

**SCOTTISH MINISTERS' CODE OF PRACTICE  
ON THE DISCHARGE OF FUNCTIONS BY SCOTTISH  
PUBLIC AUTHORITIES  
UNDER THE  
FREEDOM OF INFORMATION (SCOTLAND) ACT 2002  
AND THE  
ENVIRONMENTAL INFORMATION (SCOTLAND)  
REGULATIONS 2004**

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## **FOREWORD**

The Freedom of Information (Scotland) Act 2002 ('FOISA') and the Environmental Information (Scotland) Regulations 2004 ('EIRs') enable the public to access information held by Scottish public authorities. These regimes require authorities to either make available the information requested by an applicant or to explain why the information is not being made available. Public authorities subject to FOISA must also have a Publication Scheme which sets out the information that they will routinely publish. The Scottish Information Commissioner (the Commissioner) is responsible for enforcing and promoting both regimes.

Throughout this code, reference to "the regimes" and to FOI is a reference collectively to the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004.

Under section 60 of FOISA and regulation 18 of the EIRs, Scottish Ministers may publish a Code of Practice which describes the practice which they consider would be desirable for Scottish public authorities to follow in connection with the discharge of their functions under FOISA and the EIRs. (The references to "good" or "best" practice in this Code are references to the practice the Ministers consider would be desirable.) The Scottish Government has consulted the Commissioner about the content of this Code, and it has been laid before the Scottish Parliament. It supersedes the Section 60 Code of Practice issued by the Scottish Ministers in December 2014.

Since FOISA came into effect on 1 January 2005, a considerable body of guidance has been developed by the Commissioner, and this Code seeks to avoid duplication or overlap with this. It also avoids repetition of the statutory requirements contained in FOISA and the EIRs, focusing instead on providing guidance on what an authority can do to ensure that best practice is demonstrated at every stage of dealing with a request for information. Where authorities require further information on the application of FOISA and the EIRs, they should refer to the guidance published by the Commissioner (see [www.itspublicknowledge.info](http://www.itspublicknowledge.info)).

Further guidance on records management is set out in the Code of Practice on Records Management by Scottish Public Authorities, issued in December 2011 by the Scottish Ministers under section 61 of FOISA.

By setting out best practice as it has developed over the past ten years, Scottish Ministers intend this revised Code to further support and encourage Scottish public authorities to act in both the letter and spirit of the law. It stresses in particular the best practice to be followed in providing advice and assistance to requesters, and promotes the importance of proactively publishing information. As such, the Code supports and promotes the improved openness and accountability of public authorities.

## **PART 1**

### **INTRODUCTION**

This Part explains the purpose of the Code, provides an overview of the main terms of the regimes and the bodies subject to them, and explains the role of the Commissioner in enforcing the Code.

#### **1. Purpose of the Code**

This Code provides guidance to Scottish public authorities on the practice which Scottish Ministers consider desirable for authorities to follow in connection with the discharge of their functions under the regimes<sup>1</sup>.

In particular it includes guidance on:-

- responsibility for FOI within an authority;
- handling a request for information;
- training and staffing arrangements;
- records management and searching for information;
- the provision of advice and assistance by authorities to people who propose to make, or have made, requests for information;
- responding to requests;
- transferring requests to other authorities;
- consulting third parties to whom information requested relates, or people whose interests are likely to be affected by the disclosure of such information;
- the disclosure of contractual and procurement-related information;
- responding to reviews;
- monitoring compliance, collecting and recording statistics about request handling;
- proactively publishing information; and
- appeals to the Commissioner

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<sup>1</sup> This fulfils the statutory obligation on the Scottish Ministers under section 60 of FOISA and regulation 18 of the EIRs.

The Code sits between the regimes and the Commissioner's guidance. It contains good practice guidance to supplement the statutory provisions, but it is not intended to provide detailed, comprehensive guidance on the regimes. Such guidance is already available from the Commissioner<sup>2</sup>.

The Code is not a substitute for the legislation and does not duplicate or conflict with the legislation. The Commissioner will promote observance of the Code and can serve a practice recommendation on any authority whose practice does not conform to the Code. Should an authority fail to comply with the Code it may be failing in its duties under the regimes. The Commissioner has a range of powers to address any such failures to comply.

## 2. Main terms of the regimes

By way of an overview, it is helpful to outline the main terms of the regimes, both of which encourage a more open culture across the public sector by conferring on the public a statutory right of access to information of any age that is held by Scottish public authorities<sup>3</sup>.

- Anyone may make a request for recorded information. FOISA applies to all information<sup>4</sup> while the EIRs apply to environmental information only. Section 39(2)(a) of FOISA allows an authority to exempt environmental information which the authority is obliged to make available to the public under the EIRs (or would be so obliged if not for an exception in the EIRs). By applying the exemption at section 39(2)(a), the authority can then go on to consider the request under the EIRs alone. Authorities who do not claim this exemption for a request for environmental information are required to consider that request fully under both FOISA and the EIRs.
- The request may seek information which is held by another person on behalf of the public authority (e.g. information held by an outsourcing partner);
- Requests for information must be answered as soon as possible and within 20 working days. If a request is for environmental information and the information held is both complex and voluminous, the authority may extend this period up to a maximum of 40 working days<sup>5</sup>;

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<sup>2</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.asp>

<sup>3</sup> Under FOISA information supplied in confidence by the UK Government to a Scottish public authority is not be considered held, but may still be requested from the relevant UK government department subject to UK FoI provision.

<sup>4</sup> A Court of Session Decision (Glasgow City Council and Dundee City Council v Scottish Information Commissioner [2009] CSIH 73, issued on 30 September 2009) clarified that FOISA provides a right to obtain 'information' not copies of specific 'documents'. However, an authority can provide copies of documents if that is the easiest way to provide the information requested.

<sup>5</sup> Under regulation 7 of the EIRs.

- A fee may be payable for receipt of the information requested. Regulations set out the basis on which fees may be charged for FOI requests, which are subject to an upper cost limit.<sup>6</sup> There are no comparable fees regulations for EIRs; when responding to EIRs authorities may charge “a reasonable amount”<sup>7</sup>. Authorities should publish their scheme of charges for all requests for information.
- There is a presumption in favour of disclosure under both regimes, but the right of access is not absolute. FOISA and the EIRs set out ‘exemptions’ and ‘exceptions’ respectively under which information may be withheld. If any information is withheld, the authority must explain why. Authorities are not obliged by either regime to apply exemptions or exceptions, even where they could be applied. This means they can disclose information through choice, unless prevented by other legislative provisions such as the Data Protection Act 1998. When deciding whether to release or withhold information, authorities must be mindful of their statutory duties under other legislation.
- Where information is subject to an exemption or exception, in many cases the authority must also decide whether it is more in the public interest to withhold the information than to make it available. There is an in-built presumption in the regimes that it is in the public interest to disclose information unless the authority can show why there is a greater public interest in withholding the information. Where competing public interests are evenly balanced, the information should be disclosed.
- If the applicant does not receive a response or is dissatisfied with the response (e.g. because they have not received all of the information asked for or they disagree with the authority’s reasons for withholding the information), they may ask the authority to review their decision within 40 working days of receiving the response (or, where no response has been received, within 40 working days of the deadline for the original request).
- If the applicant is still dissatisfied after the internal review, or fails to receive a review response, they have six months to appeal to the Commissioner for a decision on whether the authority has appropriately handled their request. Thereafter the applicant and the authority may have a right of appeal to the Court of Session on a point of law.

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<sup>6</sup> For FOISA, see the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 and the Freedom of Information (Fees for Required Disclosure under section 13) (Scotland) Regulations 2004. For the EIRs see regulation 8.

<sup>7</sup> Regulation 8(3) of the EIRs.

- Both regimes encourage the proactive publication of information. Public authorities subject to FOISA must have a Publication Scheme which is approved by the Commissioner. The Scheme, and its supporting Guide to Information, specifies the information (including environmental information) that an authority will routinely publish. Under regulation 4 of the EIRs, authorities must also ensure that the environmental information they hold is made progressively available to the public by electronic means, unless it was collected before 14 February 2003 and is not available in electronic form.

