

**FREEDOM OF INFORMATION (SCOTLAND)
ACT 2002**

AN INTRODUCTION

**Derek O'Carroll, Advocate
Advocates Library
Parliament House
Edinburgh EH1 1RF
derek.ocarroll@advocates.org.uk
0131 226 5071
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Abbreviations and interpretation

“The Act” means the Freedom of Information (Scotland) Act 2002.

“The 2000 Act” means Freedom of Information Act 2000.

“The Commissioner” means the Scottish Information Commissioner.

“section” refers to a section of the Act unless otherwise stated.

“schedule” refers to a schedule of the Act unless otherwise stated.

“Part” refers to a Part of the Act unless otherwise stated.

“public authority” means a Scottish public authority as defined by section 3 of the Act (unless otherwise stated).

“applicant” refers to a person who makes an application to a public authority for information to be given.



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1.0 INTRODUCTION TO THE ACT

1.1 The Freedom of Information (Scotland) Act 2002 was passed by the Scottish Parliament in April 2002. The purpose of the Act is to provide a right of access by the public to information held by public authorities. Until this year, there was no comprehensive statutory scheme enabling access to information held by public authorities¹. While there was is a Code of Practice applying to various public bodies which provided guidance as to when information should be released, that Code was non-statutory and could not be directly enforced by formal legal means².

1.2 In principle, subject to various wide-ranging exemptions, anyone, anywhere, is entitled to be given information held by a public authority on request in terms of the Act. Certain minor parts of the Act were brought into force on 30 September 2002³. The main part of the Act came into force on 1st January 2005.

1.3 The Act is closely modelled on the Freedom of Information Act 2000. That Act applies to most UK public bodies including the UK government. The 2000 Act was also brought fully into force on 1st January 2005⁴. Thus, there are now two Freedom of Information Acts applying to public authorities in Scotland. The Scottish Act will apply to the public authorities specified in schedule 1 to the Act. These are specified in section 2 of this Introduction. The UK Act will apply to public authorities with no devolved functions (for example UK Government departments).

1.4 The Act brings Scotland into line with other western nations. USA has had a federal Act since 1966⁵. Canada has had a federal Act since 1983 and

most provinces have passed their own legislation⁶. Australia passed the Australia Federal Freedom of Information Act in 1982⁷. New Zealand passed a wide-ranging Act in 1982⁸ while nearer home, Ireland passed its own legislation in 1997⁹. It has been said of the Irish Act that:

*"...the impact of the Act in government has been to make policy advice sharper, more succinct. Subjective comment and inappropriate reflections are increasingly less evident. FOI has also improved the way that services are delivered to the public. Arrangements for dealing with the public are now more user-friendly and there is a much more professional approach. It has also made Ministers think more deeply about their responsibility for individual decisions"*¹⁰

In relation to the Australian Act, it has been said that:

*"...[the Act] had a marked impact on the way agencies make decisions and the way they record information...[the Act] has focused decision-makers' minds on the need to base decisions on relevant factors and to record the decision-making process...The knowledge that decisions and processes are open to scrutiny, including under the Freedom of Information Act, imposes a constant discipline on the public sector."*¹¹

It is still perhaps too early to say, especially given the differences between the British Acts and the foreign Acts, whether the British Acts will have the same effect. Much will depend on the way that public authorities choose to implement their obligations under the Act and the extent to which the public seek to use the Act.

1.5 The following are the **key features** of the Act which will apply once the Act comes fully into force.

- **The general entitlement.** In terms of section 1 of the Act, the general entitlement is that a "person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority".

The information which the applicant is entitled to is the information held by the public authority at the time that the request is received.

- **What is meant by “information”.** The definition is very wide. “Information” means information recorded in any form¹². Thus, anything which is recorded, whether on paper, on computer or otherwise falls within the definition. However, information does not include anything that is known by an individual but is not recorded in any form. It covers all information, whenever created, held by the public authority.
- **What is a Scottish public authority?**¹³ The Act places a duty on public authorities, as specified in Schedule 1, to supply information in certain circumstances. Those bodies include local authorities. See Section 2.3 and 2.4 of this Introduction for more detail.
- **Who can seek information.** Any person¹⁴, any organisation, anywhere can seek information from a public authority for any purpose. The person or organisation requesting the information does not have to explain why they want the information or the use to which it will be put.
- **What information is covered by the Act?** In principle, all information held by the public authority is subject to the Act. However, there are a large number of exemptions from the general duty. The exemptions fall into two classes. The first class is information covered by an “absolute exemption”. This means that the public authority has an absolute right not to release the information or even to reveal whether it possesses the information in some cases. The second class is information covered by a ‘discretionary exemption’ (sometimes also referred to as ‘qualified exemption’). Where a request is made for information covered by a discretionary exemption, the public authority must carry out a balancing exercise, weighing up the public interest in disclosing the information against the public interest in not disclosing the information. Even if the information is exempt, the public authority is still entitled to release the

information (unless some other restriction applies, such as a statutory prohibition). See Section 3 of this Introduction for more detail.

- **How to make a request for information.** Anyone wishing to access information held by a public authority under the Act must make the request in writing (which includes email) or in some other permanent form (such as on tape) to the public authority. The request must give the name of the applicant and an address for correspondence. It must also describe the information requested. It does not have to specify that the information is required under the Act. Frequently, the request will not. Therefore, public authorities need to be aware that any request for information may trigger a duty under the Act.
- **What does the public authority require to do on receipt of the request?** The basic duty is that the public authority must comply with the request promptly and in any event, within 20 working days of the date of receipt of the request. That basic duty is subject to a number of considerations.
 - The authority may need further information from the applicant to identify the information sought (see further Section 2.8 of this Introduction).
 - The public authority may send a fees notice to the applicant (see below).
 - The cost of providing the information may exceed the statutory limit (see below).
 - The information may be exempt (see above and Section 3 of this Introduction).
 - The authority may not have the information.
 - The request may be refused as vexatious.
 - The request may be refused as a repeated request from the same person.

If the information is exempt, the public authority must serve a refusal notice within the statutory period. If the authority does not hold the information, it must serve a notice within the statutory period.

- **How should the information be provided?** The information can be provided by any means which are reasonable in the circumstances¹⁵. This includes:

- providing a copy of the document containing the information;
- providing a digest or summary of the information;
- giving the applicant the chance of inspecting a record containing the information;

However, if the applicant has expressed a preference for receiving the information in one or more of these means, the public authority must give effect to that preference, so far as reasonably practicable.

- **Charges for information.** The public authority may be entitled to charge for the information. The amount of the fee is determined by Regulations made by the Scottish Ministers¹⁶. If the cost of providing the information is above the limit set in the Regulations, the public authority does not have to provide the information. However, it may choose to do so if it wishes in which case the fee chargeable is set out in the Regulations.
- **Duty to advise and assist**¹⁷. A public authority must provide reasonable advice and assistance to anyone who has made a request for information and anyone who proposes to make such a request. The Code of Practice to issued by the Scottish Ministers under section 60 (see below) provides Guidance on fulfilling that duty. If a public authority follows that Guidance, the duty is fulfilled. See Section 5 of this Introduction for the Code of Practice.
- **Scottish Information Commissioner.** The Act establishes the office of the Scottish Information Commissioner. His role mirrors that of the Information Commissioner in so far as his role under the Freedom of

Information Act 2000 is concerned. The Commissioner's role is to promote observance of the Act and Codes of Guidance by Scottish public authorities. The Commissioner may also make recommendations as to good practice and has an enforcement role (see below and Section 4 of this Introduction).

