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FREEDOM OF INFORMATION (SCOTLAND) ACT [2002]

CODE OF PRACTICE AS TO FUNCTIONS UNDER THIS ACT

**WORKING DRAFT PROVIDED TO THE JUSTICE 1 COMMITTEE OF THE
SCOTTISH PARLIAMENT TO SUPPORT STAGE 2 SCRUTINY OF THE
FREEDOM OF INFORMATION (SCOTLAND) BILL**

**Laid before the Scottish Parliament on [] pursuant to section 60(5) of
the Freedom of Information (Scotland) Act [2002]**

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FOREWORD TO THE DRAFT CODE OF PRACTICE ON THE DISCHARGE OF THE FUNCTIONS OF PUBLIC AUTHORITIES UNDER THE FREEDOM OF INFORMATION (SCOTLAND) ACT [2002]

INTRODUCTION

1. The Code of Practice, to which this is a foreword, fulfils the duty on the Scottish Ministers set out in section 60 of the Freedom of Information (Scotland) Act [2002], to provide guidance to public authorities as to the practice which it would, in the opinion of the Scottish Ministers, be desirable for them to follow in connection with the discharge of their functions under this Act. This foreword does not form part of the Code itself.

2. It is the Scottish Executive's intention that the Freedom of Information (Scotland) Act will further the stated aim of greater openness and transparency across the Scottish public sector. Wherever appropriate, the disclosure of information, both proactively and in response to specific requests, serves to strengthen government and increase public involvement in decision-making. Conformity with the Code will assist this.

3. The Code is a supplement to the provisions in the Act. It is not a substitute for legislation. Public authorities should seek legal advice as considered necessary on general issues relating to the implementation of the Act, or its application to individual cases.

Practice Recommendations

4. Under the provisions of section 43 of the Act, the Scottish Information Commissioner has a duty to promote the observance of this Code by public authorities. If it appears to the Commissioner that the practice of a public authority in the exercise of its functions under the Act does not conform with that proposed in the Code of Practice, he or she may give to the authority a recommendation (known as a "practice recommendation") specifying the steps which should, in his or her opinion, be taken to promote such conformity.

5. A practice recommendation must be given in writing and must refer to the particular provisions of the Code of Practice with which, in the Commissioner's opinion, the public authority's practice does not conform. A practice recommendation is simply a recommendation, designed to assist an authority to improve its procedures under the legislation, and consequently cannot be directly enforced by the Information Commissioner. However, a failure to comply with a practice recommendation may lead to a failure to comply with the Act. A failure to take account of a practice recommendation may also be the subject of specific comment in a report to the Parliament by the Commissioner.

Information Notices

6. If the Commissioner reasonably requires any information for the purpose of determining whether the practice of a public authority conforms with that proposed in

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this Code, under section 50 of the Act he or she may serve on the authority a notice (known as an "information notice") requiring it to furnish him or her with such information relating to conformity with the Code of Practice as is specified.

7. Under the provisions of section 53 of the Act, if a public authority fails to comply with an information notice, the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice. The court may then inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of, the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.

Duty to provide advice and assistance

8. Section 15 of the Act places a duty on public authorities to provide advice and assistance to applicants, so far as it is reasonable to expect an authority to do so. A public authority is deemed to have complied with this duty if it has conformed with the Code in relation to the provision of advice and assistance.

9. Consequently, where an authority departs from the Code's provisions relating to the provision of advice and assistance, it should be prepared to explain to the Commissioner that the advice and assistance provided was reasonable in the circumstances. Where an authority cannot do so, the Commissioner may consider that authority to have failed to meet its obligations under section 15 to provide advice and assistance. Where this is the case, the Commissioner may issue a decision notice under section 49 or an enforcement notice under section 51. If an authority fails to comply with a decision notice or an enforcement notice, the Commissioner may certify this to the court, inviting the court to inquire into the matter and determine whether the authority should be deemed to have committed a contempt of court.

MAIN FEATURES OF THE ACT

10. The main features of the Freedom of Information (Scotland) Act [2002] are:

- i) the establishment of a general right of access to recorded information of any age held by a wide range of bodies across the public sector in Scotland, subject to certain conditions and exemptions;
- ii) in relation to most exempt information, the information must nonetheless be disclosed where the public interest in disclosure outweighs the public interest in maintaining the exemption;
- iii) a duty on each Scottish public authority to adopt and maintain a 'publication scheme', approved by the Scottish Information Commissioner. Publication schemes must specify the classes and manner in which information is, or is intended to be, published together with an indication of whether the information will be available free of charge or on payment;

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- iv) the creation of a new office of Scottish Information Commissioner, with wide powers to promote good practice and to enforce the rights created in the Act; and
- v) a duty on the Scottish Ministers to promulgate Codes of Practice containing guidance on specific issues (under sections 60 and 61 of the Act).

