

Freedom of Information (Scotland) Act 2002

Overview

[draft introduction which makes clear the status of this guidance and its aim, who it is for and how it should be used. To be placed here?]

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1. In summary

The Freedom of Information (Scotland) Act 2002 was passed by the Scottish Parliament on 24 April and received Royal Assent on 28 May 2002. It will introduce a general statutory right of access to all types of 'recorded' information of any age held by Scottish public authorities. Subject to certain conditions and exemptions, any person who makes a request to a public authority for information will be entitled to receive it.

The Act will be promoted and enforced by a fully independent Scottish Information Commissioner, who will be appointed by Her Majesty on the nomination of the Scottish Parliament.

Two Codes of Practice to be issued under the Act will provide guidance to public authorities:

- on responding to requests for information and associated matters (s60), and
- on records management (s61)

Each Scottish public authority will be required to adopt and maintain a 'publication scheme' setting out how it intends to publish the different classes of information it holds, and whether there is to be a charge for the information.

No decision has yet been taken on when the Act will be implemented, although the legislation states that it will have to be in force no later than 31 December 2005. The Scottish Freedom of Information Implementation Group, with representation from across the Scottish public sector, was set up to ensure that all necessary measures are put in place so that the Act can be implemented smoothly and consistently. The first annual report of the Group has been published and this, along with other papers, can be accessed via the Executive's web-site (<http://www.scotland.gov.uk/government/foi/>).

2. Who is covered by the Act?

The Act applies to Scottish public authorities. A detailed list is contained in Schedule 1 of the Act. This includes:

- the Scottish Executive
- Local Authorities
- NHS Scotland (NHS Boards, Trusts and other Health related organisations)
- Schools, Colleges and Universities
- the Police
- the Scottish Parliament

Schedule 1 also contains a list of other public bodies covered by the Act, ranging from various official advisory and expert committees to regulators and organisations such as the Parole Board for Scotland, the Scottish Environmental Protection Agency, the Scottish Qualifications Authority and the Mental Welfare Commission for Scotland.

In addition, there is a provision in the Act for other authorities to be named later, and for organisations to be designated as public authorities because they exercise functions of a public

nature or provide a service under a contract which is a function of that authority. It is intended that this provision will be used to bring within the scope of the Act private companies involved in significant work of a public nature, for example private companies involved in major PFI /PPP contracts. In such cases, only the company's involvement in work of a public nature would be affected by FOI and not other areas of business.

3. The right to information

New rights

The Freedom of Information (Scotland) Act 2002 entitles a person who requests information from a Scottish public authority that holds it to be given it by the authority (subject to certain conditions and exemptions).

The applicant may express a preference for receiving the information in a particular format, in summary, or by asking to inspect a record.

As soon as the Act is in force, applicants will be able to exercise their statutory right of access to information held by Scottish public authorities. They will then be able to ask for information recorded both before and after the Act was passed. It should be noted that the Act is fully retrospective and will apply to information of any age [including historical records (see part 13).]

Public authorities will also need to be aware that there is a right of access to certain information under Environmental Information Regulations (see part 14).

Making a request

Under the Act, there will be no restrictions on who may apply to a Scottish public authority for information, although the request must be in writing or in another form with some permanency capable of being used for subsequent reference (such as a recording made on audio or video tape). All recorded communications to a public authority seeking information must be considered as FOI requests, although the applicant does not have to quote the Act or give reasons for requesting the information.

4. New responsibilities for public authorities

Publication schemes

The Act places a duty on each Scottish public authority to adopt and maintain a 'publication scheme', which must be approved by the Scottish Information Commissioner. Such schemes must set out:

- the classes of information the authority publishes,
- the manner in which the information is published, and
- details of any charges.

It is anticipated that the Scottish Information Commissioner, when appointed, will work with public authorities to develop guidance on what should be included in publication schemes.

In considering the content of its publication scheme, the Act requires a public authority to have regard to the public interest in allowing access to the information it holds;

- about provision, cost and standard of its service provision
- factual information or analysis informing decision making, and
- in the publication of reasons for decisions made by it.

Publication schemes may either be designed for particular bodies or may be generic. The Commissioner may also approve model schemes for a group of similar bodies, such as schools.

Information is exempt from the Act if the applicant can reasonably obtain it by other means. Where information is already accessible because it is covered by the authority's publication scheme, the authority will not then be required to provide the information in response to an FOI request. In other words, 'published' material is not generally covered by the Act.

Responding to requests

A request will have to satisfy certain conditions before an authority is obligated to respond to it. For example, it must be in a form capable of being used for subsequent reference and must include sufficient information to enable the authority to identify the information requested. Authorities will not have to comply with 'vexatious' or 'repeated requests', if the authority has recently responded to an identical or substantially similar request from the same person. However, public authorities will be under a duty to provide advice and assistance to anyone making a request. Further guidance on this duty will be set out in the Section 60 Code of Practice. (see part 8).