- **Challenges to decisions of a public authority.**
 - **Internal Review.** An applicant who is dissatisfied with the way that the public authority has dealt with a request for information may seek a review within 40 working days. That review must be done promptly and in any event, within 20 working days. The applicant must then be told the result of the review and the reasons.
 - **Application to Scottish Information Commissioner.** If the applicant is dissatisfied with the result of the review, s/he may make an application for decision by the Commissioner. Effectively, it is an appeal.
 - **Enforcement notice.** Apart from the review procedure, the Commissioner also has the power to serve an enforcement notice on a public authority if s/he is satisfied that that the authority has failed to comply with the Act. If the public authority fails to comply with the enforcement notice, the Commissioner can take court action.
 - **No civil right of action.** The applicant does not have the right to take any court action concerning the failure of a public authority to comply with any duty under the Act. However, an applicant can appeal, on a point of law only, to the Court of Session against certain decisions of the Commissioner. The public authority also has such a right of appeal. It may also appeal against an information notice or an enforcement notice served on that authority by the Commissioner.
- **Publication schemes.** All public authorities must put into place a publication scheme. A publication scheme is one which specifies what classes of information the authority publishes (or intends to publish) as a

matter of course. The scheme must also say how the information is to be published (publishing includes publication on the Internet) and whether any charges are to be made for the information. When devising the scheme, the authority must have regard to certain criteria in the Act. The scheme must be approved by the Commissioner, who can approve it for a limited or unlimited period. The Commissioner has published Guidance on the preparation of publication schemes under section 43(2) of the Act as well as publication scheme templates. Information which is published in accordance with the publication scheme is exempt from the Act¹⁸.

- **Codes of practice.** Under section 60, the Scottish Ministers have issued a Code of Practice providing Guidance to public authority as to good practice¹⁹. Under section 61, the Scottish Ministers have published a Code of Practice providing Guidance to public authorities on good practice in record keeping²⁰. See Section 5 of this Introduction.
- **Deletion, alteration etc of information.** It is a criminal offence for anyone to alter, block, destroy etc. any information following a request for disclosure if it is done with the intention of preventing disclosure of the information to the person requesting it²¹. However, if any amendment or deletion would have been done anyway, between the time of the request and the time that the information is given to the applicant, and it was not reasonably practicable to prevent destruction of the information, the amendment etc. is lawful. If information is destroyed before request is made for it, even if done with the intention of concealment, that is not prohibited by section 65.

1.6 Relationship with other legislation.

- **Data Protection Act 1998.** The Act and the 1998 Act are closely related in that they both relate to the provision of information held by an organisation. However, the philosophies of the two Acts are rather

different. The Act is concerned to promote dissemination of information. The 1998 Act is designed to protect information which is personal data. The conflict between the two Acts is resolved to some extent by the 2000 Act which provides (roughly speaking) that personal data requests by the data subject are exempt from the disclosure provisions of the Act and instead, in effect, have to be dealt with under the 1998 Act²². Personal data requests by those who are not the data subject are dealt with under the Act. It is likely however that such requests would infringe the data protection principles and so would be exempt information under the Act.

- **Human Rights Act 1998.** All bodies subject to the Act are also subject to the Human Rights Act 1998 which, in effect, incorporates the terms of the European Convention on Human rights into UK law. It is possible that in some limited circumstances, an individual may have a right of access to information which is not given under the Act. Article 8²³ has been used in the past to obtain a right of access to information not otherwise available²⁴. It is unlikely that Article 10 of the Convention (freedom of expression) will be relevant, as that protects the right to free expression of information that is already in the public domain rather than the right to obtain information which is presently confidential. Articles 5 and 6²⁵ may be relevant if the information was required in order that a fair civil or criminal trial could be held. However, it is thought that the right to information under the Act itself may not amount to a "civil right", as it is likely to be classified as a public right. Article 2²⁶ and Article 3²⁷ may in rare cases require a public authority to release information so as to prevent a breach of those Articles taking place by either another public authority or by a non-public authority²⁸. All provisions of the Act must be read in the light of

the Human Rights Act 1998 and interpreted consistently with it²⁹.

Where there is a conflict, the Human Rights Act 1998 prevails³⁰.

- **Other legislation enabling access to information.** Various other legislation provides that a public authority is under a duty to supply information. In general, section 25 provides that where information is otherwise available, whether for a fee or not, that information is absolutely exempt from the Act.
- **Other legislation preventing access to information.** Information is absolutely exempt if the disclosure is prohibited by any enactment³¹.

1.7 **Historical records**³². These are records more than 30 years old and are subject to special provisions under the Act.

1.8 **Consequences of the Act for public authorities.** The Act is a complex piece of legislation. It imposes much greater demands on public authorities than the previous Code of Practice. The following are the main effects of the Act for public authorities.

- Each public authority must adopt and maintain a publication scheme relating to all information which it intends to publish as a matter of course³³. The Scottish Information Commissioner must approve the scheme³⁴.
- Because the Act will be retrospective³⁵, public authorities will need to review its systems for storage and retrieval of information held in records, past and present. See the Code of Practice at Section 5 of this Introduction for advice.
- Consideration will have to be given for the way in which in practice, requests for information will be dealt with under the Act. Authorities will need to consider who will deal with such requests and how. Consideration will have to be given to integration of requests for information under the Act, under the 1998 Act and under other statutory provisions which oblige

disclosure of information. The procedures should be tested with dummy runs relating to the sort of information likely to be requested under the Act.

- Consideration will need to be given by each public authority to the way that it will communicate with other public authorities in relation to requests for information. That will require discussions with them so as to set up protocols and clear lines of communication. The timescales in the Act for performing duties are tight.
- There will probably need to be a designated post within the organisation as a whole to take chief responsibility for implementation and maintenance of the scheme of the Act. That person may well be the existing person who deals with requests under the 1998 Act. In addition, depending on the size of the public authority, there may need to be designated officers in individual departments who would co-ordinate with the chief information officer.
- Policies will need to be developed by the organisation as to how it will apply the discretionary exemption criteria, particularly in relation to areas where there are likely to be significant numbers of requests.
- There will require to be extensive training within the organisation of all officers so that they understand the effects of the Act and their responsibilities under it. That training would also incorporate efforts to achieve the culture shift (implied in the Act) towards a presumption of openness in responding to the public.

SECTION 2: SOME KEY FEATURES OF THE ACT EXPANDED

2.1 What is a Scottish public authority?

- Only “Scottish public authorities” ³⁶, as defined, have duties to provide information under the Act. Unlike the Human Rights Act 1998 (which uses the same term), public authorities are mostly explicitly identified. In schedule 1, a large number of bodies and person are identified as public authorities.
- In addition, companies which are wholly owned by the Scottish Ministers or any of the bodies in Schedule 1 are public authorities³⁷.

2.2 It will be noted that RSLs are not public authorities. They were excluded from the list during the passage of the Bill by the Scottish Executive. Neither are vehicles used for large scale stock transfers. Also excluded are private bodies which carry out public functions.

2.3 However, the Scottish Ministers have the power to add to the list, or delete a body from the list, at any time. They can add the following:

- a) a Scottish public body or person which is either part of the Scottish Administration or a Scottish public authority whose functions are not wholly reserved; (the designation can restrict the information which is subject to the Act);
- b) a person/body who appears to the Scottish Ministers to be exercising functions of a public nature (in which cases, the Act only applies to information related to those functions);
- c) a person/body contracted by a Scottish public authority to provide services which are a function of the authority (in which case, the Act only applies to information related to those services).

The Scottish Ministers must consult before making a decision as regards b) and c). It is possible that the power may be used particularly in relation to PPP schemes and at least some contracting out arrangements by local authorities and other Scottish public authorities.

2.4 Grounds for refusal to supply information

The starting point of the Act is section 1(1) which states that if a person requests information from a public authority which holds that information, s/he is entitled to be given it by the authority. That general duty is subject to a large number of qualifications and exemptions. The qualifications are described below. The specific exemptions are dealt with in Section 3 of this Introduction. More detail on these qualifications to the general section 1(1) duty is given below. In summary, the qualifications are noted below.