### 3. Bodies which are subject to the regimes

The Scottish public authorities which are subject to the regimes are listed in Schedule 1 of FOISA or designated in an order under section 5(1) of FOISA. These include the Scottish Government, local authorities, the NHS, schools, colleges and universities, and the police. Wholly publicly-owned companies (including those wholly owned by more than one authority) are also covered by the regimes.<sup>8</sup> Under the EIRs, additional bodies are subject to the regime if they fall under the control of a public authority covered by EIRs and they have public responsibilities, functions, or provide public services in relation to the environment.

Where a public authority is considering outsourcing any of its functions it should take steps to ensure that there is no resulting reduction in the public's rights to access information through requests and proactive publication. This may be by outsourcing to a wholly-owned company which will be subject to the regimes. Where this is not possible, the authority must take steps to ensure public access to information relating to the functions which have been outsourced, as set out in part 2, section 8 of this Code (particularly information about performance and finances). This might be through the provisions of any contract in place.

### 4. Role of the Scottish Information Commissioner

The Commissioner has duties and powers to promote the following of good practice by public authorities. This includes promoting observance of this Code<sup>9</sup>. Scottish public authorities are expected to adhere to the Code unless there are good reasons not to which are capable of being justified to the Commissioner. If the Commissioner considers that an authority is failing to take account of the guidance in this Code, the Commissioner may issue a **practice recommendation** specifying the steps that the authority should, in the Commissioner's opinion, take to conform with the Code<sup>10</sup>.

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<sup>8</sup> Under section 6 of FOISA.

<sup>9</sup> Under section 43 of FOISA and regulation 18 of the EIRs.

<sup>10</sup> Under section 44 of FOISA and regulation 17 of the EIRs.

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 designed to help the authority improve its compliance with the legislation. Although it cannot be directly enforced by the Commissioner, a failure to comply with a practice recommendation may lead to a failure to comply with the legislation which can result in an **enforcement notice** being issued by the Commissioner.<sup>11</sup> A failure may also be the subject of specific comment in a report by the Commissioner to Parliament.

If the Commissioner reasonably requires any information to determine whether an authority is complying with the Code (or with the provisions of the regimes), the Commissioner may issue an **information notice** which requires an authority to provide the necessary information to the Commissioner within a stipulated time<sup>12</sup>. The notice will explain why the Commissioner requires the information and give details of the authority's right to appeal to the Court of Session against the decision that resulted in the giving of an information notice.

The Commissioner may also refer to non-compliance with the Code in **decision notices** issued as a result of a request being appealed<sup>13</sup>. If a public authority fails to comply with an information notice, an enforcement notice, or a decision notice, the Commissioner may certify in writing to the Court that the public authority has failed to comply with the notice.<sup>14</sup> The Court may then inquire into the matter and may deal with the authority as if it were in contempt of court.

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<sup>11</sup> See section 51 of FOISA and regulation 17 of the EIRs.

<sup>12</sup> Under section 50 of FOISA and regulation 17 of the EIRs.

<sup>13</sup> Under section 47 of FOISA and regulation 17 of the EIRs.

<sup>14</sup> See section 53 of FOISA.

## **PART 2**

### **RECOMMENDED BEST PRACTICE**

#### **1. Responsibility for FOI within an authority**

##### **1.1 Organisational responsibility**

- 1.1.1 FOI should be recognised as a specific statutory corporate function within an authority. As such, it should receive the necessary levels of organisational support at both strategic and operational levels as well as sufficient resource to ensure compliance with Scotland's access to information regimes.
- 1.1.2 It is good practice for authorities to have an overarching FOI policy statement. The policy should clearly define roles and responsibilities, and provide a framework to ensure that the most effective procedures and practices are established to handle requests for information. The policy should identify a person at senior level who has overall strategic responsibility for FOI.
- 1.1.3 The policy statement should provide, at an operational and senior level, for the monitoring of compliance with the regimes and relevant codes of practice. It should be endorsed by senior management, for example at board level, and should be readily available to staff at all levels.
- 1.1.4 Public authorities must have appropriate policies, procedures, systems, training arrangements and resources in place to support and deliver FOI duties. Authorities should review their FOI procedures and practices regularly to ensure arrangements continue to meet both statutory obligations and best practice.
- 1.1.5 Authorities must ensure that they have robust, proportionate systems to allow them to log, track and monitor the requests for information they receive.
- 1.1.6 Authorities should also review and report on their FOI performance data regularly. Reporting should identify any issues with the handling of requests (e.g. meeting the statutory timescales) or identifying areas of work and/or types of information which are frequently the subject of requests.

##### **1.2 Roles and responsibilities**

- 1.2.1 Meeting the requirements of the legislation and bringing about a culture of openness depends significantly on leadership from the top. Authorities should ensure there is a clearly established responsibility at a senior level within the organisation for overseeing compliance with the regimes and creating a culture supportive of the public's right to know.

- 1.2.2 It is good practice to have a designated senior member of staff with lead management responsibility for FOI within each authority. This lead role should be acknowledged formally within the organisation and reflected in its policies and procedures. Overall responsibility for the effective implementation and regular review of these should lie with the senior member of staff with lead responsibility for FOI. All staff should be aware of who has the lead management role for FOI.
- 1.2.3 Senior managers should ensure that appropriate procedures and practices are established and embedded within the organisation to make sure staff are adequately trained and fully supported at all levels in carrying out their FOI duties. Senior managers should also take responsibility and be accountable for FOI in their areas.
- 1.2.4 Staff with operational responsibility for responding to FOI requests should have the appropriate skills, knowledge and appropriate levels of authority to perform them. There must be suitable arrangements in place to support staff responding to requests e.g. an escalation process that provides staff with a formal route to report issues to senior staff particularly where it is likely that a response will be delayed beyond the statutory timescale for compliance.
- 1.2.5 Authorities must ensure, as a minimum, that all staff:
- can recognise a request that has been made to them; and
  - are aware of any procedures for forwarding requests or enquiries to staff who are able to answer them.
- 1.2.6 In addition, authorities must ensure that all staff in contact with the public can explain to applicants how to make a request to the authority. Many applicants may be unaware of their rights or unfamiliar with the legislation and staff should be prepared to explain the key provisions of the regimes to potential applicants.

### **1.3 Training arrangements**

- 1.3.1 Authorities should provide training to ensure that all staff have sufficient knowledge of the regimes.
- 1.3.2 Authorities must ensure that staff with responsibility for issuing responses to requests for information have undertaken appropriate training to ensure that responses meet statutory requirements and this code of practice. Authorities should also ensure that suitable training is provided to staff with responsibility for providing cover during periods of staff absence and/or increased FOI workloads.
- 1.3.3 Authorities should provide specific training for staff with responsibility for conducting reviews.

1.3.4 Authorities should establish procedures to ensure that training is refreshed on a regular basis. Arrangements should also be flexible, allowing the authority to conduct ad-hoc training activity when necessary.

#### **1.4 Staff contingency and cover**

1.4.1 Authorities should have in place robust arrangements to ensure that staff absence (whether planned or un-planned), does not affect the authority's ability to respond to requests for information, and requests for review, within statutory timescales.

1.4.2 Where practicable, authorities should have a dedicated FOI or general enquiry email inbox for information requests to be sent to. Even so, it is good practice to have in place arrangements for checking a colleague's email inbox if they are absent in case any requests have been sent directly to them (as these would still constitute valid requests to be answered within 20 working days of the email arriving in the inbox). This should be done even where an out of office alert has been activated – under the regimes, a request is still considered as received by the authority even if an out of office alert has been sent back to the requester.

## **2. Recording and reporting statistics**

### **2.1 What should be monitored?**

2.1.1 It is for each public authority to determine what information can most usefully be recorded under its administrative procedures, while satisfying itself that it is complying with the law (and is able to demonstrate this). Authorities must ensure that their systems provide adequate statistical information to monitor performance effectively.

2.1.2 Monitoring all requests, including routine queries which are handled regularly and answered in full, may be disproportionate.

