



SCOTTISH EXECUTIVE

Legal and Parliamentary Services

Constitution & Parliamentary Secretariat
Freedom of Information Unit

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To All Consultees

July 2003

Dear Sir/Madam

CONSULTATION ON THE DRAFT CODE OF PRACTICE UNDER SECTION 60 OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

The Freedom of Information (Scotland) Act 2002 will be fully implemented in January 2005. The Act will introduce important new rights for all to request information held by Scottish public authorities. Scottish Ministers will issue two codes of practice that will underpin operation of the Act - one on records management and one on how authorities should carry out their functions under the Act. I am writing to you to ask for your comments on a draft version of the latter, the code of practice covering authorities' functions under the Act.

Attached to this letter you will find

- a short background paper Annex 1
- a copy of the draft Code Annex 2
- the respondee information form Annex 3
- what we'd like to know Annex 4

What we would like you to do

We would be grateful for any general comments you may have on the Code and also for a response to the specific questions posed at Annex 4. It would be helpful if you could clearly indicate in your response on which part of the Code you are offering comments as this will aid the analysis of responses received. It is important that you forward your response under cover of the completed "Respondee Information Form" which is attached at Annex 3.

Access to consultation responses

We will make all responses available to the public in the Scottish Executive Library and on the Scottish Executive consultation web pages by 28 November 2003 unless confidentiality is requested. All responses not marked confidential will be checked for any potentially defamatory material before being logged in the library or placed on the website.



Where to send your comments

Please send comments on the Code by **31 October 2003**:

By e-mail to:

Foi@scotland.gsi.gov.uk

By fax to: 0131 244 2582

By post to:

Ms Karen Martin
Freedom of Information Unit
Room 4-SW
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If you have telephone queries about the consultation please call Karen on 0131 244 5061.

Should you have any comments about how this consultation exercise has been *conducted*, please send them to John McNairney, Head of Implementation Branch, Freedom of Information Unit at the same address noted above.

Copies of the draft code are available in large print and summaries can also be made available, on request, in other formats and languages by contacting Karen at the address above.

تتوفر نسخ من مسودة القواعد بأحرف طباعة كبيرة ويمكن أيضاً أن تتوفر لدى الطلب ملخصات بأشكال ولغات على العنوان المذكور أعلاه. Karen أخرى عن طريق الاتصال بـ كارين

খসড়া সংকেতবাক্যর অনুলিপিগুলি বড় হরফে পাওয়া যাচ্ছে এবং সারাংশও অনুরোধ করলে পাওয়া যাবে অন্য আকারে এবং ভাষায়, কারেনের (Karen) সাথে উপরের ঠিকানায় যোগাযোগ করলে।

草案拷貝提供大字印刷版本，概要部分有其它格式和語言，如果需要，請與 Karen 聯係，地址見上。

Tha leth-bhreacan den dreach-còda rim faotainn ann an clò mòr agus gheibhear cuideachd geàrr-chunntasan, le iarrtas, ann an cruthan agus cànanan eile le fios a chur gu Karen aig an t-seòladh gu h-àrd.

प्रारूप कोड की प्रतिलिपियाँ बड़े प्रिंट में उपलब्ध हैं तथा आपके अनुरोध पर इसका संक्षिप्त रूप अन्य प्रारूपों एवं भाषाओं में उपलब्ध कराए जा सकते हैं। इसके लिए ऊपर लिखित पते पर कारेन (Karen) से संपर्क करें।

ਜ਼ਾਬਤੇ ਦੇ ਮਸੌਦੇ ਦੀਆਂ ਕਾਪੀਆਂ ਵੱਡੇ ਅਖਰਾਂ ਵਿੱਚ ਉਪਲਬਧ ਹਨ ਅਤੇ ਬੇਨਤੀ ਕਰਨ 'ਤੇ ਹੋਰ ਰੂਪਾਂ 'ਤੇ ਭਾਸ਼ਾਵਾਂ ਵਿੱਚ ਸੰਖੇਪ ਸਾਰ ਵੀ ਮੁਹੱਈਆ ਕਰਾਏ ਜਾ ਸਕਦੇ ਹਨ। ਕਿਰਪਾ ਕਰ ਕੇ ਕੇਰਨ (Karen) ਨਾਲ ਉਪਰ ਲਿਖੇ ਪਤੇ 'ਤੇ ਸੰਪਰਕ ਕਰੋ।

(ڈرافٹ کوڈ) کی نقول بڑے حروف میں دستیاب ہیں اور درخواست کرنے پر اسکا اختصار یہ مسوداتی رمز

زبانوں میں مندرجہ بالا پتے پر کرین (Karen) سے رابطہ کر کے حاصل کی جا سکتی ہیں۔ دیگر شکلوں اور

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tim Ellis', written in a cursive style.