- The public authority does not hold the information (either because it never had it or used to but is now destroyed).
- The request is not made in a permanent form.
- The applicant has given insufficient specification of the information requested.
- A fee is chargeable and has not been paid.
- The cost of providing the information is greater than the statutory limit.
- The request is one of two or more and the cost of complying with them is more than the statutory limit in total.
- The request is a repeated request and a reasonable time has not elapsed.
- The request is vexatious.
- The information is exempt (see Section 3 of this Introduction).

In most cases, even where the public authority does not have a section 1(1) duty, it must serve a notice on the applicant explaining why the information is not being supplied.

2.5 Information “held” by the local authority³⁸. This means “recorded” information only. It does not matter how the information is recorded. Recorded information includes hand-written information, computer records, emails, video tapes and audio tapes. It does not matter whether the information is recorded in a particular file or is kept loose. If the information is not recorded, but is simply known by a person in that organisation, that information is not covered by the Act. The information “held” includes information held by someone else (such as a documents retrieval service) on behalf of the public authority. It does not include information held by the authority on behalf of another person or information which was supplied by a Minister of the Crown or a UK Government department in confidence³⁹. If another public authority holds the information, there is no provision in the Act for transfer of the request. However, the Code of Practice suggests that it would be good practice in those circumstances for the receiving public authority to consider the transfer. See paragraphs 30 to 34 of the Code of Practice in Section 5 of this Introduction.

2.6 Consultation with third parties

The Act does not provide any formal mechanism for consultation with third parties with regard to whether information should be released. However, the section 60 Code of Practice states that consultation with third parties before deciding whether to release information may be desirable in some circumstances. See paragraph 47 of the section 60 Code of Practice in Section 5 of this Introduction.

2.7 Destroyed information. The right to information is to information which is held by the public authority at the date of the application. However, if the information is subject to deletion or amendment between the date of the

receipt of the request and the date that it is given, the right of the applicant is to that information under deletion or amendment. That proviso is subject to two important qualifications. The first is that the information may not be destroyed between the date of receipt of the request and the date that it would have been given unless it was not reasonably practicable to have prevented the request. The second is that it is a criminal offence under section 65 for any person to alter etc. records with intent to prevent disclosure. The effect of these qualifications is that a public authority must take care to see that information is not altered between the time of the request and the time that it is given to avoid the accusation that the purpose of the alteration was to prevent disclosure of the information requested rather than for some other innocent reason. See further, the section 61 Code of Practice on Records Management.

2.8 Insufficient specification by applicant of information required⁴⁰. It may often happen that the applicant for the information has not given sufficient explanation to enable the public authority to identify and locate the information requested. If so, the authority, acting reasonably, may reply to the applicant seeking further specification so as to enable it to identify and locate the information. It is under no duty to provide the information until it has the further specification. It is not however for the applicant to identify where the public authority may be holding the information or the name or type of file that the information is being held in. Those are matters which are likely to be only with the knowledge of the authority.

2.9 Form of request for the information⁴¹. The request must be in writing or another permanent form (such as audio or video tape). It includes email. The request must be legible and capable of being used for future reference. The request must state the name of the applicant and provide an address for

correspondence. It does not have to give the residential address of the applicant. It does not need to specify why the information is being requested. The request does not have to specify the use to which the information will be put. The applicant may be an individual or an organisation (such as a company). The applicant can be resident anywhere in the world and be of any nationality. Thus, requests which are made verbally do not have to be responded to and no duty to provide the information arises under the Act. However, the public authority has a general duty under section 15 to provide reasonable advice and assistance to a person who proposes to make or has made a request for information. Accordingly, if a person makes a verbal request for information, s/he should be advised to put it in writing, and who to send that request to. It may be that the public authority should instead actually assist the person to make the request in writing, such as by creating the written form and obtaining the applicant's signature. This might be the case where the applicant is illiterate or incapable of writing or where English is not their first language. The section 60 Code of Guidance provides Guidance on the duty to provide advice and assistance. See paragraphs 17 to 22⁴².

2.10 A fee is to be charged for the information⁴³. The Scottish Ministers have made regulations allowing fees to be charged for providing information following consultation with the Scottish Information Commissioner⁴⁴. The following is the position as regards the *maximum* fee that may be charged.

- Any request costing up to £100 to fulfil will be free of charge.
- Requests which would cost between £100 and £600 to fulfil will be charged at 10% of the projected cost.
- There is no duty to meet a request for information which would cost over about £600 (but the public authority may choose to do so and charge £50 plus the full projected cost of supplying the information over £600).

If the information is contained in the publication scheme, the fee will be the amount specified in the scheme (such information is in any event exempt information: see Section 3 of this Introduction). If the information is information which the public authority is obliged to release under any enactment, then the fee will be that fee, if any, specified in that enactment (again, such information is exempt from the Act: see Section 3 of this Introduction). A public authority will not be obliged to charge the fee specified in the Regulations.

Where a person has requested information, and a fee is to be charged, the public authority may then send the applicant a "fees notice" specifying the fee. From the date that the fees notice is served, the 'clock stops running' so far as time limits for providing the information are concerned. The fee must be received within three months from the date that the fees notice is sent. The clock starts running again from the day after the fee is received. If the fee is not paid at all, the public authority has no duty to provide the information. If the fee is paid late, while the authority is under no duty to supply the information, the fee (it is thought) would have to be returned to the applicant who could then of course make a fresh request. In these circumstances, it is suggested that there would be little point in simply returning the fee and that it would be good practice to supply the information requested.

The section 60 Code of Practice contains, at Annex 3, detailed Guidance on the application of the charging regime under the Act and Regulations.

2.11 Cumulative requests and cost⁴⁵. The Scottish Ministers have passed Regulations, the effect of which is to allow public authorities not to comply with a request where it is linked with one or more other requests and the total cost of complying with all the requests exceeds the statutory limit⁴⁶. This

is essentially an anti-avoidance measure to prevent individuals or organisations evading the statutory cost limit by breaking down a large request for information into smaller parts. The information however must be published at large within 20 days to take advantage of this exception.

2.12 **Vexatious requests**⁴⁷. If the request is “vexatious”, the public authority is under no obligation to supply the information. No further amplification is given in the Act as to what is meant by vexatious. In law, a vexatious action has two elements. Both must be present for the action to be vexatious. The first is that the litigant raises an action without sufficient grounds: that is, it has no reasonable prospects of success. The second element is that the true purpose of the action is to annoy or cause nuisance to the respondent. It is difficult to apply this understanding to a request for information under the Act. This is because, to take the first element, if the request is one that has no reasonable prospects of success, that must mean that the public authority is under no duty to release the information requested. All it need do is issue a notice to that effect. The effect of that is the same as if a refusal notice had been served: the applicant still has a right to review and a right thereafter to complain to the Scottish Information Commissioner: the only difference being that the point at issue would be whether the applicant was vexatious rather than whether the authority was under a duty to release the information. The second difficulty relates to the second element of the definition. Since an applicant does not have to reveal a motive for the request for information, ascribing a motive to a request may be inherently difficult. How does the authority decide that the intention of asking for the information is to annoy rather than say, satisfy idle curiosity? Such a request may be frivolous, but they are not excluded from the Act. It may be that public authorities would wish to use this power sparingly. The Code of Practice provides Guidance on this matter at paragraphs 23 and 24.

2.13 Repeated requests⁴⁸. Where a public authority has complied with a request for information, it is not obliged to comply with a subsequent request from the same person which is identical, or substantially similar, unless a “reasonable period of time” has elapsed. Paragraph 25 of the Code of Guidance provides some assistance on interpretation of this provision⁴⁹.

