

FOISA WORKING ASSUMPTION

WRITTEN SCOTTISH PARLIAMENTARY QUESTIONS

IMPORTANT NOTE: Working Assumptions are simply that – a guide to the most likely approach. They are not a substitute for consideration of individual cases on their merits.

Category of Information: Answer and background information to written PQ.

Working assumptions

1. This category of information can be split into several sub-categories, as below:
 - (a) Written answer: **release**.
 - (b) Factual biographical information about MSP asking the question from published sources: **release** – generally by referring the applicant to the Parliament’s web-site.
 - (c) Factual background and statistical material about the policy area and answer: **release**.
 - (d) Judgements about information (such as ‘our best figures are...’ or ‘worst accusation’): generally **withhold** (as this is the opinion of officials rather than factual information). Apply exemption 30(b)(i) [prejudice to the effective conduct of public affairs; inhibiting substantially the free and frank provision of advice].
 - (e) Opinion and speculation about the reasons behind the question and its motivation: **withhold**. Apply exemption 30(b)(i) (prejudice to the effective conduct of public affairs – inhibiting substantially the free and frank provision of advice).

Notes:

- (i) If a request for information relating to a SPQ is received before the answer has been given, the working assumption no longer applies and the request should be referred for more specialist advice. (See “Referral Points” below.)
- (ii) It must be remembered that the FOI (Sc) Act gives access to information, not documents. Where the working assumption is to release, it is assumed that factual information will be removed from the context of the SPQ briefing pack before being sent to the applicant.

Reasons for assumptions

2. The main rationale for the assumptions above is as follows:

FOISA WORKING ASSUMPTION

(a) **Written answer** – the information is already in the public domain. Although exemption 25 (information otherwise accessible) could apply, on some occasions it may be simpler and easier to release the information, or, alternatively, provide the applicant with a link to or extract from the Official Report.

(b) **Factual biographical information about the MSP asking the question** – biographical information about MSPs is readily available in the public domain, and there is no argument for withholding it as long as it is from a published source. Factual information about the number of times an MSP has asked a question in a particular area, or lists of the previous questions they have asked, can also be put together from readily available public information, and therefore should be released.

(c) **Background factual and statistical material about the policy area and answer:** Section 29 of the Act sees a clear public interest in the release of such information, especially once the policy decision has been made.

(d) **Judgements about information (such as ‘our best figures are...’ or ‘worst accusation’):** such judgements are part of the opinion of officials and constitute advice rather than factual information. Section 30 of the Act recognises that the release of information that “would, or would be likely to inhibit substantially ... the free and frank provision of advice” may need to be withheld, subject to an assessment of the public interest. The arguments for using this exemption are therefore the same as for (e) below.

(e) **Opinion and speculation about the reasons behind the question and likely political motivation:** as for (d) above, Section 30 of the Act recognises that the release of information that “would, or would be likely to inhibit substantially ... the free and frank provision of advice” may need to be withheld, subject to an assessment of the public interest. This test is commented in paras 3 and 4 below.

3. There are strong public interest reasons why officials should be able to provide free and frank advice to Ministers in briefing for written SPQs. It is clearly in the public interest that Ministers can properly answer Parliamentary questions, and provide sound information to Parliament, to which they are accountable.

4. If Ministers are to do this effectively, they must have full and frank advice. This advice must enable them to see the political context of the question being asked, the likely motivation for the question, the views of other MSPs on the issue being discussed, and it must give them a full overview of the policy issue, Government position and background of the issue being asked about.

5. Routinely releasing such advice would swiftly lead to a reduction in the comprehensiveness and frankness of such advice with consequential detriment to the public interest.

6. It should be noted that background information relating to written SPQ’s exists for a different reason than for Oral SPQ information. The background factual information supplied in an Oral SPQ briefing is intended to be deployed by a Minister to defend policy during a questions session, whereas the factual information in formal written PQ’s exists only to show the Minister why a particular answer has been given.

FOISA WORKING ASSUMPTION

The public interest considerations relating to the factual information supplied as background to written SPQs are slightly different from those which require consideration in relation to oral PQ briefing.

Referral for advice

7. Working assumptions do not fit all situations. The referral points set out below describe specific situations where the working assumption (either to release information or withhold information) should not be used. The fact that the assumption does not apply does not mean you should automatically release the information. In these circumstances, the official dealing with the request should **consult or refer for advice** to either a more senior member of staff, or an FOI lead officer, or the FOI Unit, as appropriate.

(i) The request states that the applicant is asking for internal review of an earlier decision to refuse to release information – working assumptions are only designed to be used on the first occasion that information is requested. Appeals against decisions to withhold information may need more careful consideration and should therefore be referred.

(ii) The information relates to a matter covered by the Environmental Information Regulations (the EIRs cover all information relating to: air, water, land or soil; flora or fauna, and natural sites; the built environment; and effects on health and safety as a result of changes in the environment). EIRs are a different regime, the exceptions work differently, and more factors may need to be considered - all EIR cases should be notified to the FOI Unit who will work with ERAD to provide further advice if necessary.

(iii) The information relate to or contain third party personal data or are concerned with a personal matter. The interaction between FOI and data protection is particularly complex and such cases should therefore be referred. All cases where an individual is seeking information about themselves personally (i.e. subject access requests under the Data Protection Act) should be referred to CISD Information Management Unit.

(iv) Part or all of the information is already in the public domain, either through official channels, or through leaks or unattributable briefing. In these cases applying the assumption could have the effect of confirming that a leak has taken place. In all such cases, extra care is needed to ensure that refusals to release information are more carefully framed to avoid this, and all cases of this type should be referred.

(v) The information requested is a few years old. Since the public interest in withholding the information is likely to have changed over time the working assumption may not apply or a more careful argument may be needed when refusing to release information. All such cases should be referred.

FOISA WORKING ASSUMPTION

(vi) If you think that an exemption other than section 30 applies to the information (such as commercially sensitive material, national security information) the case should be referred.

(vii) If the PQ answer refused to give out information, and the factual briefing would reveal the information that was withheld, the case should be referred.

FOI UNIT
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