2.1.3 Monitoring activities should be proportionate to the volume of requests handled by an authority and aligned to its performance monitoring arrangements, but should include collecting information about:

- the number of requests/requests for review received and whether they fall within FOISA or the EIRs;
- the proportion of requests answered within statutory timescales (there may also be value in monitoring the length of time it takes to respond to overdue requests);
- the number of requests that have been refused and the reasons for the refusal;
- the number of times a fee has been charged;
- the outcome of reviews including the number of times an initial decision has been upheld, partially upheld or overturned, or where there has been a failure to respond to the original request; and
- the number of cases that are appealed to the Commissioner and the outcome of such appeals.

2.1.4 It is good practice for authorities to proactively publish and update their FOI monitoring data online.

2.1.5 Authorities should review and report on their FOI performance data regularly. Reporting should identify any issues with the handling of requests e.g. meeting the statutory timescales or identifying areas of work and/or types of information which are frequently the subject of requests.

### **3. Proactive publication**

#### **3.1 Model Publication Scheme**

3.1.1 It is good practice to follow the Commissioner's recommendation that an authority adopts a Model Publication Scheme and create its own guide to the information it makes available under the model scheme, which forms part of its overall compliance with the publication scheme duty.

#### **3.2 Types of information that should be published**

3.2.1 Authorities are free to publish as much information, of whatever type, they wish to publish. As a minimum, to meet the requirements of section 23 of FOISA, this should include information about:

- their functions, how they operate (including their decision-making processes), and their performance; and
- their finances, including funding allocation, procurement and the awarding of contracts.

#### **3.3 Publication schemes should be kept up to date**

3.3.1 Authorities must ensure that they are meeting the commitments made in their scheme, and that the content of their publication scheme remains up to date, with new information being added as necessary.

3.3.2 It is good practice for an authority to also consider regularly what other information is likely to be of interest to the public and could be published proactively, e.g.:

- information which is regularly the subject of information requests;
- information relating to forthcoming/recent decisions or announcements;
- information about current issues which are attracting, or are likely to attract, significant public interest or media coverage; and
- information disclosed in response to requests (i.e. disclosure log)

3.3.3 Authorities must notify the Commissioner if they are considering removing information from their schemes, or making changes to their charging regime, as this may affect the Commissioner's approval of their publication scheme.

### **3.4 Advising third parties about publishing information**

3.4.1 Where a third party is the subject of information which an authority intends to publish, it is good practice to notify them prior to publication, and inform them when it is published. For example, where authorities routinely publish information relating to procurement exercises, the contractors bidding in a tendering exercise should be made aware at the time of bidding that the information they provide may be made public.

### **3.5 Publication of environmental information**

3.5.1 There is no requirement in the EIRs to produce a publication scheme or its equivalent, but there is a requirement to publish a schedule of charges. However, section 23 of FOISA makes no distinction between environmental and non-environmental information in publication schemes, and so environmental information should feature in the content of publication schemes.

### **3.6 Relevant private bodies should ensure that appropriate steps are taken to meet the requirements of regulation 4 of the EIRs**

3.6.1 The EIRs also apply to other bodies which are not designated under FOISA, including some private sector organisations (for example those under the control of a public authority and having public responsibilities, functions, or providing services in relation to the environment). As they are covered only by the EIRs, these other bodies are not under the FOISA duty to adopt and maintain publication schemes, but must comply with the requirements of regulation 4 of the EIRs to actively disseminate environmental information.

### **3.7 Information should be accessible to all and simple to find**

3.7.1 Published information should be found readily by the public e.g. on websites, by enabling search functions and/or having an alphabetical directory and/or site map. Information should not be "buried" on a site.

3.7.2 Authorities should ensure that information is also available to people who cannot access the internet. This may be achieved by offering to print out information from the website on request.

## **4. Receiving a request for information**

### **4.1 Guidance for the public**

4.1.1 It is good practice for authorities to provide guidance for the public which explains how to make a valid information request, and the procedure the authority will follow once a request has been received.

4.1.2 Guidance for the public should include:

- an address (including an email address where possible) to which applicants may direct their requests for information or ask for assistance;
- where possible, the telephone number of someone who can provide advice and assistance
- procedures, and information about the authority's charging regime;
- a link to the Commissioner's guidance for requesters<sup>15</sup>.

4.1.3 The guidance for the public should be referred to in an authority's Publication Scheme and Guide to Information.

4.1.4 An authority may designate a central contact point for applicants to make requests for information but must recognise that a request received by any individual staff member is, in terms of the legislation, received by the authority.

### **4.2 Valid and invalid requests**

4.2.1 Authorities' FOI procedures should include steps to establish the validity of each request.

4.2.2 Where an authority rejects a request on the basis that it is invalid, it must still advise the applicant of the right to request a review of the authority's decision and, if the applicant remains dissatisfied, the right to make an application to the Commissioner for a decision on the handling of their request.

### **4.3 Validity of requests submitted through social media**

4.3.1 Authorities with official accounts or pages on social networking websites (e.g. Facebook and Twitter), websites for the publishing of media (e.g. Flickr and YouTube), or blogging sites (e.g. Blogger or Wordpress) must be alert to the possibility of receiving valid requests for information through these channels, rather than through 'traditional' email. If an authority chooses to have an official presence on such a network or website, it has a responsibility to ensure that any potential requests submitted via those sites are considered.

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<sup>15</sup> <http://www.itspublicknowledge.info/YourRights/YourRights.aspx>

- 4.3.2 If an authority has an account on a social media site, it is good practice to ensure that the site/account is monitored on a daily basis for information requests. Alternatively, where available, notification emails should be enabled, with the emails sent to a regularly monitored mailbox. For example, within the settings for a Twitter account<sup>16</sup> email notifications can be activated for whenever the account is mentioned in a tweet.
- 4.3.3 As the Commissioner's guidance to requesters<sup>17</sup> notes, valid requests can theoretically be made through social media. However, in order to be valid they must include the applicant's full name (see 4.6), a means of responding to the applicant in writing and a description of the information they seek (see 5.3). If a request submitted by social media does not specify the name of the applicant, public authorities should, in line with their duty to provide advice and assistance, advise the applicant on how to make the request valid.

#### **4.4 Validity of voice mail requests**

- 4.4.1 Where an authority receives a request for information which has been recorded on a voice-mail system, the approach to be taken will depend on whether or not the request is for environmental information. Different considerations apply to FOISA and the EIRs where a request has been made in this way.
- 4.4.2 Whether a voice-mail request should be considered as valid under FOISA will largely depend on the capabilities of the voice-mail system used by the authority receiving the request. If the system allows for voice-mail records to be permanently stored and subsequently referred to and the applicant includes a name and address for correspondence, then the request should be considered as valid. However, if the system does not have this functionality (e.g. the system automatically deletes records after a period of time and there is no facility for the authority to transfer them onto other systems for storage), then the request should not generally be considered to be valid. However, authorities should note their duty to provide applicants with advice and assistance and in such cases should try to contact applicants to advise them to re-submit their request in writing, or in another recordable format.
- 4.4.3 If, on the other hand, a request has been made by voicemail for environmental information, the request is valid regardless of whether the voicemail can be permanently stored or not. This is because the EIRs allow for requests to be made verbally in an unrecorded state.

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<sup>16</sup> <https://twitter.com/settings/notifications>

<sup>17</sup> <http://www.itspublicknowledge.info/FAQ/GeneralFAQ/InformationRequestFAQ.aspx#facebook>

#### **4.5 Requests included in other correspondence**

4.5.1 Staff should be aware that valid requests for information under FOI may be contained within other correspondence e.g. where a request for information is made within a complaint letter or correspondence on a range of matters.

#### **4.6 Provision of an applicant's full name and pseudonyms**

4.6.1 Under FOISA, an information request must include the applicant's full name. Using first or given names alone will not be sufficient, even if the applicant is known to the member of staff dealing with the request. The use of a surname plus a title (e.g. Mrs Jamieson) will generally be sufficient. There should be a presumption that any full name provided is genuine, unless there is a clear and demonstrable reason to believe otherwise.

4.6.2 Where an applicant has not given a sufficient name, or where an authority is satisfied that an applicant has used a pseudonym, the request will not be valid. In such cases, the authority should advise the applicant that if they give their full name or made a request in their own name the authority would be able to respond to the request in accordance with FOISA. The authority should explain that the Commissioner would not be able to accept any appeal arising from a request if a pseudonym or insufficient name had been used by the applicant.