2.14 Publication schemes⁵⁰. In terms of section 23, all public authorities must adopt and maintain a “publication scheme”. A publication scheme is in essence a statement as to what documents the public authority routinely publish or intend to publish. Public authorities then have a duty to publish information in accordance with the scheme and review the scheme from time to time. The scheme must specify:

- The classes of information which the authority publishes or intends to publish
- How the publication is to be done; and
- Whether a fee will be charged for the information.

In developing the scheme, the public authority must have regard to the public interest in information which:

- is about the services that it provides (including cost and quality)
- consists of facts or analyses forming the basis of important decisions made by the authority.

The scheme must be approved by the Scottish Information Commissioner and published. The Commissioner can withhold approval for the scheme and may terminate it. The Commissioner’s website contains Guidance on publications schemes, a publication scheme template and publication scheme

approval questionnaires as well as a copy of its own internal guidance on approval of publication schemes: www.itspublicknowledge.info/pscheme.htm

A similar duty applies to UK public authorities under section 19 of the Freedom of Information Act 2000. That duty had effect as from November 2002 for central government and from February 2003 for local government. Under section 45 of the Freedom of Information Act 2000, the Information Commissioner may issue guidance. He has done so in relation to publication schemes: see www.dataprotection.gov.uk/dpr/foi.nsf In particular, he has issued Guidance on: Preparing for Implementation; Guidance and Methodology as well as Model schemes. All are available on that website.

The Information Commissioner has this to say about the incentives for public authorities in preparing such schemes⁵¹:

“Adopting a scheme is a legal requirement of the Act, but the experience of those authorities which have already run pilot schemes shows there are many benefits to be gained by the authority. Schemes:

- *act as an internal communications tool – a central resource of information*
- *reduce the administrative burden of dealing with requests*
- *underline the importance of effective records management – essential if an organisation is to meet its business needs*
- *provide a valuable housekeeping exercise*
- *provide an opportunity to disseminate information about the work of the organisation, raising public awareness of its objectives, activities and services*
- *demonstrate to the public a commitment to openness*

Developing a scheme is also the first step in the process of preparing for dealing with requests under the Act”

It should also be noted that there is an absolute exemption in respect of information requested which is published under such a scheme⁵².

2.15 How the information is to be released⁵³

If information is to be given to the applicant, it is for the authority to decide how it is to be done. As a general rule, the information may be given by any means which are reasonable in the circumstances. The way in which the information is to be given will depend therefore on a number of factors including: Where the information is located, the form in which it is held, how much information there is, the ease of reproduction, the location of the applicant, whether the applicant has any special needs (for example s/he is disabled) and so on. The following are examples of ways in which information could be provided:

- taking a photocopy of documents containing the information and sending that to the applicant (with any exempt parts blocked out in pen or otherwise);
- providing the applicant with a summary or a digest of the information;
- inviting the applicant to come to the office to inspect the records which contain the information.

If the applicant expresses a preference for the information to be provided in any one of these three ways, the authority must, so far as “reasonably practicable”, give the information in that way. In considering ‘reasonable practicability’ the authority may have regard to all the circumstances, including cost. If the authority decides that it is not reasonably practicable to give effect to the applicant’s preference, it must give the applicant reasons for that. The authority may also have duties under section 21 of the Disability Discrimination Act 1995 to make reasonable adjustments to policies, practices, procedures or physical features so that use of the services provided by the authority is facilitated or made possible. That means that the authority would

have to consider the effects of the applicant's disability, if any, in making its decision as to how the information is to be released.

2.16 Time-limits for compliance⁵⁴

The general rule is that the authority must comply promptly with a request for information and in any event within 20 working days. Compliance will usually take the form of making the information available to the applicant or sending some form of notice to the applicant. The 20 days start the first working day after the receipt of the request and end on the day that the request is complied with or a notice is sent to the applicant.

Where the authority has requested further specification from the applicant as to what the information requested is, the time limit does not start to run until the first working day following the day on which that further specification is received. Where a fees notice is sent, the period from and including the day that the notice is sent to the day that the fee is received (including that day) are excluded from the calculation of the 20 days.

These time limits are very tight. There is no provision in the Scottish legislation (unlike the 2000 Act) for the time limits to be extended, for example where the information cannot be located within the time frame. However, the Scottish Ministers do have the power to amend the Act by substituting some other, longer period, if they so wish. Finally, in the case of the Records of Scotland Office, the time limit is 30 days rather than 20 days.

Section 3: Exemptions⁵⁵.

3.1 The Act provides a large number of categories of exempted information. If information is exempted, the public authority does not have to supply it on request. However, the public authority may nevertheless choose to release the information even if exempted (as long as it is not prevented from doing so for some other reason such as statute or contract etc.). The Commissioner has issued helpful briefings on the exemptions which “are designed to aid understanding of the Act” and provides an overview as to how the Commissioner understands the Act. As of April 2004, there are briefings on 11 of the exemptions with more to come. All are available on www.itspublicknowledge.information/briefings.htm.

3.2 There are two types of exemption. The first kind is an absolute exemption⁵⁶. The second is termed in this Introduction ‘discretionary exemption’. If information is subject to absolute exemption, the public authority is entitled, without further consideration to refuse to supply that information. The types of information subject to absolute exemption are listed below.

3.3 If information is subject to discretionary exemption, the public authority must carry out a balancing exercise before deciding whether to release the information or not. The balancing exercise in terms of section 2(1)(b) is that the public authority must decide whether “*in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption*”. The balance is therefore tilted towards disclosure: information should only be withheld if the public interest in withholding the information is greater than the public interest in providing the information. It

is not enough for a public authority to decide that the information falls within a discretionary exemption and then conclude that the public interest is in non-disclosure. That will especially be the case where there is also a serious prejudice test to be considered (see next paragraph). Guidance is contained at paragraphs 73 to 75 of the Code of Practice as to the application of the public interest test. It will be the case that the balancing exercise will differ as between different exemptions as well as in different cases.

3.4 In addition, it should be noted that in many cases, the exemption requires the public authority to be satisfied (before the balancing exercise is considered) that release of the information would *prejudice substantially* the purpose to which the exemption relates. One interpretation is that the public authority must be satisfied, on rational grounds, that there would be a real, identifiable risk, carrying real weight,⁵⁷ to the purpose if the information were to be released. The section 60 Code of Practice provides that the prejudice would require to be of real, actual and significant substance.⁵⁸

3.5 The Act refers throughout to “information” rather than “documents”. The duty is to release information. Usually, the information will be contained in documents. One way of complying with the duty is to supply a copy of the document. However, if the document contains a mixture of exempt and non-exempt information, the document is not thereby exempted. Only those parts of the document that relate to the exemption are exempted. Those parts can be blocked or erased. The other parts of the document must be released if they are relevant to the request.

3.6 Summary of absolute exemptions

1. Information **otherwise accessible** (section 25).

2. **Prohibition on disclosure by statute**, to avoid a **contempt of court** or because there would otherwise be a breach of a **European Community legal obligation** (section 26).
3. Information obtained from another person where disclosure would constitute an **actionable breach of confidence** (section 36(2)).
4. Information contained in various types of documents used or produced in connection with **court, tribunal, arbitration or inquiry proceedings** (section 37).
5. Various types of "**personal data**⁵⁹" being:
 - a) personal data where the applicant is the subject of the data⁶⁰;
 - b) personal census information;
 - c) a deceased person's health record;
 - d) personal data where the applicant is not the subject of the data and release of the data would breach any of the data protection principles (as if they applied to all data including manual data) (section 2(2)(e) and section 38).

3.7 Summary of discretionary exemptions

1. Information intended for **future publication** (section 27).
2. Information, disclosure of which would be likely to prejudice substantially relations between any two or more of: the three **devolved administrations and the UK Government** (section 28).
3. Information held by the **Scottish Administration** relating to formation of **policy, Ministerial communications, Law Officer advice, Ministerial private offices** (except statistical information after a decision has been taken) (section 29).

