



# **A Guide to the Freedom of Information (Scotland) Act, 2002, (FOISA)**

Information Assurance Group

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## Document Control Sheet

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## 1.0 Requests for Information under FOISA

### 1.1 Identifying FOI requests

If a request for information is received that cannot be answered as per the usual business of your department, or is identified as an enquiry under FOISA or Environmental Information Regulations, please immediately forward the request to the FOI team at [info@moray.gov.uk](mailto:info@moray.gov.uk) .

In order to be a valid request for information, the request must:

- be in writing or recorded in a permanent format, including via social media.
- state the requester's name and an address for correspondence. The name can be a person's real name or a company name; the address can be a postal address or an email address.
- state clearly the information requested to enable the Council to compile a response.

The requester cannot be asked why the request is being made nor does the requester have to specifically identify their request as a request under FOISA.

All staff should be aware of FOISA, the Council's obligations and the need to pass any requests onto the FOI team promptly.

### 1.2 Timescales

Requests must be acknowledged within 3 days and responded to within **20 working days**. The clock starts when the request is received by the Council; therefore the sooner it is logged by the FOI team, the more time there is to answer it.

Departments will be prompted by the FOI team when a response has not been received within the timescales allowed. The FOI team will also collate statistics on any requests that breach; these are reported to the Scottish Information Commissioner (SIC).

### 1.3 Procedures and Responsibilities

The Records and Heritage Manager is responsible for policy, guidelines, monitoring, reporting and advice to the Council under FOISA. The Records and Heritage Manager manages the FOI Team.

The FOI team are responsible for managing and co-ordinating requests for information and sending out requests for clarification, exemptions, refusals and such like under FOISA. The FOI team will log all requests on Lagan Customer Relationship Management system (CRM) within one day of requests being received by the Council.

The FOI team will forward requests to a designated service co-ordinator in each department and provide the department with a deadline for responding. The service

co-ordinator is responsible for collating and returning the response to the FOI team by the deadline.

Departments are responsible for researching and providing the answers to the information requested, any refusals should be clearly explained. Departments should return responses with details of staff time taken.

If the request is not clear, the department should request that the FOI team ask the requester for clarification. The 20 day clock is suspended until such clarification is received.

For resource intensive FOI enquiries, departments will investigate the response and advise the FOI team if the cost in staff time is likely to exceed £600. The estimate is to be evidenced, with staff time not to exceed an allowance of £15 per hour. The FOI team will seek clarification from the requester if the request can be narrowed, and the 20 days clock will be suspended until this is received.

The Records and Heritage Manager will consider the application of any exemptions or refusals.

Once a response is received, the FOI team will publish the response on the Council's website and respond to the requester, closing the case on the CRM system.

#### **1.4 Advice and Guidance**

The FOI team and the Records and Heritage Manager can provide detailed or specific advice and guidance as required.

Legal Services are responsible for legal advice, guidance and policy. The FOI team and Records and Heritage Manager will consult with Legal as appropriate.

#### **1.5 Monitoring**

Lagan CRM will be used to monitor timescales, record enquiries, details of requesters and officers dealing with the request, and extract statistical information for reporting purposes both to the Council and to the SIC. The system will be reviewed regularly and further briefings will be sent out as necessary.

## **2.0 Information covered by FOISA**

It is important to remember that virtually all documents created by staff can be requested and released under FOISA or the Data Protection Act, 1998 (DPA).

FOISA applies to all information held by the Moray Council, regardless of whether the Council created it or received the information from a third party. Information is not 'held' by the authority if it is held by the authority on behalf of another person or is held in confidence having been supplied by the UK Government. The Act covers

information regardless of how it is recorded, or which format it is in, for example: e-mails, post-it-notes, photos, CCTV tapes, recorded messages etc. are all covered.

Whilst the Act covers public authorities it also has implications for the private sector as information the Council receives from third parties, for example contractors, correspondence with third parties, will be open for the purposes of the Act. Confidentiality clauses added to contracts to avoid disclosure under FOISA are discouraged. You should make third parties aware that any records they provide to the council will be subject to FOI legislation.

