

# **Freedom of Information (Scotland) Act 2002 - FOI(S)A – Guidance**

**Website** link to the Freedom of Information (Scotland) Act 2002

<http://www.opsi.gov.uk/legislation/scotland/acts2002/20020013.htm>

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## FOI(S)A Request for Information

All written or recordable requests, (including internal correspondence and those created electronically), received by the council can be classed as FOI(S)A requests. They can be received at any point in the council e.g. by schools and libraries as well as services.

They must be responded to within **20 working days** and the clock starts when the request is received by the council. It should be noted that local holidays outwith recognised bank holidays are not considered to be official bank holidays and should be calculated as working days for the purpose of FOI(S)A.

If the request is for information which can be **easily and readily answered and relates to the usual business of your department then answer it** and file the reply as you would according to your office policy and the Customer Care Policy of the Council.

Also remember to check the **publication scheme**. If the information is available here then inform the enquirer and cite exemption 25(1). As more information is placed on the publication scheme in the future then the easier FOI(S)A enquiries will be to answer.

However, if the request is **complex**, covers several departments or is identified as an enquiry under FOI(S)A or mentions Environmental Information Regulations then **forward the request to Corporate Policy Unit immediately**. [info@moray.gov.uk](mailto:info@moray.gov.uk) or tel 01343 563601.

The enquirer cannot be asked why the request is being made nor does the enquirer have to identify their request as a request under FOI(S)A

**All staff** should be prepared to accept a request for information and be prepared to offer advice and assistance to anyone who has made a request for information, including explaining the Act, explaining the Council's procedures, assisting those unable to make a request in writing and helping to clarify ambiguous requests.

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

- be in writing or recorded in a permanent format, including staff notes from a verbal conversation if the applicant cannot provide the request in a written format.
- state the applicant's name and an address for correspondence. The name can be any name, or a company name, the address can be an address in another country, or an email address.
- state clearly the information requested to enable the Council to compile a response. If the request is not clear, ask the applicant for clarification. The 20 day clock is suspended until such clarification is received.

## Responsibility for FOI(S)A requests

- The Records Manager will be responsible for policy, guidelines, monitoring, reporting and advice to the Council under FOI(S)A
- The Corporate Policy Unit (CPU) will be responsible for managing and co-ordinating requests for information and sending out requests for clarification, exemptions, refusals etc under FOI(S)A from January 2007.
- Legal Services will be responsible for legal advice, guidance and policy
- Departments will be responsible for researching and providing the answers to the enquiry:-
  - ❖ **Single department** enquiries – each department will be responsible for sending out the answer, using the FOI answer template provided by CPU, **directly to the enquirer**. The answer will be signed by the responsible officer and copied to their Head of Service. The reply will be copied to the CPU
  - ❖ In **Multiple department** enquiries each department will be responsible for sending the answer, using the FOI answer template provided by CPU, **to the CPU who will co-ordinate and send out the reply to enquirer**. The answer sent to the CPU will be signed by the responsible officer and copied to their Head of Service.

- ❖ **Return details of time taken and staff costs to deal with all enquiries to CPU** as this information will be logged onto the Siebel system for statistical and cost analysis.
- ❖ **Resource intensive FOI enquiries – Excessive Cost of Compliance** – departments will investigate the response and advise CPU is cost if over £600.00. The estimate is to be evidenced. CPU will respond and seek clarification. Clock suspended.

The requests and replies will be logged into the Siebel CRM system by the CPU, so that requests can be tracked from entry into the system to reply and closure 20 days later.

### **Publication Scheme**

The Council is obliged to maintain a Publication Scheme which 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 e.g. the cost of a publication. This information does not need to be reviewed for exemptions before it is released.

The Council has a duty to keep the publication scheme up to date. If there are any suggestions for material which could and should be added to the scheme then please contact the Records Manager [records@moray.gov.uk](mailto:records@moray.gov.uk)

Remember the more information readily and easily accessible to enquirers the less time will be taken up in dealing with enquiries under FOI(S)A. Section 25 (1) (absolute exemption) applies to enquiries where the information is otherwise accessible.

### **Copyright**

Copyright applies to information supplied in the replies to FOI enquiries and is owned by the Moray Council. In supplying the information under FOI(S)A the Council does not give an automatic right to re-use material so that copyright would be infringed. Copyright may also apply to material available and published by the Council.

### **Out of Office Replies**

Remember if you are likely to be away, on leave etc, it is essential to put an Out of Office reply on your email or arrange to have mail forwarded to a colleague so that the enquirer is kept informed.