4. Information, disclosure of which would be likely to prejudice substantially:
 - i) the convention of **collective responsibility** of the Scottish Ministers;
 - ii) the **free and frank expression** of advice and views;
 - iii) the **effective conduct of public affairs** (section 30).

5. Information where exemption from section 1(1) duty if disclosure is required to safeguard **national security** (section 31).

6. **International relations.** Information, disclosure of which would be likely to prejudice substantially:
 - i) UK relations with another State, an international organisation or international court;
 - ii) UK foreign interests;Or where that information is obtained from another State, an international organisation or international court (section 32).

7. **Commercial interests and the economy.**
 - i) Information which is a **trade secret**
 - ii) Information, disclosure of which would be likely to prejudice substantially
 - anyone's **commercial interests**
 - the **economic interests of any part of the UK**
 - the **financial interests of the UK Government, or any of the three devolved Administrations** (section 33).

8. **Investigations and proceedings.**

- i) Information held at any time for the purposes of an investigation into criminal investigations and related matters (and information obtained for the purposes of civil proceedings arising therefrom);
- ii) Information held for a Fatal Accident Enquiry which has not concluded
- iii) Information held at any time relating to investigation of death of a person
- iv) Confidential information obtained during investigations carried out following the exercise by that authority of specified⁶¹ statutory powers (and information obtained for the purposes of civil proceedings arising therefrom) (Section 34).

9. Law enforcement.

Information, disclosure of which would be likely to prejudice substantially a wide range of law enforcement purposes (section 35).

10. Confidentiality.

Information relating to confidentiality of communications which could be maintained in legal proceedings (for example, communications between solicitor and client or information gathered for the purposes of legal proceedings) (section 36(1)).

11. Personal data

Personal data which are not entitled to absolute exemption (see above) (section 2(2)(e) and section 38).

12. Health, safety and the environment.

- i) Information, disclosure of which would be likely to endanger the health or safety of an individual;

- ii) Information which the public authority would be obliged to disclose in terms of Regulations made under the Aarhus Convention⁶².

13. Audit Functions.

Information, the disclosure of which, would be likely to prejudice substantially the exercise of a public authority's functions in relation to:

- i) the audit of the accounts of other public authorities;
- ii) the examination of the efficiency, economy and effectiveness with which such public authorities use their resources.

This exemption is designed to deal with bodies such as Communities Scotland or Audit Scotland or who audit and examine the affairs of other public authorities. It does not exempt information relating to internal audit records of any organisation, including Communities Scotland or Audit Scotland.

14. Royalty and honours

Information is exempt if it relates to communications with the Queen, the Royal Family or the Royal Household; or to the granting of honours by the Queen.

4.0 Enforcement of the Act

4.1 Introduction. The main enforcement mechanism in the Act is the Scottish Information Commissioner. He has a number of roles and responsibilities. They include the right to take action against a Scottish public authority if that authority is not fulfilling its duties under the Act. The applicant for information does not have any right to take direct action him/herself against a public authority if s/he believes that a public authority has not fulfilled its duties under the Act. There is no independent civil right created enabling an applicant to raise court or tribunal proceedings. All s/he may do is to seek an internal review of the decision of the public authority and if still dissatisfied, complain to the Scottish Information Commissioner. There is a right of appeal against certain decisions of the Scottish Information Commissioner to the Court of Session on a point of law. This Section of the Introduction examines briefly these enforcement issues.

4.2 Internal review⁶³

An applicant who is dissatisfied with the way that a public authority has dealt with a request for information under the Act is entitled to ask the authority to review its actions and decisions in relation to the request. This formally known as a "requirement for review". Thus, the applicant may challenge any part of the decision of the authority (for example, a decision to apply an exemption or to treat a request as repeated etc.).

The requirement for review must be made in the same way as an application for information. The requirement for review must also:

- give the name of the applicant and an address for correspondence;

- specify the request for information to which the requirement for review related;
- specify the cause of the dissatisfaction of the applicant with the authority's decisions or actions.

The requirement for review must be made not later than the fortieth working day after:

- the expiry of the time allowed for compliance with the request (usually 20 working days); or
- the date on which the authority:
 - complied with a request for information;
 - sent a fees notice;
 - sent a refusal notice;
 - sent a notice that the information is not held.

If the date was outwith the 20 day limit for compliance. The authority has a discretion to accept a requirement for review which is late if it thinks that it is appropriate.

On receipt of the requirement for review, the authority must comply promptly, and in any event, by not later than the 20th day after receipt by it of the information. The authority can do any of the following:

- confirm its decision with or without modification;
- substitute a different decision;
- reach a decision where the complaint is that the authority had not made a decision.

The authority must then send the applicant notice in writing of what it has decided within the 20 days.

There is no requirement on the authority to comply with a requirement for review if the requirement for review is vexatious or the original request for information was vexatious or repeated. In these cases, the authority must notify the applicant of this. Any notice sent by the authority following a requirement for review must contain details of the right of application to the Commissioner and the right of appeal against his decision.

4.3 Scottish Information Commissioner⁶⁴

The functions of the Commissioner are as follows:

- to promote good practice by public authorities by promoting the observance of the Act and the Codes;
- decide what information it is expedient to give to the public regarding the Act and good practice etc. and then ensure that that information is given;
- give advice to anyone as regards the Act and good practice;
- the power to assess whether a public authority is following good practice and if not, the power to issue a “practice recommendation” to a public authority if he believes that the authority is not conforming to the Codes of Practice issued by the Scottish Ministers;
- make proposals to the Scottish Ministers regarding who should be treated as a public authority;
- lay an annual report before the Scottish Parliament ;
- deal with “applications for decisions” by applicants for information who are dissatisfied with the decisions of the public authority: (see below).

4.4 Scottish Information Commissioner: applications for decision⁶⁵.

In effect, the Scottish Information Commissioner acts as an appeal body in respect of applicants for information who are dissatisfied with the decision of the public authority *following a requirement for review* (or the failure of the public authority to make any decision on a requirement for review). If no requirement for review has been made, there is no right to apply to the Commissioner for a decision. The decision applied for is whether the original application for information has been dealt with in accordance with Part 1 of the Act.

The application must be made in the same way as an application for information. The application for decision must:

- state the name of the applicant and an address for correspondence;
- specify the request for information to which the requirement for review relates;
- specify the matter which gave rise to the applicant's dissatisfaction relating to the original decision of the authority;
- specify the way in which the authority has failed to deal with the application in terms of Part 1 of the Act.

The application must be made within six months after the date of the authority's decision on the requirement for review (although the Commissioner may extend that time limit if "appropriate").

Certain applications for a decision are excluded. These are:

- requests for review to the Commissioner himself (that is, the Commissioner cannot be asked to make a decision on a previous decision made by him as a public authority on a requirement for review);
- requirement for reviews made to a procurator fiscal or the Lord Advocate (in his capacity of head of the criminal prosecution system etc.);
- an application which is "frivolous or vexatious";

- where the application appears to have been abandoned or withdrawn.

In the usual case, once the application for decision has been accepted, the Commissioner then contacts the authority and invites it to comment. The Commissioner then has up to four months to try to effect a settlement between the authority and the applicant. He also has the power to issue an "information notice" on the public authority requiring it to provide information if that is needed in order to decide whether the public authority has complied with the Act. If no settlement is forthcoming, the Commissioner must then make a decision, which is given by notice to the parties. If the decision is that the public authority has failed to comply with any provision in Part 1 of the Act, he must say so in the decision notice and specify what requires to be done in order to comply with the Act. A time limit must be given. There is an appeal open to either party against his decision: see below.