TIM ELLIS
Head of FOI Unit

ANNEX 1

CONSULTATION ON THE DRAFT CODE OF PRACTICE UNDER SECTION 60 OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

Background

1. The Freedom of Information (Scotland) Act 2002 ("the Act") was passed by the Scottish Parliament on 24 April 2002 and received Royal Assent on 28 May 2002. It will come fully into force on 1 January 2005 and will introduce a general right of access to information held by public authorities. Subject to certain conditions and exemptions, any person who makes a request in writing (or some other permanent form) to a public authority will be entitled to receive it. The Act will be promoted and enforced by a fully independent Scottish Information Commissioner.

2. Under section 60 of the Act, and after consultation with the Scottish Information Commissioner, the Scottish Ministers must issue, and from time to time revise, a code of practice which will provide best practice guidance to authorities on how to carry out their functions under the Act.

Content

3. The Act stipulates that the Code must address:-

- The provision of advice and assistance by the authorities to persons who propose to make, or have made, requests for information;
- The transfer of requests by one of the authorities to another by which the information requested is or may be held;
- Consultation with persons to whom information requested relates or with persons whose interests are likely to be affected by the disclosure of such information;
- The inclusion in contracts entered into by the authorities of terms relating to the disclosure of information; and
- The collection and recording by the authorities of statistics as respects the discharge by them of their functions under this Act.

4. The attached draft of the section 60 Code on functions under the Act also provides some guidance on issues such as vexatious or repeated requests and on factors that may inform a decision on the public interest. It also provides advice on the relationship between the functions of the FOI Act and the duties on public authorities arising from the Disability Discrimination Act 1995.

The Scottish Executive Consultation Process

5. 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 an area of work to do so in ways which will inform and enhance that work.

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

7. Typically, Scottish Executive consultations involve a written paper inviting answers to specific questions or more general views about the material presented. The papers are distributed to organisations and individuals with an interest in the area of consultation and they are also placed on the Scottish Executive web-site enabling a wider audience to access the paper and submit their responses. Copies of all the responses received (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, EH112 3XD, telephone 0131 244 4552).

**SCOTTISH MINISTERS CODE OF PRACTICE
ON THE DISCHARGE OF FUNCTIONS BY
PUBLIC AUTHORITIES UNDER THE
FREEDOM OF INFORMATION (SCOTLAND)
ACT 2002**

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

**Prepared in consultation with the Scottish Information
Commissioner**

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DRAFT

INTRODUCTION

The Freedom of Information (Scotland) Act 2002 (the Act) received Royal Assent in May 2002. Scottish Ministers consider that the Act will assist in fostering greater openness and transparency across the Scottish public sector. The disclosure of information, whether proactively or in response to specific requests, serves to strengthen government and increase public involvement in decision-making.

Section 60 of the Act requires the Scottish Ministers to issue guidance to public authorities on discharging their functions under the Act. This Code of Practice fulfils that duty and has been prepared in consultation with the Scottish Information Commissioner.

The Code provides best practice guidance to public authorities and its adoption will help authorities to comply with their duties under it. It is not a substitute for legislation nor do its provisions have the force of law. However, as part of his role, the Scottish Information Commissioner will promote observance of the Code. Should an authority fail to comply with the Code, they may be failing in their duties under the Act. Authorities should, therefore, seek legal advice as appropriate on general issues relating to the implementation of the Act or its application to individual cases to ensure that they comply with statutory provisions. Authorities should also ensure that they comply with existing duties under other legislation, for example, the Disability Discrimination Act 1995, the Race Relations (Amendment) Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations [2003].

Part I introduces the main features of the Act and authorities' duties under it; Part II expands on this, providing more detailed advice to authorities on specific functions; and Part III concentrates on refusals and appeals.

Under the Act, any information held by a public authority may be requested. Authorities should, therefore, ensure that they maintain a complete and accurate record of their business, both as a matter of good records management practice and in order that such information is easily accessible when a request is received under the Act. Authorities should not omit recording information that might be of interest to the public in order to prevent disclosure. Furthermore, authorities should be aware that under section 65 of the Act, it is an offence, punishable by a fine, to "alter, deface, block, erase, destroy or conceal a record with the intent of preventing disclosure".

Further guidance on records management is set out in the Code of Practice on Records Management, issued by the Scottish Ministers under section 61 of the Act.

Guidance on the release of environmental information is contained in the [Code of Practice on Access to Environmental Information] issued by the Scottish Ministers under section 62 of the Act.

Words and expressions used in this Code have the same meaning as the same words and expressions used in the Freedom of Information (Scotland) Act 2002.

Copyright

Public authorities should be aware that information provided under the Act may be subject to copyright protection. Supplying information under the Act does not convey a right to re-use that information in a way that would infringe copyright, for example by making multiple copies or issuing copies to the public or in the context of commercial publications. These activities will often involve obtaining the permission of the authority that provided the material. Permission is generally granted in the form of a copyright licence.