TRAINING

11. All communications in writing to a public authority potentially fall within the scope of the Act, if they seek information, and must be dealt with in accordance with the provisions of the Act. It is therefore essential that everyone working in a public authority, who deals with correspondence, or who otherwise may be required to provide information, is familiar with the provisions of the Act, of the Codes of Practice issued under its provisions, and any relevant guidance on good practice issued by the Commissioner.

[Drafting note: Reference to be made to the Training Strategy being developed by the cross-sector Freedom of Information Implementation Group. Nb. further guidance may also be issued by the Scottish Information Commissioner, public authorities and other bodies.]

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DRAFT CODE OF PRACTICE ON THE DISCHARGE OF THE FUNCTIONS OF PUBLIC AUTHORITIES UNDER PART I OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT [2002]

The Scottish Ministers, after consulting the Scottish Information Commissioner, issue the following Code of Practice pursuant to section 60 of the Act.

Laid before Parliament on [] pursuant to section 60(5) of the Freedom of Information (Scotland) Act [2002].

INTRODUCTION

1. This Code of Practice provides guidance to public authorities as to the practice which it would, in the opinion of the Scottish Ministers, be desirable for them to follow in connection with the discharge of their functions under the Freedom of Information (Scotland) Act ("the Act").

2. The aims of the Code are to:

- facilitate the disclosure of information under the Act by setting out good administrative practice that it is desirable for public authorities to follow when handling requests for information, including, where appropriate, the transfer of a request to a different authority;
- protect the interests of applicants by setting out standards for the provision of advice which it would be good practice to make available to them and to encourage the development of effective means of handling complaints about decisions taken under the Act;
- ensure that the interests of third parties who may be affected by any decision to disclose information are considered by the authority, by setting standards for consultation; and
- ensure that authorities consider the implications for Freedom of Information before agreeing to confidentiality provisions in contracts and accepting information in confidence from a third party more generally.

3. Although there is a statutory duty on the Scottish Ministers to issue the Code, the provisions of the Code themselves do not have statutory force. The statutory requirements for dealing with requests for information are contained in the Act and the regulations made under it, and public authorities must comply with these statutory provisions at all times. Additionally, public authorities will need to ensure that they comply with their existing duties under other legislation, including the Disability Discrimination Act 1995.

[Drafting note: Refer to additional guidance developed to help public authorities meet their obligations under this and other legislation, for example equal opportunities legislation.]

4. Section 43 of the Act places a duty on the Scottish Information Commissioner to promote the following of good practice by public authorities ("good practice" includes compliance with the provisions of the Code), and section 44 of the Act

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enables the Scottish Information Commissioner to issue a "practice recommendation" to a public authority if it appears to him or her that the practice of the authority does not conform with that proposed in the Code. Further, section 15 of the Act places a duty on public authorities to provide advice and assistance to applicants and potential applicants. Authorities will have complied with this duty in any particular case if they have conformed with the Code in relation to the provision of advice or assistance in that case.

5. Words and expressions used in this Code have the same meaning as the same words and expressions used in the Act.

THE PROVISION OF ADVICE TO PERSONS MAKING REQUESTS FOR INFORMATION

6. Every public authority should provide advice and assistance (as set out below) to those who propose to make, or who have made, requests for information to it, in order to facilitate their use of the Act.

7. Public authorities should publish their procedures for dealing with requests for information, which should include an address (including an e-mail address where possible) to which applicants may direct requests for information or for assistance. These procedures should be referred to in the authority's publication scheme.

8. A request for information must be made in writing (which includes a request transmitted by electronic means which is received in legible form and is capable of being used for subsequent reference). Where a person is unable to frame their request in writing, the public authority should ensure that appropriate assistance is given to enable that person to make a request for information. In particular, public authorities should ensure that advice and assistance is available to help those with a disability or with literacy difficulties.

9. Appropriate assistance could include offering to take a note of the application over the telephone and then send the note to the applicant for confirmation (in which case the written note of the telephone request, once verified by the applicant and returned, would constitute a written request for information and the statutory time limit for reply would begin when the written confirmation was received).