4.5 In addition, the Commissioner has the right to issue an "enforcement notice"⁶⁶ even where no complaint has been made to him, if he is of the view that a public authority has failed to comply with a provision of Part 1 of the Act. The notice must specify the default and give a time limit for compliance as details of the right to appeal.

4.6 There is a right of appeal, on a point of law only⁶⁷, to the Court of Session against decisions of the Scottish Information Commissioner, enforcement notices and information notices. Certain decisions of the Commissioner do not bind the Scottish Administration if a certificate is issued by the First Minister⁶⁸.

If a public authority fails to comply with a decision notice, an information notice or an enforcement notice, the Commissioner "may certify to the court

that the authority has failed to comply with the notice. The court may then enquire into the matter and then may deal with the matter as if it were a contempt of court⁶⁹.

Section 5: Codes of Practice

[excerpts from]

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

Laid before the Scottish Parliament on 6th September 2004

pursuant to section 60(5) of the Freedom of Information (Scotland) Act 2002

The full version is available at www.scotland.gov.uk/library5/government/sedfpa.pdf

PART II

Provision of advice to persons making requests for information

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

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

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

20. Where the applicant has provided insufficient information to enable the authority to identify and locate the information sought, or where the request is unclear, the authority should help the applicant to describe more clearly and particularly what information they require. Authorities should be aware that the aim of providing assistance is to clarify the nature of the information being sought not to determine the applicant's aims or motivation. Where more information is needed to clarify the request, it is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail. The 20 day period will run from the date of clarification but authorities should note that the Commissioner will take a hard stance against any authority that uses clarification as a means of delaying dealing with an application. Appropriate help could include:

- providing an outline of different kinds of information which might meet the terms of the request;
- providing access to detailed catalogues and indexes, where these are available, to help the applicant to see the nature and extent of the information held by the authority;
- providing a general response to the request setting out options for further information which could be provided on request; or
- an indication of what information could be provided within the cost ceiling, in instances where a request would be refused on cost grounds. This list is not exhaustive and authorities should always be flexible in offering advice and assistance taking into account the circumstances of each individual case.

21. In seeking to clarify what is sought, authorities should always bear in mind that applicants cannot reasonably be expected to possess identifiers, such as a file reference number or a description of a particular record, unless this information is made available by the authority for the use of applicants.

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

Vexatious Requests

23. An authority is not obliged to comply with a vexatious request. The Act does not define the term vexatious and, in the first instance, it will be for the authority to decide whether requests are vexatious. However, irritation or nuisance caused by the applicant or by receipt of the request should play no part in an authority's consideration of whether or not an application is vexatious. Authorities should be prepared to provide justification for their approach to the Commissioner, and their decisions in this respect should, therefore, be based on clear-cut reasoning.

Factors which an authority might take into account could include:

- whether the request has already been rejected on appeal to the Commissioner and the applicant knows this;
- whether there has been unreasonable refusal or failure to identify sufficiently clearly the information required;
- whether there has been unreasonable refusal or failure to accept documented evidence that the information is not held;
- whether the request can be shown to be clearly intended to disrupt the authority's work rather than for the purpose of obtaining information.

24. This list is not exhaustive but the power to refuse to respond to a request on the grounds contained in section 14 of the Act should be used sparingly, and should not be abused simply to avoid dealing with a request for information.

Repeated Requests

25. Under the same section, the Act also provides that an authority, which has already complied with a request for information from a person, can refuse to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request. If the information has changed between applications, this is unlikely to be viewed as a repeated request. For example, requests could be made once per week for up to date figures. Public authorities who receive what they consider to be repeat requests have the option of making the information available in their publication schemes. What constitutes a "reasonable period of time" will depend on the circumstances of the case but, as with decisions about vexatious requests, authorities should be prepared to justify their reasoning to the Commissioner.

26. Where an authority considers a request to be vexatious or repeated, it is not required to comply with a request. Neither is it obliged to conduct a review if the grounds for the initial refusal were made under section 14. However, in either case, notice must be given to the applicant of the rights of application to the Commissioner and of appeal.

Timeliness in dealing with requests for information

27. Public authorities should comply with a request for information as soon as possible but must, in any event, comply not later than 20 working days after receipt of the request. It is essential that authorities respond to requests in good time. This is particularly important where it is clear that the requested information is not held by them and the applicant needs to direct the enquiry elsewhere, or if the applicant has a disability and requests information in an alternative format or by alternative means.

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

28. Where an authority is not required to comply with a number of related requests because the cumulative cost of meeting these requests would exceed the cost threshold (as set out in Fees Regulations: see also paras 59-61 and Annex 3) and where the information could have been disclosed had the cost not exceeded this limit, the authority should consider whether the information can be disclosed in another, more cost-effective way. For example, the authority should consider whether the information is such that publication on the authority's web-site, and a brief note of the web-site reference to each applicant, would bring the cost within the limit.

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

Transferring requests for information

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

31. Where a public authority does not hold the requested information but is aware that it is held by another public authority, consideration should be given as to the most helpful way of assisting the applicant. It may be sufficient simply to provide the applicant with contact details of the authority holding the information and to suggest that the applicant re-applies to that authority. However, applicants should only be redirected in this way if the authority receiving the original request has confirmed that the information sought is, indeed, held by another public authority, and if securing that confirmation does not unreasonably delay a response (under s.17) to the applicant. An authority should bear in mind that where it possesses a copy of a record produced by another authority it holds it for the purposes for the Act and should deal with the request itself and not transfer it to the originating authority.

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

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

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

34. The transfer of requests from one authority to another may be difficult to administer and may also have implications for authorities' responsibilities under the Data Protection Act 1998. In particular, an applicant who makes a request to one authority may have reasons for not wishing the request to be circulated to other authorities; the request may contain personal information and the identity of the applicant may itself be personal information. Further, it is important that applicants are aware who is dealing with their request for information, when the statutory time scale for responding to their request begins, and what their rights are under the Act. In most instances, therefore, the guidance provided at paragraphs 30 to 32 above should form the framework for responses where information sought is not held.

Information provided in Confidence

35. By virtue of sections 36(2) and 2(2)(c) of the Act any information the disclosure of which would constitute an actionable breach of confidence attracts an absolute exemption. The Act does not require that the exemption be subject the public interest test but it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest.

What is confidentiality?

36. A duty of confidence will arise when one person imparts information to another in the expectation that the information will only be used or disclosed in accordance with his or her wishes. If there is a breach of confidence the person who provided the information or any other person affected by the breach may be able to take action in the courts.

37. There are three requirements for an action for breach of confidence:-

- that the information must have the necessary quality of confidence;

- that it must have been communicated in circumstances imposing a duty of confidence; and
- that there must be unauthorised use of the information to the detriment of the party communicating it.

38. In order to decide whether an obligation of confidence has arisen in a particular case, authorities will need to consider both the nature of the information itself and the circumstances under which the information was given. There are essentially two circumstances in which an obligation of confidence can arise:-

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

39. The duty of confidence, however, is not absolute and the courts recognise three broad circumstances where confidential information can be disclosed: disclosures with consent; disclosures required by law and disclosures where there is an overriding public interest.

40. Authorities should always consider carefully any request to hold information in confidence and should make clear that they cannot guarantee that information will not be disclosed unless the requirements of section 36(2) (or some other exemption) are met.

Public Sector Contracts

41. When entering into contracts (in this context contract should be read as including any other form of agreement or undertaking) public authorities should refuse to include terms which restrict the disclosure of information held by the authority and relating to the contract beyond the restriction permitted in the Act i.e. the information constitutes a trade secret or its disclosure under the Act would, or would be likely to, prejudice substantially the commercial interests of any person.