#### **4.7 Requests on behalf of other people**

4.7.1 Information requests can be made by a third party on behalf of an applicant. The request must contain the name of the person on whose behalf the request is being made, often referred to as the "true applicant". If a request appears to have been made on behalf of an unnamed person, the authority should contact the applicant to explain what needs to be done in order for a valid request to be made.

#### **4.8 Authorities should communicate with the applicant about the progress of a request**

4.8.1 It is good practice to acknowledge receipt of the request, explaining who will be handling it and when a response will be provided.

4.8.2 If there is likely to be any delay to responding to the request an apology should be provided to the applicant together with an estimated response date. Authorities should note that, even if they apologise, the deadlines under both regimes are absolute and failure to comply is a breach of the legislation. The applicant will still have the right to seek a review of the failure to give a substantive response within 20 working days.

## **4.9 Extending the period of compliance under the EIRs**

- 4.9.1 Where an authority seeks to extend the time it takes to respond to a request for environmental information under the EIRs due to the volume and complexity of the requested information<sup>18</sup>, it must inform the applicant as soon as possible but in any event within the original 20 working day deadline. The applicant should also be informed of their statutory rights (including the right to appeal to the Commissioner) as they may wish to request a review of the authority's decision to seek an extension before the extended period expires.

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<sup>18</sup> Regulation 7 of the EIRs.

**5. Providing advice and assistance to applicants, seeking clarification of requests, charging a fee**

**5.1 Authorities should offer advice and assistance at all stages of a request**

5.1.1 Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.

**5.2 Requests for documents or copies of documents**

5.2.1 FOISA provides a right of access to information and not a right of access to copies of specific documents. However, authorities should not refuse requests for copies of documents (e.g. a report, a minute or a contract) as long as it is reasonably clear from the request that it is the information recorded in the document that the applicant wants.

**5.3 Authorities must provide appropriate advice and assistance to enable applicants to describe clearly the information they require**

5.3.1 This will be particularly important where an applicant has made a request which is invalid, for example by failing to clearly describe the information sought, or where they have requested documents but it is still not reasonably clear what information they require. The authority must provide appropriate advice and assistance to enable an applicant to make their request in a way which will describe the information they want reasonably clearly. The authority should remember that applicants cannot reasonably be expected to always possess identifiers such as file reference numbers or the description of a particular record. Applicants should not be expected to always have the technical knowledge or terminology to identify the information they seek.

5.3.2 The extent to which an authority is required to provide such advice and assistance will depend on the particular circumstances of the applicant<sup>19</sup>. For example, although both FOISA and the EIRs are generally “applicant blind”, there will be cases where it will be evident that the request is made by people who might be expected to describe precisely what it is that they wish to receive (for example a solicitor making a request on behalf of a client). There will also be cases where requests are made by individuals who cannot be expected to express themselves with such precision and who need more support. Authorities should also have regard to their duties under the Equality Act 2010 in ensuring accessibility for all.

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<sup>19</sup> This point was made clear in the Court of Session Decision, Glasgow City Council and Dundee City Council v Scottish Information Commissioner [2009] CSIH 73, issued on 30 September 2009.

5.3.3 If an authority is unclear about what information the applicant wants, it should obtain clarification by performing its duty to provide reasonable advice and assistance to the applicant. Where a request is not reasonably clear, advice and assistance could include:

- providing an outline of the different kinds of information which might meet the terms of the request;
- providing access to detailed catalogues and indexes, where available, to help the applicant ascertain 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;
- contacting the applicant to discuss what information the applicant wants.

5.3.4 The aim of providing advice and assistance is to give the applicant an opportunity to discuss their application with the authority, with the aim of helping the applicant describe the information being sought reasonably clearly, so that the authority is able to identify and locate it. Applicants should not be given the impression that they are obliged to disclose the intent behind their request or that they will be treated differently if they do so.

#### **5.4 Authorities should not delay in seeking clarification**

5.4.1 Where a public authority has received a valid request, but needs more information from the applicant to identify and locate the information, the authority should ask the applicant to clarify what information is sought as soon as reasonably possible. It is good practice to do so immediately rather than delay. The statutory 20 working-day deadline for responding to a request will not start until clarification has then been received from the applicant.<sup>20</sup>

5.4.2 Advice and assistance should be provided as soon as reasonably possible. The Commissioner is likely to be critical of any authority which takes an unreasonable length of time to provide advice and assistance in order to delay the applicant submitting a valid request.

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<sup>20</sup> As set out in sections 1(3) and 10(1)(b) of FOISA, and regulation 9(2) & (4) of the EIRs.

## **5.5 When sufficient clarification is not provided**

- 5.5.1 If, after seeking clarification and all reasonable 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 required to proceed with the request.<sup>21</sup>
- 5.5.2 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.
- 5.5.3 Where clarification is sought from the applicant but no response is received, the authority should remind the applicant after around 20 working days that it cannot proceed until the applicant responds. If no clarification is received after 40 working days the authority should write to the applicant explaining that the case is now considered to be closed but providing details of its own review procedure and the applicant's rights to apply to the Commissioner for a decision.

## **5.6 Where a fee is payable and content of fees notices**

- 5.6.1 Under FOISA, authorities are entitled to charge for the direct and indirect costs incurred in locating, retrieving and providing information. Full details of what can and cannot be charged for are contained in the Fees Regulations.<sup>22</sup> However, authorities are not entitled to charge for:
- any costs incurred in determining whether it actually holds the information;
  - any costs incurred in determining whether information should or should not be disclosed; or
  - the time spent deciding what parts of a document/report should be redacted (although the actual process of redacting can be charged).
- 5.6.2 Where a fee is payable the authority should notify the applicant as soon as possible and within the 20 working day time limit. The fees notice must set out the projected costs of handling the request. Authorities must ensure that the projected costs should be a reasonable estimate of the costs likely to be incurred and based only on the estimated actual costs to the authority. The statutory 20 working-day deadline for responding to a request pauses when the fees notice is issued and will resume once the applicant has paid the fee.

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<sup>21</sup> Under section 1(3) of FOISA the authority is not obliged to give the requested information until it has received the clarification sought. Under regulation 10(4)(c) of the EIRs the request may be refused if it is formulated in too general a matter and the authority has complied with its duty to provide advice and assistance.

<sup>22</sup> Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations).

- 5.6.3 The public authority should tell the applicant that they must pay the fee within three months of the date of the fees notice (60 working days under the EIRs) or the public authority is no longer any obligation to give the applicant the information. If the applicant is unwilling to pay the fee, the authority should consider what information could be provided free of charge that may be of relevance to the applicant's request and suggest how the applicant may wish to narrow the scope of their request accordingly.
- 5.6.4 Where no response is received after the issuing of the fees notice, the authority should remind the applicant after around 20 working days that it cannot proceed until the applicant responds. After 40 working days the applicant's right to review the issuing of the fees notice expires, at which point the authority should write to the applicant explaining that the case is now considered to be closed. However, if the fee is paid after 40 working days but before three months have passed, the case must be reopened and the right to review reinstated.
- 5.6.5 Upon payment of a fees notice, the timescale for responding resumes from the point when the fees notice was issued. If 10 working days had passed between receipt of the request and the issuing of the fees notice, this means that only 10 working days remain to respond once the fee has been paid. It is therefore both good practice and common sense to issue a fees notice as soon as possible after receiving the request.

## **6 Locating and retrieving information and record keeping**

### **6.1 Record Keeping**

6.1.1 Guidance on effective records management is set out under the Code of Practice on Records Management<sup>23</sup>, issued by the Scottish Ministers under section 61 of FOISA. The Public Records (Scotland) Act 2011<sup>24</sup>, places obligations on many public authorities to adopt and maintain a records management plan.

### **6.2 Locating and retrieving information**

6.2.1 Authorities should make arrangements to allow staff to locate and retrieve information easily. This will allow authorities to respond to requests and requests for review quickly, and provide reassurance that all relevant sources where the information might be held within the organisation have been checked.

6.2.2 Searches should be proportionate and focus on systems (whether paper-based or electronic) where staff with a working knowledge of the records relating to the information request consider what information might be held. Reference to “systems” do not relate only to IT systems but may include any other system, including paper records, informal systems such as officers’ notes, and temporary records. Authorities should think beyond conventional places where information might be held to satisfy themselves that full and robust searches have been undertaken.

