments?

Q20: How many times have you issued a fees notice?

Q21: How many times have fees notices which you have issued not been paid?

Q22: Are there any other issues on fees/charging which you wish to raise?

QUESTIONS ON TOPIC 4 - Timescales

Q23: Can you provide us with evidence of any significant difficulties arising from the 20-day response time requirements?

Q24: Are there any other time limits provided for in the Act which are giving rise to concern?

QUESTIONS ON TOPIC 5 - Prohibitions to disclosure of information

Q25: Do you have any examples of occasions where statutory provisions in other legislation are in practice preventing the release of information through FOI(S)A by Scottish public authorities?

QUESTIONS ON TOPIC 6 - FOI(S)A Section 31 guidance

Q26: Do you have any comments on the Guidance Note on handling requests for national security related information? (A copy of the guidance note is provided in Annex B of the consultation paper)

Q27: Do you have any views on the length of time certificates made under s31(2) of FOI(S)A should remain in place?

RESPONDENT INFORMATION FORM

Consultation title : **Freedom of Information (Scotland) Act 2002 - One year on**

Please complete the details below and return this form with your response. This will ensure that we handle your response appropriately. Thank you for your help.

Name:

Postal Address:

1. Are you responding: (please tick one box)
- (a) as an individual ☐ go to Q2a/b and then Q4
- (b) **on behalf of** a group/organisation ☐ go to Q3 and then Q4

INDIVIDUALS

- 2a. Do you agree to your response being made available to the public (in Scottish Executive library and/or on the Scottish Executive website)?

Yes (go to 2b below) ☐

No, not at all ☐ We will treat your response as confidential

- 2b. Where *confidentiality is not requested*, we will make your response available to the public on the following basis (**please tick one** of the following boxes)**

Yes, make my response, name and address all available ☐

Yes, make my response available, but not my name or address ☐

Yes, make my response and name available, but not my address ☐

ON BEHALF OF GROUPS OR ORGANISATIONS:

- 3 The name and address of your organisation ***will be*** made available to the public (in the Scottish Executive library and/or on the Scottish Executive website). Are you also content for your **response** to be made available?

Yes ☐

No ☐ We will treat your response as confidential

SHARING RESPONSES/FUTURE ENGAGEMENT

- 4 We will share your response internally with other Scottish Executive policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Executive to contact you again in the future in relation to this consultation response?

Yes ☐

No ☐

BACKGROUND ON THE SCOTTISH EXECUTIVE CONSULTATION PROCESS

Consultation is an essential and important aspect of Scottish Executive working methods. Given the wide-ranging areas of work of the Scottish Executive, there are many varied types of consultation. However, in general, Scottish Executive consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Executive encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Executive consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Executive web site enabling a wider audience to access the paper and submit their responses¹. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Executive library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Executive consultation papers and related publications (e.g. analysis of response reports) can be accessed at: Scottish Executive consultations (<http://www.scotland.gov.uk/consultations>)

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

¹ <http://www.scotland.gov.uk/consultations>