42. Particular care is needed in the treatment of the above. Companies will need to be confident that an authority will apply its general commitment to openness in a way which does not damage their legitimate interests. Public authorities should, ideally before accepting information regarded by the company as commercially sensitive, take steps to ensure that the company understands the possible implications of the Act. Provisions included in the contract could make clear the need to comply with the Act and to account for public expenditure.

43. When entering into a contract, pressure may be put on authorities to accept confidentiality clauses so that information relating to particular terms of the contract will be exempt; for example, its value and performance, arrangements for monitoring progress and performance under the contract, incentives for early completion or penalty clauses for failing to meet targets. Public authorities should consider carefully whether the information is, in fact, confidential and also the public interest in disclosing any or all of the terms. Public authorities should therefore resist such clauses, wherever possible.

44. Where, exceptionally, it is necessary to include non-disclosure provisions in a contract, the public authority could agree with the contractor a schedule of the contract which clearly identifies both information which should not be disclosed and information which will be released. Any acceptance of such confidentiality provisions must be for a good reason, be capable of being justified to the Commissioner and include the proviso that information which is not, in fact, exempt under the terms of the Act or whose disclosure is required on public interest grounds, may have to be disclosed regardless of any agreement.

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

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

47. There may be cases where information has been received from a third party and to disclose that information without their prior consent would constitute an actionable breach of confidence. Where this may be the case, authorities should consider discussing with the third party whether the requested information is still to be regarded as confidential.

Consultation should take place where:

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

Consultation will be unnecessary where:

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

48. An authority is not relieved of its obligation to disclose information under the Act or its duty to reply within the statutory time should a third party fail to respond to consultation or fail to respond within the given time frame. However, in circumstances where disclosure of that information without the prior consent of the third party could constitute an actionable breach of confidence (see also paragraph 37), authorities may wish to seek legal advice.

49. The general aim should be to facilitate more effective access to information about the procurement of public services. This will, in turn, encourage better internal management, greater accountability and best value within public authorities. Authorities may wish to consider including details of contracts in their publication schemes.

EU Procurement Regulations

50. The regulations implementing the Directives provide for compliance by authorities with a contractor's reasonable confidentiality requirements. The proposed new consolidated public sector procurement Directive (2004/18/EC) shortly to be adopted has a tighter confidentiality provision; it will prohibit the disclosure by contracting authorities of information which has been designated as confidential by contractors. However, this provision is stated to apply in accordance with national law so authorities should note that non-disclosure will still need to be brought within the confidentiality exemption in FOI.

Designation as Scottish Public Authority

51. Where an authority arranges, under contract, for another person or body to provide services which are normally a function of that authority, the Act makes provision for the Scottish Ministers to designate that person or body as a public authority. The Scottish Ministers must consult the person or body before a decision to so designate is taken. Therefore, some non-public authority contractors may, in due course, be brought within the scope of the Act, albeit only in respect of the services provided under contract. Given the responsibilities associated with any such designation, it may be prudent for authorities to consider at an early stage in the procurement process, whether it would propose to the Scottish Ministers designation of that company under section 5 of the Act. It would be good practice to advise potential contractors early so that such an eventuality can be built into their plans. The authority will also need to review its own information requirements in such an event, so that it can still satisfy the requirements of accountability and transparency in carrying out its functions.

Accepting information in confidence from third parties

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

Consultation with the UK Government and non-devolved public bodies

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

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

Personal Data

54. When dealing with requests for personal data an authority should first of all determine whether the request falls under the FOI Act or under the Data Protection Act 1998. If the request is for personal data about the person requesting the information there is no right of access under the FOI Act. Such a request should be dealt with under the terms of the Data Protection Act 1998. If, however, the request is for personal data about someone other than the applicant i.e. third party data, the request should be dealt with under the FOI Act. There is an exemption in section 38 of the FOI Act if disclosure of the third parties personal data would breach any of the Data Protection principles.

Environmental Information Regulations

55. Authorities should be aware that requests for access to environmental information may need to be responded to under separate environmental information regulations. (EIRs). The Environmental Information (Scotland) Regulations 2004 will replace the existing environmental information regulations of 1992 and 1998. The new regulations derive from European Directive 2003/4/EC, which in turn implements the UNECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (the Aarhus Convention.). Requests for information under EIRs should be dealt with in line with the Code of Practice issued under section 62 of the Act.

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Information intended for future publication

58. An authority may withhold requested information if it is intended for publication within 12 weeks of the date of the request. However, because of unforeseen circumstances, the authority may not be able to adhere to that date. Once an authority becomes aware of a delay in the publication date, it should contact the applicant and explain both the reason for the delay and the revised date of publication (if known). Significant delay in publication would be likely to remove the ability to withhold information because it is intended for it to be published. If the applicant is not satisfied and requests a review of the authority's decision not to supply the information because of its future publication then the authority should consider complying with the request for review even if this has been made outside the statutory period of 40 working days specified in section 20 of the Act. Authorities have discretion to do this under section 20(6) of the Act.

Fees for the provision of information

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

60. The Fees Regulations do not apply:

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

Public authorities should ensure that, in cases falling outside those covered by the Fees Regulation, any charges they make are in accordance with any other legislation and are within the terms of any relevant guidance issued by the Scottish Executive. Guidance on charging for the provision of information is attached at Annex 3.

61. Where the applicant indicates that he or she is not prepared to pay the fees notified in any fees notice issued, the authority should consider whether there is any information that may be of interest to the applicant which is available free of charge.

Monitoring

62. Authorities should adopt appropriate systems to monitor their performance under the new arrangements. It will be for each public authority to determine what information can most effectively be recorded under its administrative procedures, while satisfying itself that it is complying with the law (and able to demonstrate this). Once the general right of access comes into force, all written or recordable requests for information can be classed as a FOI request, but monitoring all requests may be problematic for authorities. However, monitoring activities should generally include collecting:

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

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

PART III

Requirement for Review

63. Any applicant who is dissatisfied with the way that an authority has dealt with a request for information is entitled to require the authority to review its decision. Where an authority refuses to disclose information in whole or in part, they are required to notify the applicant both of their right to request a review and of their right to appeal to the Commissioner.

64. A "requirement for review" is quite distinct from any other procedure an authority may have in place for dealing with general complaints about other service areas. A request for a review must be made no later than 40 working days following the expiry of the period for responding to a request for information (although, under section 20(6) of the Act, authorities have a discretion to comply with a

request for review after this period has elapsed if it considers it appropriate to do so) or from the date on which the authority complied with the request, sent a fees or refusal notice or a notice that the information is not held. Where an applicant has not been made aware of his or her rights to a review but nevertheless questions, in writing, the decision of an authority, the authority should treat the query as a formal request for review.

65. It is important that authorities put in place appropriate and accessible procedures for handling reviews. The review procedure should be fair and impartial and it should enable different decisions to be taken if appropriate. The review process should also fully address the access needs of disabled applicants. (See also Annex 2). The procedure should be straightforward and capable of producing a determination of the review promptly and in any event, within 20 working days of receipt of the request for the review.

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

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

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

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

70. Any notice confirming the authority's original decision should include the necessary particulars explaining the applicant's right to appeal the review decision, within certain time limits.

Refusal of request

71. In issuing a refusal notice, the authority should explain which exemption in Part 2 of the Act applies and, if otherwise not apparent, why it applies. (However, under section 18 the authority can, in certain cases and where this is in the public interest, issue a refusal notice which does not state whether or not the requested information exists). The Act also requires authorities, when withholding information other than under an "absolute exemption", to state the reason for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure. (subject to the proviso at section 16(3)). (See also paragraph 63)

Substantial Prejudice

72. In determining whether the disclosure of information would result in "substantial prejudice" to those interests referred to in Part 2 of the Act, authorities should consider disclosing the information unless the prejudice caused would be real, actual and of significant substance.