## **2.1 FOISA and the Data Protection Act**

The difference between a request for information under FOISA and DPA:

- A request under FOISA will be for general information or information about a 3rd party and will not contain personal information. However, we cannot release 3rd party information if doing so would mean breaching any of the Data Protection principles.
- A DPA Subject Access Request will be from a living individual requesting personal information about himself/herself (the data subject). Under the DPA the Moray Council charges a fee of £10. For further information see: [www.moray.gov.uk/moray\\_standard/page\\_41179](http://www.moray.gov.uk/moray_standard/page_41179) .

A request may in part need to be handled as a Subject Access Request but also in part as a FOI. Both types of requests are handled by the FOI Team and they can provide specific guidance as required.

## **2.2 FOISA and Environmental Information (Scotland) Regulations**

The Environmental Information (Scotland) Regulations 2004 (EIRs) gives the public the right to ask any Scottish public authority for Environmental Information.

"Environmental Information" covers a broad range of topics, such as:

- the environment itself, including air, water, earth, and the habitats of animals and plants;
- other things that affect the environment, such as emissions, radiation, noise and other forms of pollution;
- policies, plans and laws on the environment.

Examples of Environmental Information:

- levels of chlorine in swimming pools;
- water and air-quality test reports;
- genetically modified crops;
- air conditioning systems in public buildings.

EIRs and FOIs are not mutually exclusive, and a request that is made specifically under FOI can be answered as an FOI so long as it is also answered as an EIR as well; alternatively the request can be refused as an FOI under section 39(2)(a), so

long as it is then fully answered under EIR, as this satisfies FOI and EIR. The FOI team can provide assistance.

The intention of both pieces of legislation is to allow the public access to information, yet there are some differences between the two;

- Requests for information can be made orally under EIRs.
- The 20 day time period for responding to requests can be extended to 40 days where the request is complex and voluminous and would involve a considerable amount of work.
- Provision for charging of fees is different: there is no upper or lower threshold and authorities can recover, in full, the cost of supplying the information.
- EIRs have exceptions rather than exemptions: all subject to the public interest test.
- Information relating to emissions has special status and will have to be supplied in most cases.

Both types of request are logged and co-ordinated by the FOI team, please forward any requests to them.

### **3.0 Withholding Information**

Under FOISA, anyone who requests information from a Scottish public authority which holds it is entitled to be given it by the authority. The Act supports and encourages the disclosure of information. However, there are certain circumstances where the Council does not have to provide the information requested through an FOI:

1. If the information is not held by the Council.
2. If an exemption applies. (see below)
3. Neither confirming or denying
4. Excessive cost of compliance
5. If the request is vexatious
6. If it is a repeated request or substantially similar to other requests (unless a reasonable interval has elapsed between requests).

#### **3.1 Information Not Held (Sec. 17)**

If information is not held then this cannot be released and Section 17 will be cited by the FOI Team.

#### **3.2 Neither Confirm Nor Deny (Sec. 18)**

If indicating the existence of information that would be exempt under exemptions sec. 28 – 35, 39(1) or 41, and, is considered to be contrary to the public interest, the request may be refused under Sec. 18. This refusal can be made whether or not the information exists and is held. This refusal is rarely required.

### **3.3 Excessive cost of compliance (Sec. 12)**

If the cost of compliance would exceed the £600 threshold, set by Scottish Statutory Instrument 467, then the information is exempt and a Section 12 refusal may be cited by the FOI team. The refusal must inform the requester the estimated cost and how the estimation has been reached using actual costs.

When estimating staff time a maximum of £15.00 per hour may be used, however, if a member of staff's hourly rate is less than this their actual hourly rate must be used. £600 at £15.00 per hour equates to 40 hours of work by a member of staff, and at £10 per hour equates to 60 hours of work.

It is good practice and strongly encouraged for the FOI team to liaise with the requester to clarify if the parameters of the request can be narrowed; this may allow for some information to be given before the threshold is reached.

### **3.4 Vexatious Requests (Sec. 14)**

The Council does not have to comply with a request for information if the request (and NOT the requester) is vexatious. Current thinking is that a request can only be considered vexatious where there is good evidence that the purpose of the request is not to obtain information but to disrupt the working of the authority. These types of requests should not be confused with a request made with a view to obtaining information to embarrass the Council with its contents, or to make political capital out of it, which would normally be legitimate requests.