6.2.3 Authorities should, where appropriate, maintain a record of searches conducted, including details of who carried out the searches and the systems that were checked. Records of searches provide helpful evidence to reviewers and, in the event of an appeal, to the Commissioner. It is also best practice for authorities to keep on record any discussions they have with applicants and where relevant, third parties.

### **6.3 Confidentiality Markings**

6.3.1 Authorities should note that marking information as “confidential” (or another similar internally generated security classification) is not necessarily a material consideration in decisions about disclosing or withholding information under the regimes. Although there are circumstances where information might correctly be considered as confidential, authorities must consider each request on its own merits within the terms of the regimes and be able to clearly show to the applicant and the Commissioner why the information should not be disclosed.

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<sup>23</sup> <http://www.scotland.gov.uk/About/FOI/18022/13383>

<sup>24</sup> <http://www.legislation.gov.uk/asp/2011/12/contents/enacted>

## **7. Consulting third parties**

### **7.1 Making third parties aware of authorities' duties**

7.1.1 Authorities should ensure that third parties which supply them with information are aware of the authority's duty to comply with the regimes and that information will have to be disclosed upon request unless an exemption under FOISA or an exception under the EIRs applies. For example, tenderers must be aware of authorities' duties under the regimes and the process of answering requests in advance of any requests being received.

7.1.2 Authorities should exercise caution about making any confidentiality agreements with third parties in relation to information they are to supply. For example, when inviting consultation responses, authorities should resist providing any undertaking that all responses will be treated as confidential.

### **7.2 Where consultation is likely to be appropriate**

7.2.1 There is no definitive list of circumstances in which consultation would be appropriate, and much depends on the facts and circumstances of the particular case. Consultation is likely to be appropriate where a third party's interest in the handling of a request will be significant, for example because they are the primary focus of the information (e.g. as a business or an individual) or because disclosure would significantly affect them.

7.2.2 Consultation is recommended in all cases where:

- the views of the third party may help the authority to determine whether an exemption or exception applies to the information requested. For example, if disclosure would cause substantial prejudice to that third party's interests, or constitute a breach of confidentiality, the authority would need evidence to support that view; or
- the views of the third party may help the authority determine where the public interest lies.

### **7.3 Where consultation is less likely to be necessary or appropriate**

7.3.1 Consultation is less likely to be necessary where:

- the authority already has evidence from the third party that disclosure would, or would not, prejudice their interests; or
- the views of the third party can bear no influence on the authority's decision (for example where there is other legislation either preventing or requiring disclosure).

7.3.2 Consultation may not be appropriate where:

- in the authority's view there is no basis for withholding the information;
- the cost of consulting third parties would be disproportionate (for example, because many third parties are involved); or
- where the authority holds evidence of earlier consultation on the status and sensitivity of the information and nothing (including the views of the third party) has changed.

7.3.3 In such cases, the authority should consider what is the most reasonable course of action for it to take in light of the requirements of the regimes, the potential effects of disclosure and the public interest. It will usually be appropriate to notify the third party about the disclosure of information.

## **7.4 Meeting statutory deadlines**

7.4.1 Meeting the statutory deadline for responding to a request must always take priority over consulting third parties. This will often mean that an authority can only allow third parties a short time to respond; this time should not be extended if that will prevent authorities responding on time. If the authority does not identify the need to consult third parties until near the deadline, instead of consulting, they should just notify third parties at the same time as they respond to the applicant.

7.4.2 Authorities should identify interested third parties as soon as possible to give them the sufficient time in which to respond to consultation.

## **7.5 Inviting views from third parties**

7.5.1 When inviting third parties for their views, an authority should focus the invitation on the information that has been requested. It should always be made clear to the third party that their consent is not being sought and they do not have a veto on release. It is for the Scottish public authority that received the request, not the third party (or representative of the third party), to determine whether or not information should be disclosed. A refusal by a third party to consent to disclosure does not, in itself, mean that information should be withheld.

7.5.2 If the applicant is an individual their identity should almost always remain withheld from third parties as this is personal data and its disclosure is likely to be in breach of the Data Protection Principles. There may be occasions when the identity of the applicant is relevant to the request but it should not be shared with third parties unless permission is sought and granted, or the request was made in the public domain (e.g. via [whatdotheyknow.com](http://whatdotheyknow.com)).

7.5.3 The Royal Household is the appropriate third party for an authority to consult about requests for, or relating to, Royal information. The Household is the channel of communication between Members of the

Royal Family and public authorities on all matters relating to FOI. The Secretariat in the Private Secretary's Office at Buckingham Palace is authorised to liaise with authorities on behalf of the offices of all Members of the Royal Family about such matters. The Secretariat's contact details are:

Secretariat  
Private Secretary's Office  
Buckingham Palace  
London  
SW1A 1AA

E-mail: [foi@royal.gov.uk](mailto:foi@royal.gov.uk)

7.5.4 The Royal Household is consulted where a request or requested information relates to any Royal matters, such as:

- correspondence or notes of meetings with Her Majesty, other Members of the Royal Family or Royal Household officials or representatives;
- Royal visits;
- the personal affairs of Her Majesty and Members of the Royal Family.

7.5.5 As the Household is consulted on large numbers of requests by authorities from across the UK, as well as Scotland, it is good practice to notify them as soon as a request arrives. This gives the Household time to consider any potential sensitivities and helps them to reply promptly when an authority consults them about their proposed decision.

## **7.6 Consulting representative bodies**

7.6.1 Where a large number of third parties are involved the authority may consider that it would be sufficient to consult a representative sample of them. If those parties have a representative organisation that can express views on their behalf, the authority may consider that it would be sufficient to consult that representative organisation.

## **7.7 When a response is not received**

7.7.1 The fact that the third party has not responded to consultation does not relieve the public authority of its duty to make information available, or its duty to reply within the statutory timescales.

## **7.8 Notifying third parties about the release of information**

7.8.1 When an authority has made a decision to release information it may, as a courtesy, notify any third parties who have a material interest that information relevant to them has been released in response to a

request, regardless of whether they have been consulted. This ensures that the release does not come as a surprise. Notification is at the discretion of the authority and would depend on the individual circumstances of the information and what is judged to be a material interest.

## **8. The disclosure of information relating to contracts or procurement processes**

### **Introduction**

This part of the Code provides guidance in dealing with and making available contractual and procurement-related information, whether proactively or in response to an information request. In particular, this section sets out:-

- ‘guiding principles’ which authorities should consider in balancing the public’s right to know with the need to protect legitimate commercial concerns; and
- best practice in dealing with contractual and procurement-related information.

It is not possible in this Code to provide definitive statements about whether specified types of contractual and procurement-related information should be made available. Each authority must make its own decision in light of the facts and circumstances of the particular case. However, in outlining the guiding principles and best practice, the Code seeks to promote a more consistent approach to the disclosure of procurement-related information by authorities.

### **Guiding Principles**

In making available contractual and procurement-related information, whether proactively or in response to an information request, the following guiding principles should be considered.

#### **8.1 Principle 1: Transparency in the use of public funds**

8.1.1 The public must be reassured that public bodies are spending taxpayers’ money wisely. The type of contractual and/or procurement information produced may vary depending on the situation, but where held the public should be able to access:

- how much money is being spent;
- with whom that money is being spent;
- the nature of the services, goods or works that money is buying;
- what redress is available if those services, goods, or works are below an agreed standard;
- any cost benefit analysis that has been undertaken;
- any carbon footprint analysis that may have been undertaken;
- any equality assessment that may have been undertaken;
- any sustainability assessment that may have been undertaken; and
- any privacy impact assessment that may have been undertaken or justification as to why one has not been carried out.

8.1.2 In particular, the public has the right to know the full financial implications of long term and high value contracts, such as PFI/PPP contracts (subject to the exemptions/exceptions of the regimes).

## **8.2 Principle 2: Demonstrable diligence in managing contractors to ensure best value for money**

8.2.1 Information should also be made available which makes clear the extent to which the authority is actively managing its contractor.