Scottish public authorities will also have a duty to respond to requests within 20 working days. In certain circumstances, the Keeper of the Records of Scotland (listed in Schedule 1) will have 30 working days to respond to requests. Where possible, information must be provided to the applicant in the manner requested, if it is reasonably practical to do so. [It should be noted that this requirement will not detract from any duty the authority is placed under by the Disability Discrimination Act 1995. Guidance will be developed which will explain how public authorities should administer the FOI regime in accordance with that legislation.]

As mentioned above, a public authority will not have to respond to an FOI request for information that is included in a publication scheme as the material is otherwise accessible. In contrast, an authority will be required to respond to requests for material which is 'unpublished' on a case-by-case basis, taking into account the right of access and exemptions. Although, it should be noted that there is an exemption which covers material that is due to be published within twelve weeks.

Where an authority decides not to release the information requested, because it considers an exemption applies, it must give reasons for its decision and must inform the applicant of his/her right of appeal to the Scottish Information Commissioner. However, even where an exemption applies, an authority may still be required to release the information if it is in the public interest to do so (see part 6 and 7).

5. Charging scheme

Public authorities may charge for the disclosure of information. An authority's publication scheme will be required to set out any charges for the provision of information under the scheme and, in approving the scheme, the Commissioner will have regard to the level of these charges. Statutory charging regimes for the provision of information (for instance, for extracts of birth or marriage certificates) would be unaffected by the Act.

Information covered neither by an authority's publication scheme nor by a statutory charging scheme will be subject to the following charging regime (to be finalised then set out in subordinate legislation):

- any request costing under £100 to fulfil will be free of charge to the applicant,
- for requests costing between £100 and an upper cost threshold (likely to be set between £500 and £600) the applicant will be charged 10% of prescribed costs,
- authorities will not be required to respond to requests costing in excess of the upper cost threshold (although they may do so if they wish).

6. The public interest

In the majority of cases where an exemption applies the authority will then have to consider whether to release the information, despite the exemption, because it is in the public interest to do so. This public interest test involves considering the circumstances of each particular case and the exemption that covers the information. The balance will always lie in favour of disclosure: information should only be withheld if the public interest in withholding it is greater than the public interest in releasing it.

Those exemptions to which the public interest test does not apply are known as 'absolute' exemptions. Absolute exemptions cover:

- information otherwise accessible,
- statutory prohibitions on disclosure,
- breaches of confidence,
- court records, and
- information for which other access rights are provided – such as personal information under the UK wide Data Protection Act 1998.

7. Exemptions

Some of the information held by a public authority may be regarded as exempt information i.e. it will not have to be provided in response to an individual request. There are 17 such exemptions and they relate to information held for a variety of functions. These cover areas such as national security and defence, police investigations and the formulation or development of government policy.

Before an exemption is cited to withhold information, a public authority will usually be obliged to consider two further points. Firstly, some of the exemptions can only be cited if the release of the information would *prejudice substantially* the purpose to which the exemption relates.

For instance, information held in connection with law enforcement can only be withheld if its release would for example, prejudice substantially the prevention or the detection of a crime.

The use of “substantial prejudice” is known as a “harm test” and it is intended to make clear that information should be disclosed unless the prejudice caused would be real, actual and of significant substance.

Secondly, some of the exemptions also require the public authority to apply the “public interest” test before making a final decision as to whether or not to release the information (See part 6 of this paper). Most of the exemptions will require a public authority to consider both the test of substantial prejudice and the public interest test.

It should be noted that only the information to which an exemption applies could be withheld. If a particular document had been requested which contained some exempt information, only those specific items of exempt information may be withheld. The rest of the document would still have to be released.

In addition, it should also be noted that the exemptions in the Act do not preclude the disclosure of information by a public authority. If information is considered to fall within an exemption and, where relevant, it is considered not to be in the public interest to disclose that information, a public authority need not disclose that information, but the Act does not *require* the authority to withhold it.

It is anticipated that the Scottish Information Commissioner, over time and in light of case-by-case experience, will develop detailed guidance on exemptions.

8. Section 60 Code of practice – Functions under the Act

The Act specifies that two Codes of Practice are to be issued. Firstly, section 60 provides for the Scottish Ministers, after consultation with the Scottish Information Commissioner, to issue a Code of Practice providing guidance on how public authorities should discharge their duties in complying with the Act.

The section 60 Code covers the duty to provide advice and assistance to applicants; the transferring of requests from one authority to another; consultations with third parties (persons other than the applicant who may be affected by the release of information); procedures for dealing with complaints; and the inclusion in contracts entered into by public authorities of conditions relating to the disclosure of information. In addition, how authorities collect and record statistics to monitor their responsibilities under the Act will be covered by this Code.