Any decision on treating a request as vexatious, and refusing it under Section 14, should be discussed with the FOI team, Records and Heritage Manager and Legal department. The Council must be prepared to justify the reasoning behind a refusal on these grounds to the SIC.

### **3.5 Repeated Requests (Sec. 14)**

Where the Council has previously complied with a request for information made by any person, it does not have to comply with a subsequent identical or substantially similar request from that person UNLESS a reasonable interval has elapsed between compliance with the previous request and the current request. If the information has changed between applications, it is unlikely to be viewed as a repeated request. For example, requests could be made regularly for up to date figures.

Once the information has been provided, it is good practice to ensure the information is then included in our publication scheme. This means that any future requests for the information can be responded to by directing the requester to the relevant published information.

Any decision on treating a request as repeated should be discussed with the FOI team and Records and Heritage Manager, any specialist advice sought from

Legal. If it is decided that the request is vexatious, the FOI team will inform the requester citing Section 14.

### **3.6 Clarification**

It is good practice and encouraged that any requests that are unclear or voluminous are clarified with the requester; this can save departments significant time and effort, as well as ensure the requester is provided with the information they seek. The FOI team will be the point of contact with the requester; departments should contact the FOI team if any clarification is desired.

If clarification is not provided by the requester within one calendar month the FOI team will close the request on Lagan.

### **3.7 Duty to Provide Advice and Assistance**

Under Section 15, authorities have a duty to provide advice and assistance to requesters. Example of this are:

- Providing an outline of the different kinds of information which might meet the terms of the request.
- Providing access to detailed catalogues and indexes to help the requester understand the nature and extent of information held.
- Providing a general response setting out options for further information which could be provided on request.

## **4.0 FOISA Exemptions**

There are a number of exemptions under the Act, which means that the Council does not have to release information that falls within these categories. With the concepts of open government these exemptions may not apply very often.

Exemptions are divided into two categories: 'absolute' and 'qualified'. The latter are subject to a public interest test, which means we must weigh the public interest in maintaining the exemptions against the public interest in disclosing. Only information deemed as in the public interest to withhold can have a qualified exemption applied.

Contact the FOI team if you are uncertain about whether the information requested might be exempt from disclosure. The FOI team and the Records and Heritage Manager apply exemptions to information, and they may contact Legal services for further advice.

Where a document has been marked as confidential or restricted, remember that this is not in itself sufficient grounds on which to prevent disclosure. Each case must be considered on its merits and to decide which exemption to disclosure should apply.

If an exemption is applied it is worth considering if there is any information we can provide that would be helpful to the requester, this would fulfil our obligation under Sec. 15 to provide assistance and advice, even if we cannot answer the whole request. For example, if an absolute exemption applies consider redacting (blocking out) the sensitive information to allow for partial release of documents, the FOI team can provide further details on how this is done.

A number of exemptions may apply to any one request. There may be no need to look at them all in detail, but the main ones should be considered carefully as the requester will be informed as to why it has been applied. The presumption under FOISA is that the Council must disclose the information unless the Act provides a specific reason to withhold it. The exemptions are intended to protect sensitive or confidential information

The Act does not prevent the release of information by the Council where exemptions apply. The Council can decide to release the information even if it is exempted, as long as we are not prevented from doing so for some other reason, e.g. legislation or confidentiality.

Where information has been withheld previously, it should not be assumed that any future requests for the same information should automatically be refused. Sensitivity of information usually decreases with age, so for each request it will be necessary to consider the harm that could result at the time of this specific request, as well as taking into account any previous decisions. Each case has to be considered separately.

The 20 working day period cannot be extended to take a decision on exemptions.

#### **4.1 Absolute Exemptions (no public interest tests)**

**Section 25** – Information Otherwise Accessible and available e.g. published on a website etc.

**Section 26** – Prohibitions on Disclosure e.g. if legislation currently prohibits the disclosure of information by the Council, this takes precedence over FOI. The exemption also applies if disclosure would result in the Council being in contempt of court such as where there is a court order in place prohibiting the Council from making the information available. It also applies if to disclose the information would be incompatible with a European Union obligation.