8.2.2 For example, where it is appropriate to the individual contract, the public should be able to see whether:

- project management and procurement best practice principles are being applied;
- suitable checks and balances are in place to ensure proper monitoring of project performance;
- those checks and balances are being actioned effectively; and
- intervention on the part of the public authority is happening where necessary.

## **8.3 Principle 3: Respecting commercial interests**

8.3.1 The regimes and this Code are not intended to undermine a public authority's commercial relationships with the private sector. To protect the legitimate concerns of the private sector, authorities should consider appropriate use of the section 33(1)(b) exemption in FOISA (commercial interests) or the exceptions under regulations 10(5)(e) and 10(5)(f) (commercial interests and breach of confidentiality) of the EIRS when considering disclosure of contractual and procurement-related information. Otherwise, there could be a risk that:

- companies would be discouraged from dealing with the public sector, fearing disclosure of information that may damage them commercially, or
- companies would withhold information where possible, making the choice of the best contractor more uncertain as it would be based on limited and censored data.

### **Good practice**

**8.4 When beginning any new procurement exercise, public authorities should ensure that bidders/suppliers understand the extent to which their information may be disclosed by the authority (either proactively or in response to an information request).**

8.4.1 *Including disclosure provisions in the procurement documentation.*

- 8.4.2 Bidders should be made aware in Pre-Qualification Questionnaire and Invitation to Tender documentation that an authority is not able to hold information in confidence unless it is genuinely sensitive in nature and therefore is exempt from release (for example because commercial interests may be harmed<sup>25</sup>, or its disclosure would constitute an actionable breach of confidence<sup>26</sup>).
- 8.4.3 Withholding information under certain exemptions (e.g. commercial interests) requires that substantial prejudice is demonstrated – the authority must be able to show that real, actual, significant harm would be caused by disclosure.
- 8.4.4 They should also be aware that the authority will not implicitly accept confidentiality terms, and that any confidentiality markings, whilst being noted, may have little weight if the information is requested (for example if it is apparent that the information is not sensitive).
- 8.4.5 However, an authority should recognise a bidder’s legitimate commercial concerns. As such, best practice dictates that a bidder should be asked to identify information it provides to the authority that it believes to be truly sensitive, and to explain why and how long it is likely to remain so. The authority should make clear to the bidder that it cannot be bound by their views, but that they will help inform the authority in determining what information it can and cannot make available on request.
- 8.4.6 The authority should undertake to consult with the bidder if it receives a request for any information previously highlighted as being sensitive, within the identified sensitivity period. The sensitivity of information will vary depending on the timing of the request. For example, information may be sensitive during the tender exercise, but may cease to be sensitive once the contract has been awarded.
- 8.4.7 The bidder should also be consulted if there is any doubt about the information’s sensitivity, regardless of the specified period. If the authority considers that information is exempt from release because its release may prejudice the bidder’s commercial interests, it must obtain evidence from the bidder to support this view. Of course, the final decision on the release or withholding of information rests with the authority.

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<sup>25</sup> Exemption under section 33(1)(b) of FOISA, or exception under regulation 10(5)(e) or (f), or regulation 10(5)(c) of the EIRs.

<sup>26</sup> Exemption under section 36(2) of FOISA, or exception under regulation 10(d) of the EIRs.

8.4.8 This approach may not be appropriate for all tenders and contracts (for example it may be disproportionate or the volume of tenders/contracts may make it impractical). If so, the criteria applied to contract review which is detailed below ('Reviewing older contracts which came into force before 1 January 2005 for confidentiality provisions') should be considered.

8.4.9 *Inclusion of disclosure provisions in contracts.*

8.4.10 The terms and conditions of a contract should contain disclosure provisions regarding information provided during the competition phase, but may also be expanded to include the disclosing of information by the contractor. Although not strictly a consideration under this Code (as it only applies to public authorities), it is sensible to tackle all these issues under a single 'disclosure of information' (or similar) provision. Such provisions will be particularly relevant where the contractor is designated a 'public authority' for the purposes of the particular contract by an order made under FOISA. Authorities should also notify contractors whose contracts involve environmental functions, responsibilities or services that they may themselves be directly subject to EIRs in relation to those contracts.

8.4.11 It is recommended that a provision is included in the contract to the effect that the authority will aim to consult the contractor on any request for information which has been identified as being sensitive. (As described above in 8.4, where exemptions are being applied on the basis that release would harm a third party, the authority must have evidence from the third party that this is the case.)

8.4.12 As regards information identified by either party as sensitive, authorities may consider including that information in an annex which also sets out the reasons for sensitivity and the period of sensitivity. This will facilitate disclosure of the remainder of the contract should a request for information be received or if it is being published proactively.

8.4.13 As already indicated, there must be transparency in the use of public funds. In particular, contracts must reflect the fact that the public have the right to know the financial implications of PFI/PPP contracts (and other contracts entered into by the public sector at public expense), for example how much money is being spent, with whom, for what purpose and over what period.

## **8.5 Consultation with suppliers on disclosure requests**

8.5.1 As already indicated, consideration should be given to making express provision as to when consultation with bidders/suppliers will be appropriate where requests for information involve information provided by them. (Section 7 of this Code on 'Consulting third parties' provides general guidance on this issue.)

- 8.5.2 Where bidders/suppliers have been given the opportunity to identify sensitive material and have done so (and any declared period of sensitivity has not expired), then clearly consultation is needed if the request relates to that information. However, if it does not, then consultation is likely to be unnecessary. If the bidder/supplier has not identified any sensitive information, then consultation should likewise be unnecessary (unless the authority considers that an exemption/exception may apply on the grounds that the information's release would nevertheless prejudice the bidder/supplier's interests). The authority will wish to consider whether, as a courtesy in such cases, bidders/suppliers are notified that a request has been made and are given the opportunity to comment as appropriate. The bidder/supplier then has a 'do nothing' option if the request is of no concern to them. The authority still has a duty to respond within the relevant timescales.
- 8.5.3 As discussed in 8.7, information in respect of older contracts will have been provided prior to any understandings on information sensitivity being agreed. Therefore requests for older material that could have some commercial sensitivity should involve consultation with bidders/suppliers.
- 8.5.4 Even when a supplier or third party has indicated that information should be withheld and the public authority agrees that exemptions or exceptions may apply, that does not mean that the public interest will necessarily weigh in favour of withholding information. Unless an absolute exemption applies, the public interest test will need to be considered in each case, in light of the facts and circumstances prevailing at the time of the request.

## **8.6 Time limits for withholding information**

- 8.6.1 Most contractual and procurement-related information is only sensitive for a definable period of time. It is not, however, possible to be prescriptive about when the sensitivity will decrease; this time period will vary widely depending on the type of procurement information in question and the stage reached in the tender exercise. The sensitivity of price information may decrease after a relatively short period, whereas 'trade secret' information may be sensitive for much longer.

## **8.7 Reviewing older contracts which came into effect before 1 January 2005 for confidentiality provisions**

- 8.7.1 Some authorities will have existing contracts that pre-date the coming into force of the regimes in 2005. These contracts may have wide-reaching confidentiality provisions that are unsupported under the regimes. Information covered by a confidentiality provision will only be exempt (for example under either sections 33(1)(b) or 36(2) of FOISA) if the information is truly a trade secret or commercially sensitive, or disclosure would be an actionable breach of confidence. In these cases the authority should consult the relevant suppliers to:

- a) advise them that information covered by the contract may need to be disclosed under the regimes, irrespective of any confidentiality provision; and
- b) agree procedures for consultation in the event that an information request is received.

8.7.2 It may be impractical or disproportionate to review every extant contract. Authorities may however wish to focus on contracts that are:

- large value;
- critical to the authority's function;
- controversial;
- longer term and still have a number of years to run; or
- otherwise likely to attract information requests.

## **8.8 Proactive publication in contracts and procurement**

8.8.1 It is best practice for authorities to consider proactively publishing information relating to the procurement process and contracts, rather than wait until information requests are submitted to them.

8.8.2 In deciding what information to publish, authorities may wish to focus in the first instance on publishing contracts in which there is a particular public interest (for example those which they consider to be of high value or long-term, or otherwise high profile). In particular, authorities should consider publishing information relating to the financial implications of long term and high value contracts, such as PFI and PPP contracts.

