

CRITERIA FOR DECISION-MAKING

Responsibility for decision-making

1. As Scottish Ministers are the public authority in terms of FOI law, all decisions regarding disclosure of information under FOISA or EIRs are made in their name. Given the volume of requests, and competing priorities of Government business, it is simply not practical for Ministers to take all decisions about disclosure. In order to ensure that we meet our statutory obligations to comply promptly, ordinarily Ministers will delegate responsibility for decision-making to officials of appropriate seniority, in line with the *Carltona* doctrine (see [Right First Time](#), Scottish Government, 2010).

2. To support openness and transparency about the circumstances where Ministers will take decisions, the following criteria will be applied:

- Responding to requests made under FOI laws is a statutory function. In ordinary circumstances, therefore, decisions about disclosure in response to requests will be decided by officials of appropriate seniority – normally C Band (Grade 7) or above.
- Requests to the Scottish Government will be triaged and allocated by the FOI Unit. Requests initially assessed by the FOI Unit as sensitive or exceptionally complex will be confirmed as requiring a Ministerial decision. The FOI Unit may consider comments from Special Advisers and relevant officials in making an objective assessment of sensitivity or exceptional complexity.
- The rationale for seeking all Ministerial decisions on disclosure will be recorded in the case file.
- If the case handler considers that the triage assessment of sensitivity or complexity of a request should be changed after consideration of the information held, then the FOI Unit should be advised and asked to make an objective assessment of the decision level required.

Criteria for decision levels

3. All requests made under FOISA and EIRs should be regarded as routine unless objectively assessed by the FOI Unit as sensitive or exceptionally complex. The following definitions are not exhaustive and it is important that seeking Ministerial decisions can be justified, because it may introduce a delay in responding to the requester.

- Sensitive cases are those considered to raise matters of highly significant public interest. This may include new areas of policy development or major set piece events, eg Programme for Government or the Budget.
- Exceptionally complex cases are those likely to involve complex arguments or legal points which have not been considered in previous cases, or which involve complex and nuanced public interest arguments. There may be complex, overlapping policy interactions to consider.

Quality assurance of responses

4. We will use a quality assurance process to support decision-making in all responses before issue to the requester. It is a check that our responses to information requests are accurate, of good quality and are technically competent.

- Our responses should be accurate in terms of our advice¹ – and ensure any redactions are applied correctly.
- Our responses should be of good quality, explaining our decisions and reasoning, and offering advice and assistance where appropriate.
- Our responses should be technically competent, applying FOISA exemptions or EIR exceptions correctly and addressing any competing obligations, such as under data protection legislation.

Principles underpinning request handling

5. In order to comply with our obligations under FOISA and EIRs and with the best practice guidance set out in the Ministers' section 60 Code – and in light of the Scottish Information Commissioner's own Guidance and Procedures for responding to requests under FOISA or EIRs – we should conduct our case handling in light of the following underpinning principles:

- We will ensure that a presumption in favour of disclosure is applied to all requests, supported by a new statement of compliance providing confirmation.
- We will offer appropriate advice and assistance to requesters, in line with our duty under section 15(1) of FOISA or regulation 9 of the EIRs.
- We will respond to all requests for information promptly – the actual time taken will depend on the request and the information held, but we acknowledge that 20 working days to respond is an upper limit, not a target.
- We will record the reasons for seeking Ministerial decisions on disclosure.
- We will treat requesters equally, regardless of their identity or type – that is, in a way that is 'applicant neutral'.
- We will engage appropriately with our requesters to explain the reasons for our decisions to refuse requests or to exempt or redact information.
- We will publish responses (subject to appropriate redaction, such as to comply with data protection legislation) where information is disclosed.

Assessment of sensitive/exceptionally complex cases

6. All requests to the Scottish Government will be referred to the FOI Unit for triage and allocation. The FOI Unit will triage requests before allocation to a case handler to identify those which are sensitive or exceptionally complex. In carrying out its objective assessment, the FOI Unit may seek advice from Special Advisers and/or relevant officials to indicate where Ministerial decisions may be justified, due to highly significant public interest considerations.

7. Where requests are assessed by the FOI Unit as requiring a Ministerial decision, the reasons for this will be recorded in the case file. During the handling of the request, if it

¹ Accuracy refers to the advice in the response. If the information we hold is inaccurate or out of date, it may still need to be released, though suitable caveats should be included in the response.

becomes clear to the case handler that the request can no longer be regarded as sensitive or exceptionally complex, the case handler should check with the FOI Unit that a Ministerial decision will no longer be required. Conversely, if a case initially assessed as routine is subsequently considered sensitive or exceptionally complex once full searches are complete and the specific information is considered in detail, then the case handler should revert to the FOI Unit who will make an objective assessment. Again the FOI Unit may seek advice from Special Advisers before deciding whether to reassess a case as requiring a Ministerial decision.