**Section 36** – Confidentiality e.g. constitute a breach of confidence actionable by a third party. If the Council obtains information in confidence, the person who gave the Council the information could take the Council to court for breach of confidence if the information were to be released; then the information must not be released. This may relate to information relating to the Council's contracts with external suppliers, or information relating to the care of individuals by Social Workers. Please note that the Section 60 Code of Practice requires that the Council should refuse to include

confidentiality clauses in contracts which would restrict access to information. Please refer to the Procurement Procedures document (available on the intranet) for more detailed advice on the use of this exemption in relation to contracts.

**Section 37** – Court Records e.g. Information relating to court proceedings. This exemption covers information contained in documents filed with or placed in the custody of a court, and also those served upon, or by, the authority for the purposes of Council proceedings. It is up to the court to decide whether to allow public access to the information lodged with the court for the proceedings. In many cases, courts do allow open access to pleadings and hearings.

**Section 38 (1) (a)** – Personal Information, e.g. where the requester is the subject of the information requested. If the request is for information held about the requester him/herself, the information is absolutely exempt from disclosure under FOI. The request should be processed under the Data Protection Act.

**Section 38 (1) (b)** – Personal Information relating to a third party. If the request refers to personal information about someone other than the requester, it must not be disclosed if this would contravene any data protection principle, if the subject him/herself would be refused access to the information, if disclosure would cause damage or distress to the person

Where the release of information about a third party would not contravene the principles of the DPA then the Public Interest Test must be applied (see below)

**Section 38 (1) (c)** - Personal Census information. Census information is subject to an one hundred year closure and the release of this information is managed by [The National Records of Scotland](#).

**Section 38 (1) (d)** - Deceased person's health records. It is unlikely that the Council will hold health records in the traditional sense, however, any information relating to the health of a deceased individual must not be released.

#### 4.2 Qualified Exemptions

If a qualified exemption applies, then the information may have to be released, subject to the application of the public interest test and possibly the substantial prejudice test, depending on the type of exemption.

The **public interest test** means that information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This is applied to all qualified exemptions.

The **substantial prejudice test** is not defined in FOISA, but the release of information would have to cause real or likely damage for this exemption to be accepted by the SIC.

**Section 27 (1)** – Information intended for future publication within 12 weeks of the request. This exemption covers information due for one-off publication, for example, a policy or strategy, and, information published on specified dates or at specified intervals, such as statistical or annual reports.

**Section 27 (2)** - Research information, due to be published and where prior publication would substantially prejudice the research programme or the interest of the Council. Any research or consultation programme the Council has embarked upon will normally be allowed to run its course and report according to its specified timetable. Only in cases of public interest will the Council be required to release the information in advance of scheduled publication. **Subject to the substantial prejudice test**

**Section 28** – Relations within the UK. If release would prejudice relations within the UK; including between the Scottish Government, and any other such administration. **Subject to the substantial prejudice test**

**Section 29** – Formulation of Scottish Administrative Policy, e.g. government policy, operations of ministerial private offices etc.

**Section 30** – Prejudice to the effective conduct of public affairs. If the disclosure of information would be liable to harm the provision of free and frank advice by any individual or organisation, or the candid exchange of views for the purposes of deliberation within the Council, requests for access may be refused. This exemption may cover some consultation undertaken by the Council, and some debates within Committees. **Subject to the substantial prejudice test**

**Section 31 (1)** – Safeguarding national security and defence. Subsection (2) requires a signed certificate from Scottish Government exempting the designated information.

**Section 31 (4)** - Defence of the nation/capability of the Armed Forces. **Subject to the substantial prejudice test**

**Section 32** – International Relations. If disclosure would, or be likely to, impact on relations between the UK and other states, courts etc. **Subject to the substantial prejudice test**

**Section 33** – Commercial interests and the economy. If it constitutes a trade secret, or would be likely to prejudice substantially the commercial, economic or financial interests of any person (including a Scottish Public Authority). **Subject to the substantial prejudice test.**

**Section 33 (1) (a)** Trade Secrets. A trade secret is a business-related fact that the Court will protect as being essential to an enterprise, such as a brand's secret recipe.