### **FOI(S)A and the Data Protection Act (1998)**

The difference between a request for information under FOI(S)A and the Data Protection Act 1998:

- A DPA request will usually be from a living individual requesting information about himself/herself (a data subject access request). Under the DPA the Moray Council charges a fee of £10. See the internet [http://www.moray.gov.uk/moray\\_standard/page\\_41179.html](http://www.moray.gov.uk/moray_standard/page_41179.html) for further information.
- A request under FOI(S)A will be for general information or information about a 3<sup>rd</sup> party. However, we cannot release 3<sup>rd</sup> party information if doing so would mean breaching any of the Data Protection principles, as laid out in the Data Protection Act (1998).
- If an enquiry is not a Data Protection request then it must be dealt with as an FOI request

Again if you are unsure contact the Corporate Police Unit [info@moray.gov.uk](mailto:info@moray.gov.uk) or the Records Manager – [records@moray.gov.uk](mailto:records@moray.gov.uk)

### **Information covered by FOI(S)A**

It is important to remember that all documents created by staff can be requested and released under FOI(S)A or DPA.

FOI(S)A 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 once they have entered the filing system and become records of an event.

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 FOI(S)A are discouraged. You should make third parties aware that any records they provide to the council will be subject to FOI legislation.

## **Records Management**

Good records management practices are essential for public bodies to meet their duties under the Act. If records are easy to locate, for example, 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 produced as a result of the Freedom of Information (Scotland) Act in November 2003. The Code provides guidance on records management policies, training and the keeping, management and destruction of records, both paper and electronic.

Retention schedules are part of good records' management practice and is deemed to be "normal processing" under the Data Protection Act 1998 and Freedom of Information (Scotland) Act 2002. Managing records according to agreed Retention & Disposal schedules ensures compliance with Freedom of Information and Data Protection legislation.

Please see the Records Management Strategy and Policy at [http://www.moray.gov.uk/moray\\_standard/page\\_46084.html](http://www.moray.gov.uk/moray_standard/page_46084.html)

Please see the Retention and Disposal Schedule on the intranet under Reference

## **Exemptions**

Contact the CPU if you are uncertain about whether the information requested is exempt from disclosure. CPU will contact legal services and the records manager for advice.

There are exemptions under the Act which means that the Council does not have to release the information it considers falls into the exempt categories. With the concepts of open government these exemptions will not apply very often.

Website for exemptions under FOI(S)A  
<http://www.opsi.gov.uk/legislation/scotland/acts2002/20013--c.htm#25>

Exemptions are divided into:-

### **Absolute Exemptions**

- Section 25 – Information Otherwise Accessible and available e.g. published, on a website, information regularly issued – a report [Check the publication scheme]
- Section 26 – Prohibitions on Disclosure e.g. would constitute a contempt of court to disclose
- Section 36 (2) – Confidentiality e.g. constitute a breach of confidence actionable by a third party
- Section 37 – Court Records
- Section 38 (1a -d)– Personal Information – where e.g. the applicant is the subject of the information requested (because they can request information under the Data Protection Act), personal census information, deceased person's health record

## **Non-absolute exemptions**

Non-absolute exemptions are subject to a public interest test, which means the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosing the information

- Section 27 – Information intended for future publication within 12 weeks of the request
- Section 28 – Relations within the UK – prejudice relations between the UK, including the Scottish Administration, and any other such administration
- Section 29 – Formulation of Scottish Administrative Policy – e.g. government policy
- Section 30 – Prejudice to the effective conduct of public affairs e.g. prejudicial to the collective responsibility of Scottish Ministers
- Section 31 – National security and defence
- Section 32 – International Relations
- Section 33 – Commercial interests and the economy e.g. a trade secret, is likely to prejudice substantially the commercial interests of any person (including a Scottish Public Authority)
- Section 34 – Investigations by Scottish public authorities and proceedings arising out of such investigations e.g. report to the procurator fiscal concerning possible prosecution
- Section 35 – Law enforcement
- Section 39 – Health, safety and the environment e.g. likely to endanger the physical or mental health or the safety of an individual
- 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
- 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

## **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 the Freedom of Information (Scotland) Act 2002 (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 £100.00 to the upper limit of £600.00. The Council's Policy Committee adopted these charges on 24 October 2007 but will review the situation in one year.

The authority must estimate the cost when the request is received and send out a fee notice to the applicant, detailing how the cost has been arrived at. 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 authority should write to the applicant to inform them of this.

## **Excessive cost of compliance**

The SSIs 376 and 467 limits the cost of staff time to £15.00 per hour and has established that the prescribed amount under section 12(1) of the Act (excessive costs of compliance) will be £600.00.

Therefore if the estimate for the research needed to comply with a request for information **exceeds £600.00** then the **information need not be supplied**. £600.00 at £15.00 per hour equates to 40 hours of work by a member of staff. The Office of the Scottish Information Commissioner require the actual staff costs involved to be used.

### **Reviews and Appeals**

The applicant has a right to a review by the Council if they are dissatisfied with the response to their enquiry. If after the review they are still dissatisfied they have the right to appeal to the Office of the Scottish Information Commissioner. 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. All applicants must be informed of the right to review and appeal and the templates used and issued by the CPU carry this information. It is important that the templates are used when replying to applicants.

The FOI Appeal Panel will comprise of the Service Manager, the Council's Chief Legal Officer, staff involved in the original decision, Records Manager and Legal Services will also be represented. Someone not involved with the original decision should also attend the review hearing.