Copyright works made by central government qualify for Crown copyright protection, however, various categories of Crown copyright material can be reproduced without a formal licence. HMSO's website provides details of categories of Crown copyright material where this applies, including examples of information where the copyright has been asserted but waived. This includes the following: government press notices, legislation, ministerial speeches, consultation documents, documents featured on official websites (except where expressly indicated otherwise), headline statistics and unpublished public records. More details of these categories can be found at:

http://www.hmso.gov.uk/copyright/guidance/guidance_notes.htm

Training

All written (and electronic) requests for information submitted to Scottish public authorities should be dealt with in accordance with the provisions of the Act. It is, therefore, essential that all relevant personnel are familiar with its provisions, the associated Codes of Practice and any guidance on good practice issued by the Scottish Information Commissioner. Authorities should ensure that appropriate staff training is provided. In planning and delivering training authorities should be aware of other provisions affecting the disclosure of information such as Environmental Information Regulations and the interaction between the Act and the Data Protection Act.

PART I

Main Features of the Freedom of Information (Scotland) Act 2002

Act Ref.

1. The main features of the Act are:

- 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; **1**
- in relation to most exempt information, the information should only be withheld if the public interest in withholding it is greater than the public interest in releasing it; **2(1)(b)**
- the creation of a new office of Scottish Information Commissioner (the Commissioner), with wide powers to promote good practice and to enforce the rights created in the Act; **42**
- 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 of a fee; **23**
- a duty on the Scottish Ministers to issue Codes of Practice containing guidance on specific issues (under section 60 and 61 of the Act). **60, 61**

Enforcement of the Code

2. The Commissioner will promote observance of the Code. If it appears to him that an authority is failing to take account of the guidance in this Code, he may issue a "**practice recommendation**" specifying the steps that the authority should, in his opinion, take to promote conformity. **44**

3. The recommendation will set out in writing the particular provisions of the Code with which the authority is failing to comply. A practice recommendation is simply that - a recommendation, designed to help the authority improve its procedures under the legislation, and consequently cannot be directly enforced by the Commissioner. However, a failure to comply with a practice recommendation may lead to a failure to comply with the Act and may also be the subject of specific comment in the Commissioner's report to Parliament.

4. If the Commissioner requires any information to determine whether the authority is complying with the guidance in this Code (or with the provisions of the Act), he may issue an "**information notice**" which requires an authority to provide the necessary information to the Commissioner within a stipulated time. **50**

5. The notice will explain why the Commissioner requires the information in order to determine whether the authority is conforming with the Code - (or the

Act). The notice will also give details of the rights of appeal to the Court of Session. 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 the notice. The Court may then inquire into the matter and deal with the authority as if it were in contempt of court.

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Duty to provide advice and assistance

6. The Act places a duty on public authorities to provide advice and assistance to applicants and potential applicants as far as it is reasonable to expect the authority to do so. An authority following the guidance in this Code in this respect will be deemed to have complied with its duty to provide advice and assistance. This is dealt with in more detail in Part II.

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7. Staff working in public authorities in contact with the public should be aware that many applicants may be unfamiliar with the legislation and staff should be prepared to explain the key provisions of the Act to potential applicants requiring assistance. Authorities may wish to consider designating a specific individual as Information Officer, through whom all requests for information could be channelled or, if appropriate, setting up a discrete unit to handle requests. This does not detract in any way from the responsibility of all staff to provide advice and assistance to applicants.

8. Staff should also be aware that, in giving assistance, an applicant's reasons for requesting the information are not relevant. Applicants should not be given the impression that they are obliged to disclose the nature of their interest or that they will be treated differently if they do so.

9. Where an authority departs from the Code's guidance on providing advice and assistance, it should be prepared to explain to the Commissioner why it considered the level of advice and assistance provided to be reasonable in the circumstances. Authorities should note that where there is a significant departure from the approach to the provision of advice and assistance, as set out in this code, they may be breaching their statutory duties under section 15.

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Means of providing information - Equality Issues

10. Equality issues have an impact on the provision of information under the Act. The Act specifically mentions disability, and authorities should also bear in mind their duties - statutory or otherwise - to groups with particular needs. Authorities should note, when considering the means of providing requested information, that whereas in almost all circumstances a *written* response will be appropriate, they should have due regard to their existing duties under the Disability Discrimination Act 1995 (DDA) and other legislation. These duties are summarised at Annex 2. Authorities should be flexible in their approach, broadly interpreting the definition of disability set out in the Act. They should also ensure that, as a matter of practice, disabled applicants are provided with information in the format they prefer, except in exceptional and extreme circumstances. The cost of responding to any FOI request in an alternative format should not, however, be passed on to the applicant.

