



CHARTERED INSTITUTE
OF HOUSING
IN SCOTLAND

A BRIEFING ON THE

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 FOR HOUSING PROFESSIONALS

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SCOTTISH EXECUTIVE



THE CHARTERED INSTITUTE OF HOUSING IN SCOTLAND

The Chartered Institute of Housing is the professional body for people in housing and related fields. The Institute has over 17,000 members in the UK and internationally. Our purpose is to maximise the contribution that housing professionals make to the wellbeing of communities.

There are over 1,600 members in Scotland working in local authorities, housing associations, housing co-operatives, Communities Scotland, voluntary organisations, the private sector and educational institutions.

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The Freedom of Information (Scotland) Act 2002 for Housing Professionals

This briefing for housing professionals on the Freedom of Information (Scotland) Act 2002 is written by Derek O'Carroll, Advocate, and is published by the Chartered Institute of Housing in Scotland, funded by the Scottish Executive. Its purpose is to give a very brief summary of the Act and to alert housing providers to developments concerning the implementation of the Act. CIH in Scotland will publish a full Guide to the Act in early 2004 by which time the Codes of Practice will have probably been finalised. This Briefing is copyright but may be freely distributed in its entire original form electronically or in hard copy. The legal position is stated as at 1 July 2003.

Abbreviations and Interpretation

"the Act" and "the 2002 Act" mean the Freedom of Information (Scotland) Act 2002

"the 2000 Act" means Freedom of Information Act 2000

"section" refers to a section of the Act unless otherwise stated

"schedule" refers to a schedule of the Act unless otherwise stated

"public authority" means a Scottish public authority

"applicant" refers to a person who makes an application to a public authority for information to be given

1. Introduction

- 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. At present, there is no comprehensive statutory scheme enabling access to information held by public authorities. While there is a Code of Practice applying to various public bodies which provides guidance as to when information should be released, that Code is non-statutory and cannot be directly enforced by formal legal means.¹
- 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 2002. The rest of the Act will be brought into force by 1 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 will also come into force in 2005. Thus, there will be 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. This includes all local authorities. At the moment, registered social landlords are not public authorities for the purposes of the Act. Therefore, they have no duties under the Act. However, the Scottish Ministers have the power to amend Schedule 1. So far as housing functions are concerned, it is the 2002 Act which will be relevant most, if not all, of the time.

¹ See the Code of Practice on Access to Scottish Executive Information, available at www.scotland.gov.uk/government/foi/codesofpractice.asp, which will continue to apply until the Act comes into force on 1 January 2005.

2. Key features of the Act

- 2.1 **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.
- 2.2 **Who is a Scottish public authority?** The Act places a duty on Scottish public authorities, as specified in Schedule 1 to the Act, to supply information in certain circumstances. Those bodies include local authorities but not RSLs.
- 2.3 **What is meant by ‘information’?** The definition is very wide. ‘Information’ means information recorded in any form. 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 way. It covers all information, whenever created, held by the public authority.
- 2.4 **Who can seek information?** Any person, 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.
- 2.5 **What information is covered and which information is exempt?** 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).
- 2.6 **How does someone make a request for information?** The request must be made 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. Therefore, any request for information may trigger a duty under the Act.
- 2.7 **What does the public authority have to do when it receives a request for information?** 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
 - The public authority may send a fees notice to the applicant (see 2.9 below)
 - The cost of providing the information may exceed the statutory limit (see 2.9 below)

- The information may be exempt (see 2.5 above)
- 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.

2.8 How should the information be provided? The information can be provided by any means which are reasonable in the circumstances. 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

If the applicant has expressed a preference, the public authority must comply if reasonably practicable.