9. Section 61 Code of Practice - Records Management

Section 61 provides for the issue by the Scottish Ministers, after consultation with the Commissioner and the Keeper of the Records of Scotland, of a Code of Practice providing Scottish public authorities with guidance on the keeping, management and destruction of their records. This Code may also include guidance on the transfer of records to the Keeper of the Records of Scotland, on reviewing records before such a transfer, and may be tailored so as to meet the requirements of different public authorities.

10. The Scottish Information Commissioner

A fully independent Scottish Information Commissioner, with responsibility to promote and enforce the FOI legislation will be established. The Scottish Information Commissioner will be appointed by Her Majesty, on the nomination of the Scottish Parliament. The Commissioner will be an independent public official whose duties will include:

- the promotion of good practice
- approving and assisting in the preparation of publication schemes
- providing information as to the public's rights under the Act
- enforcing compliance with the Act

The Commissioner will lay before the Parliament an annual report and other such reports as the Commissioner considers appropriate.

11. Enforcement

A person who has made a request for information may apply to the Scottish Information Commissioner for a decision as to whether the public authority had dealt with the request in accordance with the Act. If the Commissioner considers that an appeal is valid, the public authority will be notified and comments invited. The Commissioner will then endeavour to effect a settlement between the applicant and the authority.

If more substantive action is required the Commissioner could issue a 'decision notice' to both parties which would outline the provisions in the Act with which the public authority had failed to comply and the steps needed to be taken in order to rectify this.

To assist in the consideration of an appeal, the Commissioner may serve an 'information notice' to the public authority. This power will allow the Commissioner to obtain information held by the authority to support the appeal investigation.

If the Commissioner was satisfied that a public authority had failed to comply with a provision in the Act, an 'enforcement notice' would be served. Such a notice would advise the authority to take action to comply with the provision.

If the public authority failed to comply with either a decision, information or enforcement notice, the Commissioner could certify such failure to the Court of Session. The Court could inquire into the matter and, after hearing witnesses or any statement made on behalf of the public authority, could deal with the authority as if it had committed contempt of court.

12. Appeals

When serving a notice of any kind, the Commissioner must at the same time explain the appeals mechanism. The Act provides scope for appellants and public authorities to appeal, on points of law, against decisions made by the Commissioner to the Court of Session.

13. Historical Records

As a result of current administrative practices, some public records are closed for a certain period (for example 30 years) and then made public. The Act provides that the right of access applies from a record's origination and that certain exemptions cease to apply after 30, 60 or 100 years. Other exemptions remain always to be considered before a decision on disclosure is taken. The Act contains a number of technical provisions dealing with records held by the Keeper of the Records of Scotland.

14. Environmental Information Regulations

The Act enables the Scottish Ministers to make regulations which provide for a regime to access environmental information. These Environmental Information Regulations will implement the Aarhus Convention – the United Nations Economic Commission for Europe (UNECE) 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters'. This is a measure to which the United Kingdom and all other European Union Member States are signatories. It is intended that the Scottish Information Commissioner will operate as the appellate authority.

Once operational, these new regulations will be the principal means of gaining access to environmental information. Therefore, any request for environmental information will first be considered in accordance with the Environmental Information Regulations before, if necessary, taking account of the Freedom of Information (Scotland) Act 2002.

15. FOI and Data Protection

Individuals already have the right to access information about them ('personal data') which is held on computer, and in some paper files, under the Data Protection Act 1998. This is known as 'subject access right'. Data Protection is a reserved matter and responsibility for enforcement of the Data Protection Act 1998 lies with the (UK) Information Commissioner

The Freedom of Information (Scotland) Act 2002 extends access rights which already exist under the Data Protection Act 1998. A request by an individual for information about himself will be exempt under the Freedom of Information (Scotland) Act and will continue to be handled as a 'subject access request' under the Data Protection Act. In certain circumstances such a request may involve the release of associated third party information.

Where an applicant however specifically requests information about a third party, or where responding to a FOI request would involve the disclosure of personal information about a third party, the request falls within the remit of the Freedom of Information (Scotland) Act. However, the authority must apply the Data Protection Principles when considering the disclosure of information relating to living individuals. An authority must not release third party information, if to do so would mean breaching one of the Principles.

Data Protection Act 1998 amendments

The (UK) Freedom of Information Act 2000 will make a number of amendments to the Data Protection Act 1998. One of the most significant is that the definition of 'data' will be extended, as far as public authorities covered by the UK FOI Act are concerned, to cover **all**

personal information held. This will include 'structured' and 'unstructured' manual records. Only the right of subject access, the right to correct and limited compensation rights will apply to this new category of data. It is intended that this amendment will be extended to include personal information held by Scottish public authorities. This will be done through an order under section 104 of the Scotland Act 1998.

The Freedom of Information (Scotland) Act 2002 does not repeal any other legislation. Any Act which contains provisions dealing with the disclosure and non-disclosure of information still remain in operation and will have to be complied with. Any request for information will now have to be considered under the FOI Act as well as in relation to any other existing legislation relevant to that request.

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