8.8.3 If an authority routinely publishes information under its publication scheme which is relevant to its contractual and procurement activities, it is easier for the public to access the information, and authorities can decide what information to publish as part of a systematic management process, instead of responding to individual requests with tight timescales.

## **8.9 Relationship between information rights under procurement legislation and FOI**

8.9.1 Legislation such as the Public Contracts (Scotland) Regulations 2015 (as amended) and Procurement Reform (Scotland) Act 2014 gives tenderers involved in some tendering exercises the right to ask for information. For example, an unsuccessful tenderer may have the right to ask why their tender was unsuccessful or about the characteristics and relative advantages of the successful tenderer. The authority has the right to withhold information in some cases. The reasons for withholding information are not identical to FOISA exemptions/EIRs exceptions.

## **9. Responding to requests**

### **9.1 Duty to respond promptly to a request**

- 9.1.1 Under sections 10(1) and 21(1) of FOISA all public authorities are required to respond 'promptly' to a request or review (and, in any case, within a statutory 20 working days).
- 9.1.2 Requests and reviews received by grant-aided and independent special schools are also subject to the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016. The Regulations allow any working day which is not also a 'school day' to be disregarded for the purposes of the statutory 20 working day deadline for complying with an FOI request or review made to such schools.
- 9.1.3 The purpose of the Regulations is to allow the grant-aided and independent special schools sufficient time to respond to FOI requests and reviews, taking into account school holiday periods when a school maybe closed and/or staff are not available. However, the Regulations do not relieve those schools of their obligation to reply to a request or review 'promptly'.
- 9.1.4 Therefore, even on 'non-working days' (for the purposes of FOISA and the Regulations), if staff (with the appropriate skills, knowledge and level of authority) are working in a grant-aided or independent special school, it is good practice to work as normal on any FOI requests or reviews to ensure that responses are issued promptly.

### **9.2 Duty to advise and assist when responding to a request**

- 9.2.1 The obligation to provide advice and assistance continues at the point of issuing a response. For example, if directing the applicant to a website, the authority should take all reasonable steps to direct the applicant to the relevant section.

### **9.3 When an authority does not hold the information requested**

- 9.3.1 The legislation only applies to recorded information which is held by the authority at the time when the request is received. Authorities cannot therefore apply exemptions/exceptions to information they do not hold. Where an authority issues a response informing the applicant that it does not hold the requested information, it is good practice for an authority to explain to the applicant why it does not hold the information. A request for review is less likely to be made if authorities inform applicants why they do not hold the information they have requested.
- 9.3.2 Where an authority does not hold the information, but can identify an authority that may hold it, it is good practice to contact that authority

and confirm whether they do indeed hold the information. When consulting a second authority the identity of the person requesting the information should not be disclosed unless that person has agreed to this.

9.3.3 Where an authority does not hold the information but is aware that it is held by another public authority, it should in its refusal notice provide the applicant with contact details of the authority holding the information and suggest that the applicant makes a new information request to that authority. Where the two authorities are publicly perceived as linked, the differences between them should be explained to the applicant.

9.3.4 In addition, if the request is for environmental information which is not held by the receiving authority, but known to be held by another public authority, the receiving authority may instead offer to transfer the request to the other authority. The authority should contact the applicant promptly to inform them that it does not hold the information but that it may be held by another public authority and either provide the contact details of that authority or offer to transfer the request. No request should be transferred from one authority to another without the express agreement of the applicant.

9.3.5 Where an applicant chooses to exercise their right under the EIRs to transfer their request, the receiving authority must arrange for the transfer to take place upon receipt of the applicant's consent. Once the request has been transferred, the authority must notify the applicant by issuing a refusal notice under regulation 13 of the EIRs. Upon receipt of the transferred request the authority now with responsibility for responding to the applicant must do so in accordance with the requirements of the EIRs, with a new 20 working day time limit beginning from the date of receipt.

#### **9.4 Where excessive costs apply**

9.4.1 Where the cost of responding to a request made under FOISA will exceed the upper cost limit (currently £600<sup>27</sup>) or the burden of responding to a request under the EIRs would be manifestly unreasonable<sup>28</sup> the authority is not obliged to comply with the request.

9.4.2 Authorities should create an estimate of how the cost of complying with the request would exceed the cost limit. This estimate will provide important information to which the authority can refer:

- in considering any subsequent request for review; or
- in the event that an appeal is made to the Commissioner.

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<sup>27</sup> Section 12 of FOISA.

<sup>28</sup> Regulation 10(4)(b) of the EIRs.

9.4.3 When refusing a request on cost grounds, it is good practice for the authority's response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit. In giving advice you may wish to take account of how much the cost limit has been exceeded. Any narrowed request would be a separate new request and should be responded to accordingly.

## **9.5 When information is otherwise accessible**

9.5.1 Where a public authority refuses a request on the grounds that the information is otherwise accessible, it must send the applicant a refusal notice which acknowledges that it holds the information and explains why the exemption at section 25(1) of FOISA (or exception at regulation 6(1)(b) of the EIRs) applies<sup>29</sup>.

9.5.2 The authority should not assume that the applicant will know where and how the information can otherwise be obtained. If the information is already publicly available (e.g. on the authority's website) the authority should tell the applicant how to access it and provide adequate signposting, for example, providing direct links to online information. In all cases the authority should bear in mind its general duty to provide advice and assistance to applicants.

## **9.6 Information intended for future publication (relevant to FOISA)**

9.6.1 An authority may refuse to disclose information if it already plans to publish it within the 12 weeks from the date of the request<sup>30</sup>. When an authority cites this exemption in a refusal notice, it is good practice to provide the intended date of publication.

9.6.2 There may be occasions where, having cited the exemption in section 27(1) in response to a request for information, an authority is then unable to publish the requested information on the planned date of publication. If the authority fails to publish the information within the period, it should, in line with its duty to advise and assist, contact the applicant and explain the reason for the delay. It should give the revised date of publication if this is known.

9.6.3 While an applicant has no automatic right to receive the information as soon as a delay in publication exceeds the 12 week time limit, any significant delay would make it more difficult for the authority to continue to claim that it is reasonable to withhold the information.

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<sup>29</sup> Under FOISA the authority should have already established the information is "reasonably obtainable" to the applicant, not just generally. Under the EIRs, the information has to be publicly available and easily accessible to the applicant.

<sup>30</sup> Section 27(1) of FOISA.

9.6.4 If the applicant did not challenge the authority's earlier decision to withhold the information on the basis of the section 27(1) exemption, they may have missed the 40 day deadline for asking for a review of the original decision. If the applicant then seeks a review in such circumstances, it is good practice for authorities to carry out a late review.

## **9.7 Quality assurance measures**

9.7.1 It is good practice for authorities to check responses for accuracy and quality before they are issued. The arrangements an authority puts in place should be proportionate to its needs and different arrangements may be introduced depending on the nature, complexity and/or sensitivity of a request.

9.7.2 Authorities are expected to put in place measures to achieve both consistency and rigour in their responses to requests and requests for review.

## **9.8 Letter/email templates**

9.8.1 It is good practice for authorities to establish standard letter/email templates to be used by staff responding to FOI requests and requests for review. Templates should ensure that key rights are always provided to applicants at each stage of the process. They can also be useful for providing guidance where exemptions or exceptions are being used (including where applicable consideration of the public interest test) to ensure that all refusal notices meet with the requirements of the regimes.

## **9.9 Providing additional information**

9.9.1 There is no requirement under the legislation for authorities to create new information in response to a request. The compilation of information, e.g. in order to respond to a request for statistics, will not generally be considered as creating new information.

9.9.2 The duty to provide advice and assistance does not extend to providing additional information which falls outside the scope of the information request, or locating information held by other public authorities. However, in some situations it may be helpful to provide context to a response to avoid the information disclosed being misunderstood or misinterpreted.

## **9.10 Format information is provided in and equality considerations**

9.10.1 Under FOISA, as far as is reasonably practicable, authorities must provide the information requested in the applicant's preferred format (if the applicant has indicated a particular format). If a request is made for

information in a particular format, and the information is already held in that format, it should not be converted into another format for release.