**Section 33 (1) (b)** Commercial interests where disclosure would be likely to substantially prejudice the commercial interests of any person – This exemption will cover information relating to the Council’s relations with external contractors and also to the Council’s own commercial interests. Type of information covered includes: costing rates, factors and pricing information, negotiating positions, competition strategies, business plans, potential business options and suchlike. Please refer to [Guidance for Staff involved in Tendering](#) for more detail on the use of this exemption. ***Subject to the substantial prejudice test***

**Section 34** – Investigations by Scottish public authorities and proceedings arising out of such investigations. Information held for the purpose of investigations by the Council to establish whether an offence has been committed or for proceedings arising out of. It also covers information held by the Council for the purposes of an inquiry under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 that have not yet been concluded; information held by a Scottish public authority into the cause of death of any person whether by virtue of a duty on the authority or to make a report to the Procurator Fiscal, and information held for the purpose of investigations in relation to the regulatory functions listed in Section 35(2) of the Act and which relate to the obtaining of information from confidential sources. The purposes under Section 35(2) include:

- ascertaining whether any person has failed to comply with the law;
- ascertaining whether circumstances exist or may arise justifying regulatory action;
- investigation of persons in regulated professions or who carry out activities which require a licence;
- investigations into accidents;
- action relating to health and safety.
- Investigations relating to fraud must be treated extra-sensitively. Only when a decision has been made to proceed with prosecution should the fact that an investigation is underway be acknowledged.

**Section 35** – Law enforcement, where disclosure could prejudice the prevention and detection of crime. This covers information which would, or would be likely to, prejudice substantially a list of law enforcement matters. The list includes (among other things) the prevention or detection of crime, the apprehension or prosecution of offenders or the operation of immigration controls. The exemption also covers information that would, or would be likely to, prejudice substantially any civil proceedings brought and arising out of an investigation conducted for the list of regulatory purposes specified in Section 35(2) and brought by a public authority under a duty to carry out such an investigation. ***Subject to the substantial prejudice test***

**Section 38** – Personal information. This exemption covers personal information about someone other than the requester where to release it would not be in breach of the data protection principles (in contrast with the Sec. 38 absolute exemption).

**Section 39** – Health, safety and the environment. This exemption relates only to information that would, if disclosed, endanger the physical or mental health or safety of any individual. This exemption does not only relate to the Health and Safety of an individual mentioned within the information, but is in place to protect the Health and Safety of all individuals. Therefore, if the release of information will harm any individual, whether someone mentioned within the information, the requester or any other individual, the Council is not obliged to provide access.

**Section 40** – Audit functions e.g. prejudice the examination of the economy, efficiency and effectiveness with which such local authorities use their resources in discharging their functions. This exemption does not cover the internal audit functions of the Council. It would only apply where a public authority is carrying out an audit of another public authority, e.g. Audit Scotland carrying out an audit of the Council. ***Subject to the substantial prejudice test***

**Section 41** – Communications with Her Majesty etc and Honours e.g. communications with Her Majesty, with other members of the Royal Family or with the Royal Household

### 4.3 Tests for Qualified Exemptions

Requests for information that fall under these qualified exemptions must be dealt with on a case-by-case basis. To ascertain whether the information should be exempt from disclosure under FOI, two tests have been established, the Public Interest test and the harm test of Substantial Prejudice. In some cases, the substantial prejudice test must be met first before going on to apply the public interest test. In other cases only the public interest test is applicable. In all cases, there must be a presumption in favour of the disclosure of the information.

#### Substantial Prejudice Test

Many of the exemptions only apply if the disclosure of the information would *prejudice substantially* some particular interest.

The term is not defined in the Act. The Freedom of Information Act 2000, which applies in the rest of the UK, only refers to "prejudice" and therefore the test in Scotland for withholding information may be harder to meet; the result being that the scales are further tipped in favour of openness.