2.9 Charges for information. The public authority may be entitled to charge for the information. The amount of the fee will be determined by regulations. Those regulations will probably be made by the Scottish Ministers in autumn 2003. It is likely that the regulations will provide as follows. If the cost of providing the information is less than £100, the information must be provided free. If the cost is between £100 and £550, the fee will be 10%. If the cost of providing the information is above the limit set in the regulations, (probably around £550), the public authority will not have to provide the information. However, it may choose to do so if it wishes: the fee chargeable will be specified in the regulations. The regulations will also contain an anti-avoidance device to prevent what is in reality a large single request for information being broken down into smaller requests which do not exceed the cost limits in the regulations.

2.10 Duty to advise and assist. 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 be issued by the Scottish Ministers (see 2.14 below) will provide guidance on that duty. If a public authority follows that guidance, the duty is fulfilled.

2.11 Scottish Information Commissioner. The Act establishes the office of the Scottish Information Commissioner. He is Kevin Dunion. The Scottish Information Commissioner's web address is www.itspublicknowledge.info . His role mirrors that of the UK Information Commissioner who enforces the Freedom of Information Act 2000. The UK Information Commissioner also enforces the provisions of the Data Protection Act 1998 (a UK wide Act). The Scottish Information Commissioner's role is to promote observance, by Scottish public authorities of the Act and Codes of Guidance. The Scottish Information Commissioner may also make recommendations as to good practice and has an enforcement role (see 2.12 below).

2.12 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 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 Scottish Information 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 Scottish Information Commissioner.

2.13 Publication schemes. All public authorities must create 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 may publish model publication schemes for different kinds of public authorities². Local authorities must submit their publication scheme to the Commissioner by 28 February 2004. Information which is published in accordance with the publication scheme is exempt from the Act.

2.14 Are there any Codes of Practice? Under Section 60, the Scottish Ministers may issue a Code of Practice providing guidance to public authorities on good practice in applying the Act. A draft has been published and can be found at www.scotland.gov.uk/government/foi/reviseds60.pdf. Under Section 61, the Scottish Ministers may issue a Code of Practice providing guidance to public authorities on good practice in record keeping. A draft has been published and can be found at www.scotland.gov.uk/government/foi/s61revised.pdf. The drafts will go to the Commissioner in autumn 2003 for consultation and will be published sometime thereafter.

2.15 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 it. 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.

² No such model had been published at 1 July 2003. Check the Scottish Information Commissioner and Scottish Executive websites for the latest information: addresses in Part 4 of this Briefing. For the model scheme issued by the Information Commissioner under the Freedom of Information Act 2000, see www.dataprotection.gov.uk

2.16 Relationship with other legislation.

- **Data Protection Act 1998.**³ The 2002 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 2002 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 2002 Act which provides (roughly speaking) that personal data requests by the data subject are exempt from the disclosure provisions of the Act and instead have to be dealt with under the 1998 Act. Personal data requests by those who are not the data subject are dealt with under the 2002 Act. It is likely however that compliance with such requests would infringe the data protection principles. Therefore, those data would be exempt information under the Act.
- **Human Rights Act 1998.**⁴ The Human Rights Act 1998 in effect, incorporates the terms of the European Convention on Human Rights into UK law. It is possible that in some very limited circumstances, an individual may have a right of access to information not given under the 2002 Act. All provisions of the 2002 Act must be read in the light of the Human Rights Act 1998 and interpreted consistently with it. Where there is a conflict, the Human Rights Act 1998 prevails.
- **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. In particular, environmental legislation will have its own separate scheme for access to information.
- **Other legislation preventing access to information.** Information is absolutely exempt if the disclosure is prohibited by any enactment.

³ See the Guide published by the Chartered Institute of Housing in Scotland for more explanation of that Act.