10. Where insufficient information is provided by the applicant to enable the authority to identify and locate the information sought, or the request is ambiguous, the authority should, as far as practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested. The aim of such assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Appropriate assistance could include:

- the provision of an outline of the different kinds of information which might meet the terms of the request;
- the provision of detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;

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- the provision of a general response to the request setting out options for further information which could be provided on request; or
- where a request would be refused on cost grounds, an indication of what information could be provided within the cost ceiling.

This list is not exhaustive and authorities should be flexible in offering advice and assistance to applicants, and in particular to those with a disability or literacy difficulties.

11. If, following the provision of such assistance, the applicant has failed to describe the information requested in a way which would enable the authority to identify and locate it, the authority is not expected to seek further clarification, though it must disclose any information relating to the application, which has been successfully identified and found, and which is disclosable under the provisions of the Act, and should explain to the applicant why it cannot take the request any further.

12. An authority cannot seek information from an applicant which he [or she] cannot reasonably be expected to possess, such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants.

HANDLING REQUESTS CONSIDERED TO BE PART OF AN ORGANISED CAMPAIGN UNDER SECTION 12

13. Where an authority is not required to comply with a number of related requests because, under section 12, the cumulative cost of meeting the requests would exceed an upper threshold set in regulations, and where the requested information would have been disclosed, had the cost of responding not exceeded the upper cost threshold, the authority should consider whether the requested information can be disclosed in another, more cost-effective, manner. Where a number of requests have been received for the same information, authorities should give particular consideration to the general dissemination of the information, for example by way of publication on the Internet.

14. Where an authority does not disclose the information in another, more cost-effective manner, it should be prepared to explain to the Commissioner why it did not consider it reasonable to do so.

TRANSFERRING REQUESTS FOR INFORMATION

[Drafting note: consider adding opening paragraph noting that the transfer of requests, whilst not legally required, is in the spirit of the legislation. Particularly applicable in relation to authorities holding records on behalf of another authority.]

15. A request for information can be transferred only where the public authority in receipt of the request does not hold all the requested information (within the meaning of section 3(2) of the Act). If the authority in receipt of the request does hold the

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requested information, it should process the request in compliance with the Act. If the request is for information, some of which is held by the authority and some of which is not, the provisions in respect of the transfer of requests in the Code only apply to that part of the request which relates to information which the authority does not hold.

16. Where a public authority receives a request for information which it does not hold, but which it believes is held by another public authority, it should consider whether to consult that authority with a view to ascertaining whether it does hold the information and, if so, whether it should transfer the request to it. In considering whether to consult another public authority, the authority in receipt of the request should consider whether the applicant would have any grounds to object. If the authority reasonably concludes that an applicant would object, it should not consult the authority or transfer the request without the applicant's prior consent. Where the authority considers that the applicant's consent should be sought, this should be done as soon as is practicable.

17. The process of consulting another authority does not relieve the first authority of its obligations under the Act. It will still be required to respond to the applicant within the 20 working day period, providing to the applicant, where appropriate, the requested information which it does hold, and advising the applicant about the requested information which it does not hold. If the applicant has not consented to the transfer of the request to another authority, it may be appropriate at this stage to advise the applicant that the requested information may be held by another specified public authority.

18. A request or part of a request transferred to another public authority, with the agreement of the receiving authority, would be a request within the meaning of the Act to receiving authority. Consequently, the receiving authority must comply with its obligations under the Act in the same way as it would for a request which it received directly from an applicant. The receiving authority's obligations would begin on receipt of the request from the transferring authority and it would have 20 working days in which to respond to the applicant.

19. All transfers of requests should take place promptly.

20. Where a public authority is unable to facilitate the transfer of a request for information to another authority or considers it inappropriate to do so, it should consider what advice, if any, it can provide to the applicant to enable them to pursue their request.

21. In summary, before consulting another public authority about the transfer of a request for information to that authority, the authority should consider:

- whether it holds the requested information;
- if it does not, the authority should consider whether the applicant would have any grounds to object to the transfer;
- where the authority considers that the applicant may object, it should seek the applicant's consent before consulting another authority – if the applicant does not

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consent, the authority should not consult the other authority and should simply respond to the applicant in compliance with the Act;

- if the authority reasonably concludes that the applicant would not object, it may consult the authority and transfer the request without seeking the applicant's prior consent, but should tell him it has done so (as well as complying with its obligations under the Act).

[Drafting note: consider guidance for public archives, other than the National Archives for Scotland, on handling requests for information, where that information is held on behalf of another public authority.]