The harm test of 'substantial prejudice' protects the interests of individuals and organisations as set out in the qualified exemptions. If the prejudice caused to these interests by the disclosure of information can be shown to be real, actual and of significant substance, the Council is not required to comply with the request for access. However, this should not be viewed as a 'get-out' clause. The Council will

have to prove that substantial prejudice will be caused to an individual's or organisation's interests.

### Public Interest Test

In *all* cases of qualified exemptions, the Council must consider the public interest in making the information available. 'Public interest' can be described as something that is of serious concern or benefit to the public as a whole, or as being in the interest of the public. This covers information that enhances the democratic scrutiny of decision-making, the expenditure of public funds, and, which provides details of dangers to the state of public health or safety, or, to the environment.

The main features of the public interest test under FOISA is that 'public interest' is not defined but is generally seen as

- something which is of serious concern and benefit to the public not merely something of individual interest.
- Or,
- something which is 'in the interest of the public' not merely 'of interest to the public' It is also accepted that what is held to be in the public interest will change over time.

So when considering an exemption follow these steps:-

1. Does the information fall under the terms of an exemption? If no then release the information. If yes go on to consider the public interest test
2. Apply the public interest test. If the public interest in disclosing the information is greater than the public interest in withholding the information, the information must be released. Where the council decides to withhold information it should provide reasons for this decision and the FOI team will give these when they issue a refusal notice to the requester.
3. A judgement will need to be made based on each case individually.

Factors that may inform a decision about the public interest will include whether disclosure would:-

- enhance scrutiny of the decision making processes, improving accountability and participation
- could contribute to the administration of justice
- affect the economic interests of the whole or part of the UK
- contribute to effective oversight of public funds and that the public obtain value for money keep the public informed of any danger to public health, safety or the environment
- adversely affect national security or international relations
- contribute to ensuring that the council is adequately discharging its functions

- ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims
- contribute to a debate on a matter of public interest
- prejudice the protection of an individual's right to privacy (Human Rights Act 1998)

Factors that should not be taken into account in deciding whether releasing information is in the public interest:-

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

#### 4.4 Refusal to release information requested

Where a department seeks to refuse a request either in whole or in part because of an exemption, please pass the following information to the FOI team who will issue a refusal notice:

- Which exemption(s) has been claimed
- An explanation on why that exemption(s) has been claimed
- The reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure. This should list the public interest factors for and against disclosure, which have been taken into account before reaching the decision
- The FOI team will add that the requester has a right to a review by the Council, and if unsatisfied following a review, that the requester has the right to appeal to the Scottish Information Commissioner.

It is important that all requests are processed by the FOI team, whose templates always state the relevant related information and requester's rights.

## 5.0 Fees

Some requests for information may involve a considerable amount of searching and checking and will therefore take up quite a lot of staff time. Sections 9 and 13 of FOISA provide for fees to be charged in accordance with regulations made by Scottish ministers. These fees are set out in the following Scottish Statutory Instruments:

- Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (SSI No. 467 of 2004).
- Freedom of information (Fees for Required Disclosure under Section 13) (Scotland) Regulations 2004 (SSI No 376 of 2004)

Under the Regulations the Council is allowed to make charges for information over £100.00 at a rate of 10% of the amount above £100 to the upper limit of £600.

If providing the information would cost the Council:	
Under £100	No charge
£200	£10
£300	£20
£400	£30
£500	£40
£600	£50
Over £600	The Council is not obliged to provide (Sec. 12)

The cost must be estimated when the request is received and a fee notice, detailing how the cost has been arrived at, sent to the requester. In order to ensure that payment is received, the 20 day response time is suspended when the fee notice is sent and resumed only when payment is received. If payment is not received within 3 months from the fee notice being sent the request can be closed, but the requester must be informed of this.

For more information on access to information fees and all Council fees in [References and Links](#) below.

## 6.0 Reviews and Appeals

The requester has a right to a review by the Council if they are dissatisfied with the response to their enquiry. All requesters must be informed of the right to review and appeal; the templates used and issued by the FOI team carry this information. If a review request is received by a department it is imperative they are immediately passed to the FOI team, who will log the request and initiate the review procedure. Reviews adhere to the same timescale as other requests and can again be clarified if are unclear.