9.10.2 If the information is not yet held in the preferred format, the authority must consider whether it would be reasonably practicable to convert the information into that format. In considering what is “reasonably practicable”, the authority should have regard to all the circumstances applicable to the request. Where an authority considers providing the information in the requested format not to be “reasonably practicable”, it should inform the applicant of the reasons for its decision<sup>31</sup>.

9.10.3 In deciding whether a response to a request for information can be provided in a particular format, authorities must take into account the requirements of the Equality Act 2010<sup>32</sup> as there may be a further requirement under the Equality Act to make a reasonable adjustment, for example, by providing a copy of a document on audio tape.

## **9.11 Copyright**

9.11.1 There is a waiver for the copyright provisions in the Copyright Designs and Patents Act 1988. This permits authorities to disclose information which contains third party copyright in response to a request. However, this waiver does not apply to the person who receives the information. It is therefore good practice to explain where third party copyright may lie within information that is released. Reference to copyright rules should only be included in responses where it is appropriate to do so and should not be included as a standard reference in all responses.

## **9.12 Providing details of review procedures**

9.12.1 Authorities should provide details of the rights to request a review and to make an appeal in all response notices. Authorities are not required to do this where all of the information requested is disclosed, but it is still best practice to do so in case the requester is dissatisfied with the response (e.g. they believe there is more information held, or are unhappy with how the request was handled).

9.12.2 The details provided must include:

- The right to request a review from the authority within 40 working days. The notice should explain how to make the request for review, and should highlight that the applicant must state why they are dissatisfied with the response. It should also state that, in the

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<sup>31</sup> In terms of regulation 6 of the EIRs, an authority should comply with an applicant’s request that the information be made available in a particular format unless it is reasonable for it to make the information available in another form or format; or the information is already publicly available and easily accessible to the applicant in another form or format.

<sup>32</sup> <https://www.gov.uk/equality-act-2010-guidance>

event of an appeal to the Commissioner, the Commissioner will generally only be able to investigate the matters raised in the request for review. The authority must also provide contact details for submitting the request for review.

- The right, if the applicant is still dissatisfied following the outcome of the review, to make an application for decision to the Commissioner within six months of the response. It is good practice to include a link to the Commissioner's website or, where appropriate, contact details for the Commissioner's office.

### **9.13 'Business as usual' requests**

9.13.1 Under the regimes, any written request for recorded information to a Scottish public authority is technically a request under FOISA or the EIRs. This includes the routine requests authorities often refer to "business as usual" where:

- the requests are simple and straightforward
- the authority releases all the requested information on time, and
- it is unlikely that the applicant will be dissatisfied with the response.

9.13.2 Any response which does not meet all of the above criteria must include full details on review procedures (see 9.11).

### **9.14 Responding to requests via Twitter**

9.14.1 While it is theoretically possible for a valid request for information to be made within the 140 character limit of Twitter, it is not possible for a full response which complies with Part 1 of FOISA to be given within such a limit (i.e. setting out the applicant's right to review and appeal). Therefore, when responding to a request made through Twitter, an authority should either:

- upload a full response letter (and requested information, if appropriate) to the authority's website, then send the applicant a link to the full response; or
- ask the applicant for an email or postal address to which the full response (and information, if appropriate) can be sent.

## **10. Handling reviews**

### **10.1 Receiving requests for review**

10.1.1 A request for review is made to the authority, not to an individual officer. It is therefore important that all staff in the authority can recognise a request for review and ensure that it receives an appropriate response.

### **10.2 Valid and invalid requests for review**

10.2.1 A request for review will not be valid where an applicant requests a review before the timescale for compliance with the request has expired, and the authority has not yet responded. In such a case, the authority should advise the applicant that:

- the response to the request will be provided within the timescale for compliance (if this is the case); and
- if, following issue of the response, they are still dissatisfied (or in the event the response is not provided by the deadline) then the applicant may make a new request for review

### **10.3 Requests for review of a response**

10.3.1 If an applicant writes to the authority expressing dissatisfaction with the way in which the authority has dealt with their request following a response, the authority should treat this as a formal request for review, provided it meets the requirements of section 20(3) of FOISA or regulation 16 of the EIRs. The applicant does not need to specifically ask for a review.

10.3.2 Applicants do however need to specify why they are dissatisfied with the original response for the review request to be valid. If this is not clear, or the request fails to comply with the requirements of the regimes, the authority has a duty to advise and assist the applicant in making a valid review request. The statutory timescale will not begin until a valid review request is received by the authority.

10.3.3 The aim of a review is to allow the authority to take a fresh look at its response to an information request, to confirm the decision (with or without modifications) or, if appropriate, to substitute a different decision. The review procedure must therefore be fair and impartial and allow decision makers to look at the request afresh. It should also enable different decisions to be taken. Review procedures should be sufficiently flexible to allow for differing circumstances such as the complexity and sensitivity of the information.

10.3.4 It is good practice for the reviewer to be a person who did not respond to or advise on the original request (where possible or practicable).

10.3.5 Authorities must put in place appropriate and accessible procedures for handling reviews. These procedures should:

- nominate, or assist in nominating, the staff responsible for carrying out reviews and to whom those staff are accountable;
- set out the process to be followed by the reviewer(s) to ensure that the review is comprehensive and robust; and
- require the reviewer(s) to record the process undertaken and then produce a review report, including any lessons learned.

#### **10.4 Requests for review of a failure to respond to the original request**

10.4.1 An applicant may complain to an authority if they have not received a response to their request within the statutory timescales. This should be treated as a formal request for review of a failure to respond.

10.4.2 Where the authority accepts that it has failed to respond on time, the reviewer should apologise for the authority's failure and provide the decision on the original request to the applicant. The review response must set out the applicant's right to appeal to the Commissioner. There is no opportunity for the authority to invite a further request for review.

10.4.3 The reviewer should also identify the reasons for the procedural failure and, where appropriate, make recommendations for action to prevent recurrence.

#### **10.5 Providing details of appeal procedures**

10.5.1 Every review response must provide details of their right to appeal to the Commissioner within six months of the response.

10.5.2 The details provided must include the postal address of the Commissioner's office, along with contact telephone number and email address. These can be found on the Contact Us page of the Commissioner's website<sup>33</sup>. It would also be good practice to provide a link to the Commissioner's appeal portal<sup>34</sup>.

#### **10.6 Learning lessons from reviews**

10.6.1 It is good practice to put in place procedures for learning lessons from reviews and ensuring that any recommendations are taken forward to prevent recurrence of any failures.

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<sup>33</sup> <http://www.itspublicknowledge.info/ContactSIC/Contact.aspx>

<sup>34</sup> <http://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/AppellingtoCommissioner.aspx>

## **11. Appeals to the Scottish Information Commissioner**

### **11.1 Responding to the Commissioner**

11.1.1 Where an appeal has been made to the Commissioner regarding an authority's handling of an information request, the Commissioner will provide the authority with an opportunity to comment on the application. This opportunity also allows the authority to present submissions on its handling of the request and to include additional reasoning in support, for example, of its position that the information requested is not held by the authority, or the arguments put forward in support of the decision to not disclose information.

11.1.2 It is good practice for authorities to take the following steps to help ensure appeals are handled efficiently and cost-effectively:

- Provide a copy of the withheld information to the Commissioner within the timescales requested;
- Provide a schedule of documents and number documents individually, and clearly identify which exemptions/exceptions are applied to each piece of withheld information;
- Provide clear explanations of why exemptions/exceptions apply, including (where applicable) why the balance of the public interest lies in favour of withholding the information. These explanations should be specific to the information being withheld. The burden of proof is always on the authority to demonstrate that the exemptions/exceptions apply, and the Commissioner is unlikely to agree that exemptions/exceptions apply where only generic reasons have been provided;
- Provide a clear indication of what information has been disclosed already, if applicable;
- If the request has been refused on the grounds of excessive cost, provide the Commissioner with a cost estimate (see 9.4.2) including, where appropriate, the cost of dealing with a sample of the information;
- Provide background information and any other relevant information that the authority believes will support its case;
- Provide a clear robust response to any questions asked by the Commissioner;
- If an authority finds new information during an investigation, disclose it to the applicant immediately and inform the Commissioner. Or, inform the Commissioner and the applicant if

the authority does not plan to release it, giving reasons and citing exemptions/exceptions.