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11. Authorities are obliged to deal with FOI requests in the same way as they discharge any of their other statutory duties. For example, where a local authority decides to disseminate information in an area with a high proportion of residents from a particular ethnic community, that authority, under existing equality legislation, should consider translating the information into the language of that community.

12. Many people who use the web have disabilities of one form or another, which could be sensory or motor disabilities. It is very important that any web page produced by public sector bodies is as available to these users as to any other. It is now mandatory that government websites comply with the minimum level of the World Wide Web Consortium's Web Accessibility Initiative. More information about access technology can be found at:
[http://www.e-envoy.gov.uk/oeo/oeo.nsf/sections/webguidelines-handbook-top/\\$file/handbookindex.htm](http://www.e-envoy.gov.uk/oeo/oeo.nsf/sections/webguidelines-handbook-top/$file/handbookindex.htm)

Publication Schemes

13. All Scottish public authorities must adopt and maintain a "publication scheme", publish information in accordance with it and review the scheme from time to time. The Commissioner will approve a scheme covering each public authority. The publication scheme will set down:

- the classes of information which are published or will be published;
- the manner in which the information of each class is, or is intended to be published; and,
- whether the information is, or is intended to be, available free of charge or on payment of a fee.

14. The routine publication of more information is likely, over time, to lead to a reduction in the number of individual requests for specific pieces of information due to the operation of the exemption applicable in cases where the information is otherwise accessible. Authorities, therefore, have an incentive to include more information in their publication schemes as this will obviate the need to provide that information in response to a request under section 1. However, it would be good practice for authorities to keep a log of requests made for information which is not currently included in their publication schemes. Authorities could then consider the need to add that class of information as a new class to be covered by the scheme.

15. The publication scheme may also include details of the authority's procedures for handling requests for information. The procedures should include an address or addresses (including an e-mail address where possible) to which applicants may direct their request. A telephone number and fax number should also be provided and where possible the name of an individual who can provide assistance.

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PART II

Provision of advice to persons making requests for information

16. Every public authority should be prepared to provide advice and assistance to those making requests for information. The advice set out below should not be regarded as exhaustive.

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17. Any request for information must be made in writing or any other format capable of being used for subsequent reference (this includes requests transmitted by electronic means). Where someone is unable to frame his or her request in such a way, the authority should ensure that appropriate assistance is given to enable that person to make a request for information. While there is a general duty to provide advice and assistance to those making requests for information, particular consideration should be given to those with a disability or with communication difficulties.

8(1)(a)

18. In considering what assistance would be appropriate in the circumstances, the request should be discussed with the applicant and practical advice offered. This might include, for example, offering to take a note of the request over the telephone in their preferred format and then sending the note to the applicant for confirmation. In this case, the written note of the telephone request, once verified by the applicant and returned, would constitute the request for information. In such instances the authority should ensure that the applicant is also supplied with a stamped addressed envelope to assist in lodging the request. The statutory time period for compliance would begin upon receipt of the verified note. Where facilities are available, the call itself could be taped, with the applicant's consent, which would then constitute the request for information. Alternatively, the authority may suggest that the request is recorded and forwarded or that another person or agency may be able either to assist them with the application or to make the application on their behalf. The key issue for authorities is the need to respond flexibly to requests for information, and to provide the necessary level of advice and assistance to all applicants.

19. Where the applicant has provided insufficient information to enable the authority to identify and locate the information sought, or where the request is unclear, the authority should help the applicant to describe more clearly what information they require. In some circumstances it may be helpful to clarify the applicant's reasons for requiring information (to help the authority determine what information is required) but this can only be done with the applicant's co-operation - there is no onus on an applicant to disclose his aims or motivation. Where more information is needed to clarify the request, it is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail. Appropriate help could include:

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

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

This list is not exhaustive and authorities should always be flexible in offering advice and assistance taking into account the circumstances of each individual case.

20. In seeking to clarify what is sought, authorities should always bear in mind that applicants cannot reasonably be expected to possess identifiers, 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.

21. If, after all assistance has been given, the applicant still cannot describe the information requested in a way which enables the authority to identify and locate it, then the authority is not expected to ask for further clarification. However, it must disclose any information relating to the application which has been found and which can be disclosed under the provisions of the Act (i.e. is not subject to any exemption). In these circumstances, the authority should explain why it cannot take the request any further and provide details of its own review procedure and the applicant's rights to apply to the Commissioner for a decision.

Vexatious Requests

22. An authority is not obliged to comply with a vexatious request. The Act does not define the term vexatious and, in the first instance, it will be for the authority to decide whether requests are vexatious. However, irritation or nuisance caused by the applicant should not, by themselves, justify deciding that an application is vexatious. Authorities should be prepared to provide justification for their approach to the Commissioner, and their decisions in this respect should, therefore, be based on clear-cut reasoning. The power to refuse to respond to a request on the grounds contained in section 14 of the Act should be used sparingly, and should not be abused simply to avoid dealing with a request for information.