8. An FOI/EIR submission template will be used by the case handler to seek a Ministerial decision and set out the reasons why it is considered appropriate. This should record any FOI Unit advice that has been provided. Ministers may also seek advice from Special Advisers to assist their considerations of the public interest, where relevant. Again, any advice must be recorded.

9. This template should be used to record the Ministerial decision and the submission and decision should be recorded in the case file.

Communications handling

10. Requests made under FOI law may raise issues of reputational risk for the Scottish Government, either as a result of disclosing or refusing to disclose information. However this is not a legitimate consideration in making decisions about what to disclose in response to a request under FOI law. While related communications handling is appropriate, it must be dealt with as a parallel process which does not delay or impede or influence a prompt response to the requester.

The role of the FOI Unit

11. The FOI Unit specialises in the handling of information requests under FOISA and the EIRs and will provide advice throughout the triage, request, review and appeals processes. The Unit will carry out an objective assessment of the request at the triage stage before allocation to a case handler.

12. The Unit will remain available to the case handler to provide advice on the application of FOISA and the EIRs to the specific information in the scope of the request.

13. Where there is any disagreement between the case handler, other officials and the FOI Unit on the approach to disclosure of information, the Minister with portfolio responsibility for FOI should be asked for a determination within two days, so that the case can be put to the relevant Minister for decision on the point of dispute. The submission and determination will be recorded in the case file including the reasons for any departures from FOI Unit specialist advice.

14. In cases of exceptional complexity, where for example, the public interest test is very finely balanced or novel points are raised, the FOI Unit's advice should be provided and included in all submissions to the relevant Minister for a decision, and where requested for sensitive cases.

ROLES AND RESPONSIBILITIES

The following roles in quality assurance and decision-making process are proposed:

FOI Unit – Initial Assessment and Allocation

- All FOI/EIR requests to the Scottish Government will be forwarded to the FOI Unit for validation, triage and allocation.
- The Unit will carry out an objective assessment of the sensitivity or complexity of a request.
- Ordinarily, requests will be triaged as requiring decision by an official of appropriate seniority (normally C band or above) and allocated to a designated case handler on the day of receipt.
- Where the FOI Unit's objective assessment is that a case is sensitive or exceptionally complex, it will recommend a Ministerial decision.
- In carrying out its triage assessment, the Unit may seek advice from policy or business areas and Special Advisers on current areas of sensitivity.
- The FOI Unit will allocate to a designated case handler, confirmed² by the Director as competent to handle responses under FOISA and EIRs.
- The FOI Unit will remain on hand to provide advice to case handlers throughout the drafting process. Where there is disagreement between the case handler and other officials or Special Advisers, the FOI Unit should be asked to give an objective assessment. If agreement cannot be reached, the FOI Unit should approach the Minister with portfolio responsibility for FOI for a determination on the point of dispute.
- The FOI Unit will provide expert advice for inclusion in submissions to Ministers for decisions in exceptionally complex cases and as requested by Ministers in sensitive cases..

Case Handler

- The case handler will consider the initial assessment of the FOI Unit and alert their decision-maker (i.e. senior official or relevant Ministerial Private Office).
- The case handler will facilitate parallel communications handling in sensitive or complex cases by keeping Communications staff informed of progress.
- The case handler will carry out full searches, collate the information, and draft a recommended response.
- The case handler will record all comments and contributions received, including from Special Advisers, using the MiCase system, and the rationale for the approach recommended in their draft response.
- The case handler will prepare a submission to the decision-maker including any advice received from the FOI Unit and comments from Special Advisers. Again where there is disagreement between the case handler and other officials or Special Advisers, then the case handler should ask the FOI Unit to give its objective assessment. If agreement cannot be reached, the case handler should advise the FOI Unit, who will approach the Minister with portfolio responsibility for FOI for a determination on the point of dispute.
- The case handler should complete the Statement of Compliance before sending their submission to the Minister for decision.
- The case handler will submit the recommended response to the decision-maker using the FOI submission template to request and record the decision.

² Certification process to be put in place.

