

Freedom of Information (Scotland) Act 2002 - One year on: A consultation on the operation of the Act after one year in force

The Scotland Group is one of the Records Management Society's Special Interest Groups set up to provide opportunities for Scottish members to network with their colleagues and share their learning and experiences to the benefit of all. The Group currently has around one hundred members from across Scotland, seventy five percent of whom work in the Public Sector. The comments were gathered from a workshop session at our last event, involving fifty percent of the membership and circulated to the full membership for comment. They are therefore representative of the professional opinions of our members, with only one member asking to be disassociated from the response.

For the purposes of this consultation, the Records Management Society Scotland Group has confined itself to comment on Topic 2 of the consultation, *Discharge of duties under FOI(S)A by public authorities*, and in particular, the Section 61 Code of Practice on Records Management. In consideration of the Code, the Group identified areas of concern with the status, content, and implementation of the Code.

1. Purpose of the Code

- 1.1 In its current incarnation as a piece of guidance for Scottish public authorities which is *desirable* to follow, the Code presents a number of inconsistencies resulting in confusion rather than regulation or improvements to the management of public records in Scotland. As it is not a substitute for legislation and does not have the force of law, it becomes unclear as to what extent authorities may be failing in their duties if they do not have appropriate regard for the Code.
- 1.2 The status of the Code falls short of public authority requirements for a robust records management legislative environment. Because it is only 'desirable' for public authorities to follow, there continues to be inconsistent and incomplete legal provision for the management of public records in Scotland.
- 1.3 The Group believes in the immediate term that the Code needs to be substantially rewritten in order to be of use to public authorities as a standard to be measured against and must carry more weight for compliance. However, there is an identified and pressing need across all the public authorities represented by the Group for Scottish legislation and associated funding for the management of public records (see below).

2. Content of the Code

- 2.1 The group felt that the Code was a good 'primer', providing coverage of general principles but essentially presenting a watered down version of the international records management standard ISO 15489 (*Information and documentation - Records management*). Its relationship to this standard and

- other available records management standards and guides is unclear as is the Information Commissioner's position on this.
- 2.2 As it stands, the Code lacks sufficient detail and is too simplistic to be of real value to either experienced professionals or non-professionals. It does not serve either group particularly well.
 - 2.3 It appears to have been written with central government in mind, and has proven an uncomfortable fit with smaller local public bodies and other authorities such as universities and the NHS.
 - 2.4 Some of the processes involved are outlined in detail and others left vague and open to wider interpretation. There should be more concern for the provision of the reasons behind and preferred outcomes of records management activities rather than outlining prescriptive processes (which differ across public authorities) to achieve this. This is particularly important should the Information Commissioner consider issuing a practice recommendation under section 44 of the Act or an information notice under section 50 of the Act (using the Code as an audit tool to measure authorities against).
 - 2.5 The Code is neither a prescriptive legal code to follow nor currently a useful practical tool. Any code of practice should be complemented with detailed guidance and practical ongoing support.
 - 2.6 The Group felt that the section on electronic records demanded special attention. Principles in the code are stated as applying to both paper and electronic records, but this extra section is included anyway. This section fails to add anything substantive to the code to assist authorities in managing electronic records. This section is considered inadequate and should be rewritten.
 - 2.7 The Group also had specific concerns about the Records Manager competency framework. It was felt that this was unnecessarily restrictive to new entrants to an under populated market. Such a high specification may have worked for the initial introduction of records management to an organisation but is not necessary on an ongoing basis. It should be replaced with information about the network of skills required for the successful management and maintenance of an organisational records management programme.

3. Responsibility for Records Management in Scotland – The Relationship between the Scottish Information Commissioner and the National Archives of Scotland

- 3.1 As stated in the introduction, the role of the Scottish Information Commissioner is to promote observance of the Code, however the Commissioner's remit in terms of records management is unclear. His vision for records management has not been articulated and his decisions to date have not included any practice recommendations or information notices. Who then in practice is enforcing the Code? While there is confusion, it makes enforcement of the Code more difficult.
- 3.2 There were concerns with the overlapping jurisdiction of the Keeper of the Records of Scotland, (who has recently carried out a 'friendly', but nevertheless publicly damning, audit of Edinburgh City Archives) and that of the Scottish Information Commissioner. The Keeper currently is the source of professional records advice for Scottish public authorities. Whose

responsibility is it now to issues guidance and audit records management in Scottish public authorities?

- 3.3 Despite having the power to issue instructions on records management to public authorities, there is only one investigating officer in the Commissioner's office with records management as part of their remit. It is unclear whether this investigating officer is responsible for the records management of the Office of the Scottish Information Commissioner or whether their responsibilities or professional qualifications extend to undertaking a professional audit of records management in other public authorities.
- 3.4 Records management needs a framework of support for development similar to the role of The National Archives in England and Wales in advocating and supporting e-government and records management activities. The clearer separation of responsibilities in England and Wales has enabled this development.

4. Scottish Public Records Legislation

- 4.1 The failure of the Scottish Executive to introduce a Scottish Public Records Bill had led to a muddled situation in the management of public records in Scotland. Despite the existence of the Code there continues to be inconsistent and incomplete legal provision for the management of public records in Scotland. Public authorities require more than just records management guidance.
- 4.2 Independent provision is required for the management of records. A Code which is enshrined in FoI legislation misses the other drivers and benefits of records management (wider legislative compliance, e-government, improvements to public services, accountability and the like), and creates an unnecessary link. The Section 60 Code is clearly guidance on the functions of authorities *under the FoI(S) Act*. However, the Section 61 Code applies more widely, relating not just to an authority's responsibility under FoI, but wider "good practice". Records management goes much wider than access to information and deserves appropriate attention.