A review is organised by the FOI team, it normally involves a meeting to discuss the original request, the information available, the initial response, exemptions, and, if any changes should be made to the original response. This is held with the Information Co-ordinator, Records and Heritage Manager, Legal and a representative for the department who best knows the information and subject matter. The outcome of the meeting will determine if any information is released or if any exemptions are replied in order to complete a response to the review request.

It is important to keep all paperwork and replies filed where they can be easily retrieved as they may be needed for the review and appeal process.

If after the review the requester is still dissatisfied they have the right to appeal to the SIC. Information on how this is done is carried in the templates used by the FOI

team. If the Commissioner decides to proceed with an appeal she will invite comments from the Council and decide if the complaint is valid.

In the case of an appeal the FOI team will be notified by SIC and will organise a FOI Appeal Panel. The Panel will comprise of the Review meeting members and any other relevant members of staff. This group will organise for all necessary evidence and information to be passed to the Commissioner as it is requested. If such requested information is not forthcoming the Commissioner may issue the Council with an Information Notice. The Commissioner also has the right to apply for a warrant to enter an authority's premises and seize documents, but such incidents are unusual.

Appeals are dealt with on a case-by-case basis. Completed cases are reported on the decisions section of [SIC's website](#).

## **7.0 The Scottish Information Commissioner (SIC)**

FOISA is enforced by the Scottish Information Commissioner; a fully independent public official. Their duties and legal powers should ensure that people get the information from Scottish public authorities to which they are entitled. The Commissioner has a number of responsibilities which include: dealing with complaints, promoting good practice to authorities, informing the public about FOISA and enforcing the Act.

### **7.1 Enforcement and Prosecution**

If SIC becomes aware that an authority is not complying with its duties under the Act, she can issue an enforcement notice, telling the authority which part of the Act it is failing to comply with and what it needs to do to put things right. An authority could be found in contempt of court if it does not comply with a notice issued by the Commissioner.

Although the SIC is primarily responsible for overseeing the Act, there are a small number of occasions when the courts may become involved. It is a criminal offence for anyone to destroy or erase information after a request has been received. This offence can be committed by the authority or its employees. Such cases will be dealt with in the Sheriff Court and carries a fine of up to £5,000.

In most cases the SIC will make the final decision regarding what information should be released, but there is one exception. The First Minister can overrule the Commissioner when it relates to certain decisions taken by the Scottish Government.

The Data Protection Act 1998 is monitored by the Information Commissioner's Office (ICO).

## **8.0 Records Management**

Good records management (RM) practices are essential for public bodies to meet their duties under FOISA. If, for example, records are easy to locate then requests can be dealt with quickly; there is no "get out" clause for information that is difficult to find.

Guidance on records management is provided in the Code of Practice on Records Management November 2003. The Code provides guidance on RM policies, training and the keeping, management and destruction of records, both paper and electronic.

Retention schedules are part of good RM practice, are deemed to be "normal processing" and ensure compliance with DPA and FOISA. These and other RM guidance can be found on the RM intranet page and the Information Management page of TMC's website (please see below for links).

## **9.0 Copyright**

Copyright applies to information supplied in the replies to FOI enquiries and is owned by the Moray Council. In supplying the information under FOISA the Council does not give an automatic right to re-use material in any way that would infringe copyright. Copyright may also apply to material available and published by the Council. Information stating this is included in the FOISA templates used by the FOI team.

The Re-use of Public Sector Information Regulations sets out guidance for how public sector information can be re-used and where charges may be applicable. More information is available on the council website under Re-Use of Public Sector Information (please see below for links).

## **10.0 Publication Scheme**

The Council is obliged to maintain a Publication Scheme that sets out categories of information held and lists the information that is already available to the public, detailing how the information is available and whether a charge is applicable.

The Council has a duty to keep the publication scheme up to date. If there are any suggestions for material that could be added to the scheme then please contact the Records and Heritage Manager.

The more information readily and easily accessible to enquirers the less time will be taken up in dealing with enquiries under FOISA. Section 25 (1) applies to enquiries where the information is otherwise accessible.