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Repeated Requests

23. Under the same section, the Act also provides that an authority, which has already complied with a request for information from a person, can refuse to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request. What constitutes a "reasonable period of time" will involve a subjective assessment by authorities but, as with decisions about vexatious requests, authorities should be prepared to justify their reasoning to the Commissioner.

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24. Where an authority considers the request to be vexatious or repeated, they are not required to comply with a request. Neither are they obliged to conduct a review if the grounds for the initial refusal were made under section 14. However, in either case, notice must be given to the applicant of the rights of application to the Commissioner and of appeal. **21(9)**
47(1),
56

Timeliness in dealing with requests for information

25. Public authorities should comply with a request for information as soon as possible but must, in any event, comply not later than 20 working days after receipt of the request. It is essential that authorities respond to requests timeously. This is particularly important where it is clear that the requested information is not held by them and the applicant needs to direct his enquiry elsewhere. **10**

Handling multiple requests for information or requests which appear to be part of an organised campaign

26. Where an authority is not required to comply with a number of related requests because the cumulative cost of meeting these requests would exceed the cost threshold (as set out in Fees Regulations) and where the information could have been disclosed had the cost not exceeded this limit, the authority should consider whether the information can be disclosed in another, more cost-effective way. For example, the authority should consider whether the information is such that publication on the authority's web-site, and a brief note of the web-site reference to each applicant, would bring the cost within the limit. **12(1)**
12(4)

27. Where an authority does not disclose the information in another, more cost-effective way, it should be able to justify its approach to the Commissioner.

Transferring requests for information

28. The Act does not include procedures for the transfer of requests from one authority to another, and it will not generally be appropriate for authorities to do so. Where a request has been made for information which is not held by an authority, that authority should inform the applicant promptly that it is unable to provide the information sought. The most appropriate means of doing this will be by a notice under section 17 of the Act (i.e. notice that information is not held). **17**

29. Where a public authority does not hold the requested information but is aware that it is held by another public authority, consideration should be given as to the most helpful way of assisting the applicant. It may be sufficient simply to provide the applicant with contact details of the authority holding the information and to suggest that the applicant re-applies to that authority. However, applicants should only be redirected in this way if the authority receiving the original request has confirmed that the information sought is, indeed, held by another public authority, and if securing that confirmation does not unreasonably delay a response (under s.17) to the applicant.

30. When an applicant has made clear that the request for information should be forwarded to another authority if all or part of the material sought is not held by the public authority to which the request has been made, it may be of assistance to transfer the request:-

- having confirmed that another authority holds the relevant information; and
- having advised the applicant in writing of the transfer, the revised contact details and that the statutory period for dealing with the request will run from receipt of the transferred request.

31. In instances where an authority holds most of the information requested of it, and can establish that another public authority holds the remainder of the requested information, consideration should be given as to whether that additional information can be supplied and included in one response to the applicant. This is only likely to be of assistance to an applicant where there is no significant delay in responding as a result, and where no additional costs are involved.

32. The transfer of requests from one authority to another may be difficult to administer and may also have implications for authorities' responsibilities under the Data Protection Act 1998. It is important that applicants are aware who is dealing with their request for information, when the statutory timescale for responding to their request begins, and what their rights are under the Act. In most instances, therefore, the guidance provided at paragraphs 28 and 29 above should form the framework for responses where information sought is not held.

Confidential Information

33. Information received by an authority in confidence attracts an absolute exemption by virtue of section 36(2) and 2(2)(c) of the Act. Issues of confidentiality also apply to trade secrets and certain commercial interests where the release of information would or would likely substantially prejudice the commercial interests of any person. (See also paras 41-49). Authorities should always consider carefully any request to have information covered by a confidentiality clause, and should resist the request unless there is a clear justification for the confidentiality such as protecting a genuine trade secret or sensitive personal information.

36(2)

2(2)(c)

34. Any information can be made subject to confidentiality. While it is a complex legal concept, it broadly applies where

- there is an express term in a contract or agreement, whether written or verbal, that confidentiality shall apply; or
- the nature and circumstances of the dealings between the parties imply confidentiality, such as advice between a patient and health practitioner, or client and social worker.

35. There may be cases where information has been received from a third party and to disclose that information without their prior consent would constitute an actionable breach of confidence such that the "confidentiality" exemption in the Act would apply. In that event, authorities should discuss with the third party whether the information still needs to be classified as such.

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Consultation should take place where:

- the views of the third party may help the authority to determine whether an exemption under the Act applies to the information requested; or
- the views of the third party may help the authority to determine where the public interest lies.

2(1)(b)

Consultation will be unnecessary where:

- the authority does not intend to disclose the information in any case because of some other legitimate ground under the terms of the Act;
- the views of the third party bear no influence on the decision of the authority, for example, where there is other legislation either preventing or requiring disclosure; and
- no exemption applies and so under the Act's provisions, the information must be provided.