CONSULTATION WITH THIRD PARTIES

22. In some cases the disclosure of information pursuant to a request may affect the legal rights of a third party such as the right to have certain information treated in confidence or rights under Article 8 of the European Convention on Human Rights. Where the consent of the third party would enable a disclosure to be made, an authority should consult that party prior to reaching a decision, unless it is clear to the authority that the consent would not be forthcoming. The need for some information to be treated as confidential may lessen with time and, where this may reasonably be the case, authorities should consider with the third party whether it continues to be necessary that the information is confidential.

23. Where the interests of the third party which may be affected by a disclosure do not give rise to legal rights, the public authority should consider whether to consult the third party. Consultation will be unnecessary where:

- the public authority does not intend to disclose the information, relying on some other legitimate ground;
- the views of the third party can have no effect on the decision of the authority, for example, where there is other legislation preventing or requiring the disclosure of this information; or
- A public authority may consider that consultation is not appropriate where the cost of consulting with third parties would be disproportionate.

24. Consultation should take place where:

- the views of the third party may assist the authority to determine whether information is exempt from disclosure under the Act; or
- the views of the third party may assist the authority to determine under section 2 of the Act where the public interest lies.

25. Where the interests (but not the legal rights) of a number of third parties may be affected by a disclosure, and those parties have a representative organisation which can express views on behalf of those parties, the authority may, if it considers consultation appropriate, consider that it would be sufficient to consult that representative organisation. If there is no representative organisation, the authority may consider that it would be sufficient to consult a representative sample of the third parties in question.

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26. The fact that the third party has not responded to consultation does not relieve the authority of its duty to disclose information under the Act, or its duty to reply within the time specified in the Act.

[Drafting Note: consideration also being given to the inclusion of a section setting out when it will be appropriate for the Scottish Executive to consult the UK Government (and vice versa) on issues surrounding the disclosure of information.]

[Drafting Note: consider guidance for public authorities withholding information intended for future publication under section 27, where publication has not taken place at the expected date.]

FREEDOM OF INFORMATION AND PUBLIC SECTOR CONTRACTS

27. When entering into contracts, public authorities should refuse to include contractual terms which purport to unreasonably restrict the disclosure of information held by the authority and relating to the contract. Public authorities should not agree to hold information 'in confidence' which is not in fact confidential in nature.

28. When entering into contracts with non-public authority contractors, public authorities may be under pressure to accept confidentiality clauses so that information relating to the terms of the contract, its value and performance will be exempt from disclosure. Public authorities should not accept such clauses where this is commercially viable.

29. Any acceptance of such confidentiality provisions must be for good reasons and capable of being justified to the Commissioner.

30. Similarly, public authorities should not impose unnecessary duties of confidence on contractors. However, a public authority may need to use appropriate contractual terms to protect from disclosure, by the contractor, information which would be exempt from disclosure under the Act. The use of such confidentiality provisions must be for good reason and capable of being justified to the Commissioner. Apart from such cases, public authorities should not impose terms of confidentiality on contractors.

ACCEPTING INFORMATION IN CONFIDENCE FROM THIRD PARTIES

31. A public authority should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of the authority's functions. In addition, public authorities should not agree to hold information received from third parties "in confidence" which is not confidential in nature. And again, acceptance of any confidentiality provisions must be for good reasons, capable of being justified to the Commissioner.

REQUIREMENT FOR REVIEW - PROCEDURES

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32. Public authorities are required under section 21 of the Act to have in place a procedure for dealing with requirements for review from people who consider that their request has not been properly handled, or who are otherwise dissatisfied with the outcome of the consideration of their request, and the issue cannot be resolved in discussion with the official dealing with the request. Under section 19, a refusal notice issued to an applicant must set out the details of this procedure.

33. The review procedure should be a fair and impartial means of dealing with handling problems and reviewing decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should be possible to reverse or otherwise amend decisions previously taken.

34. Where practicable, an internal review should be handled by a person who was not a party to the original decision.

35. Records should be kept of all reviews and of their outcome. Authorities should have procedures in place for monitoring complaints and for reviewing, and, if necessary, amending, policies where such action is indicated by regular reversals of initial decisions.

36. Where the outcome of a review is that the procedures within an authority have not been properly followed by an individual within an authority, the authority should apologise to the applicant and take appropriate steps to reduce the likelihood of errors of this type occurring in future. The authority should be prepared to explain what these steps will be to the Commissioner.

37. Where the outcome of a review is that an initial decision to withhold information is upheld, or is otherwise in the authority's favour, the authority is required, under section 21, to inform the applicant of their right to apply to the Commissioner. Authorities should also ensure that applicants are made aware of how to exercise their right of appeal to the Commissioner.