The current Publication Scheme and further information is available: [www.moray.gov.uk/moray\\_standard/page\\_84996.html](http://www.moray.gov.uk/moray_standard/page_84996.html)

## 11.0 References and Links

Moray Council's Website pages:

Information Management

[http://www.moray.gov.uk/moray\\_standard/page\\_41220.html](http://www.moray.gov.uk/moray_standard/page_41220.html)

Freedom of Information

[http://www.moray.gov.uk/moray\\_standard/page\\_53728.html](http://www.moray.gov.uk/moray_standard/page_53728.html)

Re-Use of Public Sector Information

[http://www.moray.gov.uk/moray\\_standard/page\\_54272.html](http://www.moray.gov.uk/moray_standard/page_54272.html)

Access to Information fees

[http://www.moray.gov.uk/moray\\_standard/page\\_41220.html](http://www.moray.gov.uk/moray_standard/page_41220.html)

All Council fees

[http://www.moray.gov.uk/moray\\_standard/page\\_54971.html](http://www.moray.gov.uk/moray_standard/page_54971.html)

Moray Council's Intranet Pages:

Information Security (inc. FOI, DPA)

[http://intranet.moray.gov.uk/Information\\_management/information\\_security.htm](http://intranet.moray.gov.uk/Information_management/information_security.htm)

Records Management (inc. Retention Schedules, Confidential waste etc.)

[http://intranet.moray.gov.uk/Information\\_management/records\\_management.htm](http://intranet.moray.gov.uk/Information_management/records_management.htm)

Guidance for Staff involved in Tendering

<http://intranet.moray.gov.uk/FinanceStandard/procurement/Ecats/Procurement%20Procedures%202016/Procedures%202016%20-%20v14%20FINALVersion.pdf>

Freedom of Information (Scotland) Act 2002

<http://www.legislation.gov.uk/asp/2002/13/section/12>

Scottish Statutory Instrument 2004 no 376: The Freedom of Information (Fees for Disclosure under Section 13) (Scotland) Regulations 2004

<http://www.legislation.gov.uk/ssi/2004/376/contents/made>

Scottish Statutory Instrument 2004 no 467 The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

<http://www.legislation.gov.uk/ssi/2004/467/contents/made>

Scottish Government; Freedom of Information:

<http://www.gov.scot/About/Information/FOI>

Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (updated

December 2014)

<http://www.gov.scot/Resource/0046/00465757.pdf>

Code of Practice on Records Management under the Freedom of Information (Scotland) Act 2002, (updated December 2011)

<http://www.gov.scot/About/Information/FOI/18022/13383>

Scottish Information Commissioner:

[www.itspublicknowledge.info/index.htm](http://www.itspublicknowledge.info/index.htm)

Public Interest Test Guidance (SIC)

<http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx>

Differences between EIRs and FOISA

<http://www.itspublicknowledge.info/Law/EIRs/EIRsDifferencesEIRSandFOISA.aspx>

<http://www.itspublicknowledge.info/Law/WhichLawApplies.aspx>

The Information Commissioner's Office:

<https://ico.org.uk/>

## 12.0 Contacts

If you have any questions or suggestions please contact:

FOI Team:

Information Co-ordinator

Elgin Library

[info@moray.gov.uk](mailto:info@moray.gov.uk)

Tel 01343 563110

Records and Heritage Manager

Elgin Library

[records@moray.gov.uk](mailto:records@moray.gov.uk)

Tel 01343 562633

Any queries to the below addresses should be directed via the FOI team:

Scottish Information Commissioner,

Kinburn Castle, Doubledykes Road,

St Andrews, Fife

KY16 9DS

Telephone: 01334 464610

Email: [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

The Information Commissioner's Office,  
Wycliffe House, Water Lane,  
Wilmslow, Cheshire  
SK9 5AF.

Telephone: ICO Helpline: 08456 30 60 60 or 01625 54 57 45 or the Switchboard:  
01625 545700

Information Commissioner's Office – Scotland,  
28 Thistle Street, Edinburgh EH2 1EN  
Telephone/Fax: 0131 225 6341  
Email: [Scotland@ico.gsi.gov.uk](mailto:Scotland@ico.gsi.gov.uk)

## 13.0 Appendix 1: FOI Request and Response Handling Process