If the Commissioner decides to proceed he will invite comments from the Council and then decide if the complaint is valid. The Commissioner will notify both the applicant and the Council of his decision. Sometimes the Commissioner will need more information before he can make a decision concerning a complaint and he will 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 likely to be very unusual.

### **Advice and Guidance**

Guidance will be available from the Corporate Policy Unit, Records Manager and the Legal Services team on exemptions, the need for clarification, vexatious or repeated requests and costs over £600.00 threshold and any other areas of uncertainty. Please contact The CPU on [info@moray.gov.uk](mailto:info@moray.gov.uk) first.

### **Monitoring**

The system will be reviewed regularly and further briefings will be sent out as necessary. Siebel CRM will be used to monitor, record replies and enquiries, record details of applicants and officers dealing with the request, the cost involved in responding to an enquiry and extract statistical information for reporting purposes both to the Council and to the Office of the Scottish Information Commissioner.

### **The Scottish Information Commissioner**

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

### **Enforcement and Prosecution**

If the Commissioner becomes aware that an authority is not complying with its duties under the Act, he 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 Information Commissioner 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 the offence carries a fine of up to £5,000.

In most cases the Commissioner 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 Administration.

Scottish Information Commissioner, Kinburn Castle, Doubledykes Road, St Andrews, Fife KY16 9DS  
Telephone: 01334 464610  
Fax: 01334 464611  
e-mail: [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

Website <http://www.itspublicknowledge.info/index.htm>

The Data Protection Act (1998) is monitored by the Information Commissioner's Office (ICO) whose contact details are:-

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)

## References

Freedom of Information (Scotland) Act 2002

Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 6 September 2004

Code of Practice on Records Management under the Freedom of Information (Scotland) Act 2002, November 2003

Scottish Statutory Instrument 2004 no 376 The Freedom of Information (Fees for Disclosure under Section 13) (Scotland) Regulations 2004 [Section 13 of FOI(S)A is 'Fees for disclosure in certain circumstances']

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

## Contacts

If you have any questions or suggestions please contact:-

Peter Jones  
PPR and Communications Officer  
Corporate Policy Unit  
[Info@moray.gov.uk](mailto:Info@moray.gov.uk)  
Tel (01343) 563601 (Ext: 3601)

Eleanor Rowe  
Records Manager  
Elgin Library  
[Records@moray.gov.uk](mailto:Records@moray.gov.uk)  
Tel 01343 562633 (Ext 2633)

Alasdair McEachan  
Senior Solicitor  
Legal Services  
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Tel 01343 563080 (Ext 3080)

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## Check List for staff dealing with enquiries under FOI(S)A

Please remember to date each area and return the completed sheet to [info@moray.gov.uk](mailto:info@moray.gov.uk) with the response to the FOI enquiry

	Action	Date/Information
1.	FOI(S)A request received by Council	
2.	Validity of request confirmed by CPU and screened for obvious exemptions, need for clarification etc. Exemptions, clarification sent by CPU	
3.	FOI enquiries logged onto Siebel by CPU	
4.	Acknowledged by CPU within 3 days	
5.	FOI enquiry passed to department/s within 1 day- <b>named officer</b> <b>named department</b> <b>target date</b> <b>FOI answer template</b> <b>Check List</b> issued by CPU to departments along with enquiry	
6.	Enquiry investigated by department. Responsibility for gathering information and providing the answer rests with the departments.	
7.	Any queries or uncertainties, need for clarification etc please contact the CPU on <a href="mailto:info@moray.gov.uk">info@moray.gov.uk</a>	
8.	Any requests for clarification from the enquirer, exemptions, refusal notices will be issued by CPU using the FOI templates on Siebel	
9.	<b>Resource intensive FOI - Excessive costs of compliance</b> , having estimated the time taken to locate, retrieve or provide the information, the total cost is more than £600.00 contact CPU who will issue a refusal notice	
10.	<b>Single department requests</b> - send response directly to enquirer by the Target Date (i.e. within 20 days of the receipt of the request by the Council) using the FOI answer template supplied by CPU. The letter should be signed by the responsible officer and copied to their Head of Service	
11.	<b>Single department requests</b> - copy of the reply from the department must be sent to CPU for entry onto Siebel. Please return completed check list at the same time	
12.	<b>Multiple department requests</b> – a reminder sent by CPU 3 days prior to Target Date	
13.	<b>Multiple Department requests</b> - departments send response to CPU a minimum of 3 days before the target date using the answer template supplied by CPU. The response must be signed by the officer responsible for researching the response and copied to their Head of Service	
14.	Remember it is <b>important that all replies go out using the FOI templates</b> as replies must state that if the applicant is unhappy with the response they have the right to a review by the Council and an appeal to OSIC if this is unsuccessful.	
15.	Departments send details of <b>time and costs taken by staff to deal with all request to CPU</b> . This is important as it will form the basis of a review of charges to be undertaken by the Moray Council	
16.	Enquiry closed by CPU	
17.	Any reviews or appeals will be notified to the departments by CPU	