Public Interest

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

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

- the general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation;
- whether disclosure would contribute to the administration of justice and enforcement of the law including the prevention or detection of crime or the apprehension or prosecution of offenders;
- whether disclosure would affect the economic interests of the whole or part of the United Kingdom;
- whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money;
- whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment;

- whether disclosure would impact adversely on safeguarding national security or international relations; and
- whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
- whether disclosure would ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims;
- whether disclosure would contribute to a debate on a matter of public interest;
- whether disclosure would prejudice the protection of an individual's right to privacy.

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

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

¹ Some information requires to be released on demand such as certain personal data under the Data Protection Act 1998 and records relating to local authority meetings under the Local Government (Access to Information) Act 1985

² See the Code of Practice on Access to Scottish Executive Information.

³ See Freedom of Information (Scotland) Act 2002 (Commencement No. 1) Order 2002 (SSI 2002/437) bringing into force 4 categories of provisions being: those allowing changes to specified public authorities; those concerned with establishing the office of Scottish Information Commissioner; those allowing for the publication of model publication schemes and codes of practice and allowing repeal of certain legislation and those concerned with amendment of the Public Records (Scotland) Act 1937 and the Scottish Public Services Ombudsman (Scotland) Act 2002. Sections 72 (regulation making powers of the Scottish Executive) and 76 (the short title of the Act) came into force when the Royal Assent was granted: 28 May 2002. The two other commencement Orders are No.2 (SSI 2003/477) and No.3 (SSI 2004/203).

⁴ The 2002 Act came into force on 1st January 2005.

⁵ The US Freedom of Information Act, as amended by the Electronic Freedom of Information Act in 1996.

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- ⁶ Access to Information Act 1983: some provinces passed their own Acts earlier.
- ⁷ Which led to most other states passing their own Acts.
- ⁸ The Official Information Act.
- ⁹ The Irish Freedom of Information Act 1997, which took effect in April 1998.
- ¹⁰ Evidence by an Irish Minister to the House of Commons Select Committee on Public Administration 1998/99, Third Report, HC 570-I, Annex 1, paragraph 19)
- ¹¹ Australian Law Commission report 77, in 1995, at section 2.8.
- ¹² Section 73.
- ¹³ Throughout this guide the term “public authority” is used as a shorthand for “Scottish public authority”.
- ¹⁴ A child aged 12 and over is presumed to have legal capacity to take advantage to the rights given in the Act. A child under that age may exercise the rights as long as s/he has at least a general understanding of what it means to exercise the right.
- ¹⁵ Section 11(4)
- ¹⁶ The Freedom of Information (Fees for Required Disclosure)(Scotland) Regulations 2004; The Freedom of Information (Fees for Disclosure under section 13)(Scotland) Regulations 2004.
- ¹⁷ Section 15
- ¹⁸ Section 25.
- ¹⁹ See www.scotland.gov.uk/library5/government/sedfpa.pdf for the full Code in pdf format.
- ²⁰ See <http://www.scotland.gov.uk/Resource/Doc/1066/0003775.pdf> for the full document.
- ²¹ Section 65.
- ²² See section 68 of the Freedom of Information Act 2000, which redefines section 1 of the 1998 Act insofar as the definition of “data” is concerned.
- ²³ which provides a right to respect for private and family life
- ²⁴ See *Gaskin v UK* (1989) 12 EHRR 36 (recovery of records relating to care in children’s home); *Z v Finland* (1998) 25 EHRR 371 (disclosure of records relating to a person’s HIV status); *McMichael v UK* (1995) 20 EHRR 205 (information relating to Children’s Panel)
- ²⁵ Right to liberty and security; and right to fair trial: see *Edwards v UK* (1992) 15 EHRR 417.
- ²⁶ Right to life
- ²⁷ right not to be tortured or to suffer inhuman or degrading treatment
- ²⁸ See for example *McCann v UK* (1995) 21 EHRR 97 (duty of UK government to conduct effective investigations into death of IRA suspects; an obligation which might include an obligation to release information).
- ²⁹ Section 3 of the 1998 Act.
- ³⁰ The Act is secondary legislation in terms of the Human Rights Act 1998, and so is subject to it. Where there is a conflict between the Freedom of Information Act 2000 and the Human Rights Act 1998, section 3 of the 1998 Act provides that the public authority must interpret the Freedom of Information Act 2000 consistently with the 1998 Act in so far as it is possible to do so.
- ³¹ Section 26.
- ³² See Part 5 of the Act.
- ³³ Section 23. See further in section 2 of this Introduction.
- ³⁴ Kevin Dunion’s appointment as the first Scottish Information Commissioner took effect in February 2003.
- ³⁵ In the sense that it will apply to all records held by the public authority, whenever created, held by the public authority at the date of request for information.
- ³⁶ See sections 3 to 7. The term “public authority” is used throughout this guide as a shorthand for “Scottish public authority”.

³⁷ See section 3(1)(b) and section 6 for the definition of publicly-owned company. The Scottish Ministers can make an Order restricting the type of information held by such a company which is made subject to the Act.

³⁸ Sections 1 and 3(2)

³⁹ As for other information supplied by other person in confidence, see the specific exemptions noted in Section 3 of this Introduction.

⁴⁰ Section 1(3).

⁴¹ Section 8.

⁴² In Section 5 of this Introduction.

⁴³ Section 9 provides for charging of fees; sections 12 and 13 for excessive cost of compliance

⁴⁴ The Freedom of Information (Fees for Required Disclosure)(Scotland) Regulations 2004; The Freedom of Information (Fees for Disclosure under section 13)(Scotland) Regulations 2004 available at www.scotland-legislation.hmso.gov.uk/legislation/scotland/ssi2004/draft/20049237.htm and www.scotland-legislation.hmso.gov.uk/legislation/scotland/ssi2004/20040376.htm respectively.

⁴⁵ section 12(2)-(5)

⁴⁶ see Regulation 6 of the Fees for Required Disclosure Regulations 2004, SSI 2004/467

⁴⁷ section 14

⁴⁸ section 14

⁴⁹ See text at Section 5 of this Introduction.

⁵⁰ sections 23 and 24

⁵¹ Practical Guide: Part 1 Classes at paragraph 9.

⁵² Section 25. See further Section 3 of this Introduction.

⁵³ Section 11

⁵⁴ section 10.

⁵⁵ See Part 2.

⁵⁶ See section 2(2)

⁵⁷ See *Post Office v Jones* [2001] IRLR 384 at paragraph 39 for meaning of "substantial" in a disability law context.

⁵⁸ Paragraph 72.

⁵⁹ As defined by section 1 of the Data Protection Act 1998, as amended by the Freedom of Information Act 2000.

⁶⁰ In other words, such requests are to be dealt with under the Data Protection Act 1998 and not under the Act. See footnote above.

⁶¹ See section 35(2) for the particular types of statutory powers that are covered.

⁶² The Aarhus Convention is an international Convention which obliged signatories, of which the UK is one, to make Regulations providing for the release of information relating to various environmental matters: see section 62. The effect of this provision is to exempt (but not absolutely) information relating to matters which will be covered by the Regulations out of the ambit of the Act. It should be remembered that information which is obtainable otherwise than under the Act is absolutely exempt in terms of section 25 in any event.

⁶³ sections 20 and 21.

⁶⁴ See Part 3. Kevin Dunion was confirmed as the first incumbent of this post in December 2002 which took effect in February 2003.

⁶⁵ See section 47.

⁶⁶ Section 51

⁶⁷ In other words, there is no appeal on the merits of the decision. The appeal will only succeed where the appellant can show that the Commissioner has fallen into legal error: for example, he has misunderstood or misapplied the law or has acted in excess of his legal powers. The person who has the right of appeal depends on the decision made: see section 56.

⁶⁸ Section 52

⁶⁹ Section 53. It is thought that this power would be very rarely used, if ever.