36. An authority is not relieved of its obligation to disclose information under the Act, or its duty to reply within the statutory time, should a third party fail to respond to consultation.

37. In all cases, it is for the public authority, not the third party (or any representative of that party) to determine whether or not information should be disclosed under the Act. A refusal to consent to disclosure does not, in itself, mean that information should be withheld.

Accepting information in confidence from third parties

38. Information should only be accepted in confidence if it is necessary for the authority to obtain that information in order to carry out its functions. Furthermore, authorities should not agree to hold information in confidence if it is clearly not confidential in nature. If an authority accepts a confidentiality provision, it must have a good reason for doing so and must be able to justify its decision to the Commissioner.

Consultation with the UK Government and non-devolved public bodies

39. Authorities should consult with the relevant UK Department before disclosing information provided by or directly concerning that administration, except where:

- the views of that department can have no affect on the decision of the authority. This may be the case where there is other legislation which requires the information to be disclosed or where there is no applicable exemption under the Act; or

- in the circumstances, consultation would be disproportionate.

40. Likewise, UK Departments and non-devolved public authorities should consult with devolved Scottish public authorities before disclosing information unless their views can have no effect or would be disproportionate, as above.

Freedom of Information and public sector contracts

41. When entering into contracts (in this context, "contract" should be read as including any other form of agreement or undertaking with a non-public authority body) public authorities should refuse to include terms which restrict the disclosure of information held by the authority and relating to the contract beyond the restriction permitted in the Act.

33

42. Particular care is needed in the treatment of trade secrets and commercially confidential information. The exemption at section 33 of the Act concerns the need to protect from disclosure sensitive commercial information which would adversely affect those to whom the information relates. Companies will need to be confident that an authority will apply its general commitment to openness in a way which does not damage their legitimate interests. Public authorities should, ideally before receiving commercially sensitive information, take steps to ensure that companies understand the possible implications of the Act. This might be achieved through the provision of general guidance and/or specific guidance in tender and contract documents.

43. While the public interest will rarely justify disclosure of a trade secret, there will be circumstances where commercial sensitivity is not a sufficient justification for non-disclosure. Where disclosure is necessary for the protection of public health, public safety or the environment, for example, such considerations may clearly outweigh financial loss or prejudice to the competitive position of a third party.

44. In any event, authorities should not agree to hold information "in confidence" which is clearly not confidential in nature. Authorities should be aware that the "confidentiality" exemption in the Act only applies if the information has been obtained from another person and any disclosure to the public, otherwise than under the Act, would constitute a breach of confidence actionable by that or any other person.

36

45. The general aim should be to facilitate more effective access to information about the procurement of public services. This will in turn encourage better internal management, greater accountability and raise the profile of competitive tendering within public authorities. It is in the public interest to make information available unless there is evidence that doing so would prejudice the competitive position of the contracting company or the position of the public authority in future tendering exercises.

46. When entering into a contract with a non-public authority contractor, pressure may be put on authorities 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 reject such clauses wherever possible.***

47. Where, exceptionally, it is necessary to include non-disclosure provisions in a contract, an option could be to agree with the contractor a schedule of the contract which clearly identifies information which should not be disclosed. Any acceptance of such confidentiality provisions must be for a good reason and capable of being justified to the Commissioner.

48. It is for the public authority to disclose information - not for the contractor. However, an authority may wish to protect some information which it has provided to the contractor and which is exempt under the Act from disclosure by the contractor. In order to avoid unnecessary secrecy, any such constraints should be drawn as narrowly as possible and according to the individual circumstances of the case. Apart from such exceptional cases, authorities should not impose terms of secrecy on contractors.

49. Where an authority arranges, under contract, for another person or body to provide services which are normally a function of that authority, the Act makes provision for the Scottish Ministers to designate that person or body as a public authority. The Scottish Ministers must consult the person or body before a decision to so designate is taken. Therefore, some non-public authority contractors will be regarded as public authorities although only in respect of the services provided under contract. As such and to that extent, the contractor will be required to comply with the Act like any other public authority.

5(2)(b)

Personal Data

50. Where the information requested is personal data, it is important that authorities should carefully read section 38 of the Act which details the interplay between the Act and the DPA and makes provision for the treatment of such cases. *This is a complicated area and authorities should be prepared to take legal advice, when appropriate.*

Information intended for future publication

51. An authority may withhold requested information if it is intended for publication within 12 weeks of the date of the request. However, because of unforeseen circumstances, the authority may not be able to adhere to that date. Once an authority becomes aware of a delay in the publication date, it should contact the applicant and explain both the reason for the delay and the revised date of publication (if known). Significant delay in publication would be likely to remove the ability to withhold information because it is intended for it to be published.