Decisions by Officials

- Except where cases require a Ministerial decision, decisions on disclosure will be taken by officials of appropriate seniority (normally C Band and above).
- The official of appropriate seniority must be satisfied that the response is accurate, of good quality and technically competent before completing the statement of compliance
- The official must raise any questions with the case handler promptly, to minimise delay in issuing the response to the requester, and record queries or comments in the case file
- In exceptional circumstances, an official may consider that a Minister should take the final decision on disclosure. An objective decision on the official's assessment should be sought from the FOI Unit.
- The rationale for escalating the decision to a Minister must be that the case is sensitive or exceptionally complex, and must be recorded in the case file.

Special Advisers

- Special Advisers are not decision makers in handling requests. Their role is to provide comments to the FOI Unit to assist in the objective assessment of cases requiring a Ministerial decision, and to provide comment to case handlers and officials of appropriate seniority before submissions are made to Ministers. Their comments will be recorded in the case files.
- Specifically, during the triage process, Special Advisers may be asked for a view on the sensitivity of a request to assist the FOI Unit in making its objective assessment of the requirement for a Ministerial decision.
- If a case handler considers that this assessment has changed at any time during the case handling process, the case handler should approach the FOI Unit for an objective assessment. Again Special Advisers may provide the FOI Unit with views to inform this objective assessment.
- Where there is any disagreement between the case handler or official of appropriate seniority and a Special Adviser, the case handler should ask the FOI Unit for an objective assessment. If agreement cannot be reached, the FOI Unit will approach the Minister with portfolio responsibility for FOI for a determination on the point of dispute.
- Where cases are objectively assessed as requiring a Ministerial decision, Special Advisers may offer comments to the case handler to inform the submission to the Minister, for example where there are wider policy considerations that may influence the public interest test. These comments will be recorded in the case file.
- Where cases are not assessed as requiring a Ministerial decision, Special Advisers will have no involvement (beyond offering an view during the FOI Unit's triage assessment, or where the FOI Unit reassesses the sensitivity of the case) unless they are the holders of the information requested or the request relates to them directly.

Ministerial decisions

- At any time, Ministers may wish to request sight of responses of relevance to their portfolio interests, for their information and awareness. The approach to selecting such cases should be consistent with both the principles of good administration and our statutory duty to respond promptly.
- Where Ministers themselves consider that they should take the decision on disclosure, then the reason should be recorded in the case file.
- All Ministerial decisions should be recorded in the FOI Submission Template and uploaded to the case file on MiCase.
- Where Ministers consider that it is appropriate to depart from the specialist advice of the FOI Unit, then a clear rationale for this should be recorded.

Communications staff

- The role of Communications staff (except in FOI requests relating to their business area) is restricted to separate, tandem development of required press lines or handling plans which must be undertaken as a parallel process and not delay, impede or influence responses to requesters.
- Communications staff will continue to act as the point of contact between SG and the media and will continue to be responsible for issuing FOI acknowledgements and replies to journalists.

FOI SUBMISSION TEMPLATE**FOI REQUEST: SUBMISSION FOR MINISTERIAL DECISION****Purpose**

1. The Minister is invited to agree that the attached draft response to an information request made under <the Freedom of Information (Scotland) Act 2002 (FOISA)/the Environmental Information (Scotland) Regulations 2004 (the EIRs)> should be issued..

Priority

2. <Routine/Urgent/Immediate>. The 20th day for a response is <Insert Date>. However you will be aware of the Scottish Ministers' statutory obligation to comply <promptly/as soon as possible>, in terms of <section.10(1) of FOISA/regulation 5(2) of the EIRs>.

Background

<insert, in numbered paras, a brief summary of the background to the case including: a) the text of the request, b) the date on which it was received, c) any relevant procedural history e.g. if clarification sought and received, etc. etc. Also insert sufficient background information to set in context the information that has been requested (i.e. what the request is about).>

Reason for seeking Ministerial Decision

3. A Ministerial decision is considered appropriate in this case because:

- <
-
- there are significant public interest considerations; or
- it raises a complex or novel point which has not previously been considered by the Scottish Information Commissioner>

4. <insert explanation as to why this reason applies.>

Advice from FOI Unit

4. Advice has/has not been sought from the FOI Unit confirming the technical competence of the recommended option(s) related to disclosure.

Discussion

5.<Insert a summary of relevant points to assist the Minister's consideration>

Recommendation

6. The Minister is invited to agree that the attached draft response be issued..

<Case Handler>

<Title/Division>

<Extension>

FOI Decision Template

Please respond selecting from the following options:

- The Minister has noted the response and agrees that it should be issued **as drafted**
- The Minister has noted the response and has decided that the attached **amended response** should be issued
- The Minister has noted the response and requests further information about:
 - the scope of the request
 - the subject-matter of the request
 - <the application of exemption(s) <specify the relevant exemption>
 - other FOISA issue <provide details>

FOI DECISION TREE