27(1)

Fees for the provision of information

52. The Act does not require charges to be made for the provision of information. However, public authorities have discretion to charge a fee in accordance with Fees Regulations made under the Act.

9,12,13

53. The Fees Regulations do not apply:

- to material made available under a publication scheme;
- to information which is reasonably accessible to the applicant by other means;
- where provision is made by or under any other piece of legislation as to the fee that may be charged by the public authority.

23

25

9(7)

Public authorities should ensure that, in cases falling outside those covered by the Fees Regulation, any charges they make are in accordance with any other legislation and are within the terms of any relevant guidance issued by the Scottish Executive.

13(4)

Monitoring

54. Authorities should adopt appropriate systems to monitor their performance under the new arrangements. It will be for each public authority to determine what information can most effectively be recorded under their administrative procedures. Once the general right of access comes into force, all requests for information can be classed as a FOI request, but monitoring all requests may be problematic for authorities. However, monitoring activities could include collecting the numbers of:

- requests under section 1(1) which have been refused and the reasons for the refusal;
- fees which have been charged under sections 9, 12 and 13;
- reviews which have been carried out under section 20 and 21 and the outcome of such reviews;
- instances when the time limit for reply has been exceeded and reasons;

This list is not exhaustive and, with experience, authorities may, in discussion with the Commissioner, agree upon a standard set of statistics which more aptly reflect their compliance.

PART III

Requirement for Review

55. Any applicant who is dissatisfied with the way that an authority has dealt with a request for information is entitled to require the authority to review its decision. A "requirement for review" is quite distinct from any other procedure an authority may have in place for dealing with general complaints about other service areas. A request for a review must be made no later than 40 days following the expiry of the period for responding to a request for information (although this may be extended if appropriate) or from the date on which the authority complied with the request, sent a fees or refusal notice or a notice that the information is not held.

20(1)

56. It is important that authorities put in place appropriate and accessible procedures for handling reviews. The review procedure should be fair and impartial and it should enable different decisions to be taken if appropriate. The review process should also fully address the access needs of disabled applicants. The procedure should be straightforward and capable of producing a prompt determination of the review.

57. Where the requirement for review concerns a request for information under the general right of access, the review should generally be handled by staff who were not involved in the original decision. While this may not always be possible, it is important that the review procedure enables the matter to be considered afresh.

58. An authority is not obliged to comply with a request for a review if the request is considered vexatious or the original request for information was vexatious or repeated - i.e. identical or substantially similar- but must notify the applicant to that effect. The notice must also contain particulars about the rights of application to the Commissioner and of appeal.

21(8)

47(1),56

59. Where the outcome of a review is that information, previously withheld, should be disclosed then the information should be provided as soon as possible but no later than the 20 day period permitted to consider the requirement for review.

60. Where the outcome is that procedures have not been properly followed by the authority's staff, the authority should apologise to the applicant and be prepared to take all necessary steps to prevent a similar occurrence in the future.

61. Any notice confirming the authority's original decision should include the necessary particulars explaining the applicant's right to appeal the review decision, including what provisions are in place to support applicants with a disability to exercise their right of appeal to the Commissioner.

47(1)

Refusal of request

62. In issuing a refusal notice, the authority should explain which exemption in Part 2 of the Act applies. However, the authority does not have to state why the exemption applies if to do so would have the effect of disclosing information which is otherwise exempt. The Act also requires authorities, when withholding information other than under an "absolute exemption", to state the reason for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure. The public interest factors, both for and against disclosure, which have been taken into account should be explained to the applicant (subject to the proviso at section 16(3)). (See also paragraph 64)

16(3)

16(2)

Substantial Prejudice

63. In determining whether the disclosure of information would result in "substantial prejudice" to those interests referred to in Part 2 of the Act, authorities

should consider, in the first instance, disclosing the information unless the prejudice caused would be real, actual and of significant substance.

2(1)(b)

Public Interest

64. Where the authority considers that substantial prejudice would result from disclosure of the requested information, it will still be required to consider the **public interest** in making the material available. The "public interest" has been described as something that is of serious concern or benefit to the public not merely of individual interest. It has also been stated that public interest does not mean "of interest to the public" but "in the interest of the public". The term is not defined in the Act and may change over time and according to the circumstances of each situation. Because of this, authorities will need to make a subjective judgement based on the circumstances of each case and in the light of any emerging guidance or best practice.

65. It is difficult to set out a definitive list, however, amongst the factors which may inform a decision about the public interest are:-

- the general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation;
- whether disclosure would contribute to the administration of justice and enforcement of the law or would prejudice the prevention or detection of crime or the apprehension or prosecution of offenders;
- whether disclosure would affect the economic interests of the whole or part of the United Kingdom;
- whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money;
- whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment;
- whether disclosure would impact adversely on safeguarding national security or international relations; and
- whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions.
- whether disclosure would contribute to a debate on a matter of public interest;
- whether disclosure would prejudice the protection of an individual's right to privacy.

66. In deciding whether a disclosure is in the public interest, authorities should not take into account:

- possible embarrassment of government or other public authority officials;
- possible loss of confidence in government or other public authority;
- the seniority of persons involved in the subject matter;
- the risk of the applicant misinterpreting the information.

Availability

The Scottish Ministers will review and may revise this Code of Practice from time to time to ensure that it remains fit for purpose. Copies of the Code may be obtained from

Freedom of Information Unit
Room 4-SW
St Andrew's House
EDINBURGH
EH1 3DG

Telephone: 0131 244 5061

Freedom of Information Website: www.scotland.gov.uk/government/foi

E-mail: foi@scotland.gsi.gov.uk

Copies of this Code of Practice are available in large print and summaries can also be made available, on request, in other formats and languages by contacting FOI Unit at any of the addresses noted above.

OTHER RELEVANT ACTS AND GUIDANCE DOCUMENTS

Scottish Information Commissioner

www.itspublicknowledge.info

Information Commissioner

www.dataprotection.gov.uk

Disability Discrimination Act 1995

www.drc-gb.org

Race Relations Act 1976

Race Relations (Amendment) Act 2000

Race Relations Act 1976 (Statutory Duties)(Scotland) Order 2000

www.cre.gov.uk

Human Rights Act 1998

www.humanrights.gov.uk

The Data Protection Act 1998

Environmental Information Regulations 1992

Local Government (Access to Information) Act 1985

Access to Medical Reports Act 1988

Education (Disability Strategies and Pupils' Records) (Scotland) Act 2002

ANNEX 2

THE DISABILITY DISCRIMINATION ACT 1995

1. The Disability Discrimination Act 1995 is aimed at stopping discrimination against disabled people. Part 1 of the Act gives a definition of disability, Part II deals with discrimination in employment, Part III with discrimination in the provision of goods and services and Part IV with discrimination in education.
2. Goods and services are not defined within the legislation, but the Act covers all providers who make their goods or services available to the public or sections of the public. All local authorities will therefore be covered, as are health providers, cinemas, restaurants, lawyers etc.
3. When the Act first came into force in December 1996, discrimination in this area was defined as treating a disabled person less favourably for a reason relating to their disability, without justification. This can be by refusing a service, giving a lower standard of service, or providing the service on worse terms.
4. In October 1999, pro-active duties on goods and service providers were introduced. A service provider has a duty to change policies, practices and procedures that make it impossible or unreasonably difficult for a disabled person to use a service. It doesn't matter whether the same policy or practise is applied to non-disabled people as well; the test is how it affects the disabled person. An example would be a sports ground who insist that disabled people bring someone with them to games, or a mobile telephone company who provide free talk minutes but refuse to allow a deaf user equivalent free text minutes.
5. At the same time, service providers were obliged to provide auxiliary aids and services where it is reasonable to do so. This could be a text phone to allow deaf callers to contact the service, a loop system, or providing information on tape or in large print. What is reasonable will depend on, amongst other things, the cost of the aid or service, the resources of the service provider and the availability of the aid or service.
6. The opportunity for a service provider to claim justification is limited. He or she must believe one of the following conditions exist, and must hold that belief reasonably. The conditions are:-
 - there is a danger to the health and safety of the disabled person or to others;
 - the disabled person is incapable of entering into an agreement or giving consent;
 - the different treatment is necessary to provide the service to others;
 - the different terms of provision reflect the greater cost of providing the service beyond the service providers duty to make reasonable adjustments;
 - the service provider would have to fundamentally alter the nature of their service to provide it to a disabled person.

7. In October 2004, the remaining duty under Part III will come into force. Where a physical feature makes it impossible or unreasonably difficult for a disabled person to access a service, a service provider must: remove the feature or alter it, provide a reasonable means of avoiding it or make their service available in an alternative way.

8. Further information on the Act is available from the Disability Rights Commission. Contact details are:

Website www.drc-gb.org

Helpline 08457 622 633

Textphone 08457 622 644

E-mail enquiry@drc-gb.org

DRAFT

**CONSULTATION ON THE DRAFT CODE OF PRACTICE UNDER SECTION 60 OF
THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002**

WHAT WE'D LIKE TO KNOW

- 1. How well does the draft Code meet your expectations and/or requirements?**
- 2. Does the Code provide sufficiently clear guidance to authorities on their responsibilities under the Act?**
- 3. Is there more that authorities might reasonably do to enable applicants to access the information they seek?**
- 4. How well does the Code deal with any concerns you may have about social inclusion/equality mainstreaming?**
- 5. Are there other areas on which it would be helpful to provide guidance?**
- 6. Is the tone appropriate?**