⁴ See the Guide published by the Chartered Institute of Housing in Scotland for more explanation of that Act

3. Consequences for Public Authorities

- 3.1 The Act is a complex piece of legislation. It will impose much greater demands on public authorities than the existing Code of Practice. Even though the Act will not be brought fully into force until 1 January 2005, they will need to begin preparations for implementation of the Act before that date. The Scottish Executive has said that it will liaise with all public authorities in Scotland to ensure that appropriate levels of advice and assistance are available to facilitate implementation of Freedom of Information in Scotland. The following are the main effects of the Act for public authorities.
- 3.2 Each public authority must adopt and maintain a publication scheme relating to all information which it intends to publish as a matter of course. The Commissioner must approve the scheme. Local authorities must submit their publication scheme to the Commissioner by 28 February 2004.⁵ He will make a decision on approval by 1 June 2004. He has not yet published a model publication scheme. For the UK Information Commissioner's Model Publication Schemes and approved schemes (which relate to UK public authorities) see www.dataprotection.gov.uk.
- 3.3 Because the Act will be retrospective⁶, public authorities will need to review its systems for storage and retrieval of information held in records, past and present. Public authorities need to start the process now. See the draft Code of Practice at www.scotland.gov.uk/government/foi/s61revised.pdf. The Scottish Executive FoI implementation group has recommended that guidance in the form of 'generic Model Action Plans' which are 'sector-specific' be developed and approved by the Scottish Information Commissioner. No such MAPs have yet been published as at 1st July 2003.
- 3.4 Public authorities will need to consider who will deal with requests for information and how. Consideration will have to be given to integration of requests for information under the 2002 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.
- 3.5 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.
- 3.6 There will probably need to be a designated post with 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.

⁵ This is also the deadline for the Scottish Ministers, the Scottish Parliament and the police, among others. The deadline for other public authorities can be found in the 2003 report to the Scottish Parliament: see www.scotland.gov.uk/government/foi/reportprogressfoi.pdf.

⁶ 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.

- 3.7 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 it is likely to have significant numbers of requests.
- 3.8 Public authorities will need to train all their employees 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. The Scottish Executive has contracted with Masons Solicitors to design a flexible training package that all Scottish public authorities might want to use. The Chartered Institute of Housing in Scotland will also be organising a number of training events around the Act designed specifically for housing professionals.

4. Further sources of information

The Chartered Institute of Housing in Scotland intends to publish a detailed Guide to the Act, to be written by Derek O'Carroll, Advocate, early in 2004 once the Codes of Practice have been finalised.

Websites

4.1 British legislation on FoI and Data Protection.

www.scotland-legislation.hmso.gov.uk/legislation/scotland/acts2002/20020013.htm
This link is to the text of the 2002 Act. You can also access the explanatory notes to the 2002 Act which were prepared by the Scottish Executive at the time the Act was presented to the Scottish Parliament as a Bill. For the text of the regulations under the 2002 Act (which brought some parts of the Act into force) see www.scotland-legislation.hmso.gov.uk/legislation/scotland/ssi2002/20020437.htm. For the 2000 UK Act, see www.legislation.hmso.gov.uk/acts/acts2000/20000036.htm. For the text of the Data Protection Act 1998 go to: www.dataprotection.gov.uk/dpr/dpdoc.nsf.

4.2 Scottish Executive pages on FoI

www.scotland.gov.uk/government/foi
These pages contain the working papers of the FoI working group, the draft Codes of Practice to be issued under Section 60 and 61 of the Act, links to the reports to the Scottish Parliament about the implementation of the Act among other things. See below for telephone and address of the Scottish Executive FoI Unit.

4.3 Scottish Information Commissioner

www.itspublicinformation.info
This site was still in the process of construction at the time of writing but nevertheless contains useful information about the Act and the Scottish Information Commissioner. See below for telephone and address.

4.4 Information Commissioner

www.dataprotection.gov.uk
The Information Commissioner is now responsible for both data protection legislation and UK freedom of information legislation. This site is probably the best place to start research on either topic. The site is large and includes a wealth of information on such issues.

4.5 Department of Constitutional Affairs FoI pages

www.lcd.gov.uk/foi/foidpunit.htm
The Department of Constitutional Affairs has responsibility for FoI and data. These pages give access to the 2000 Act, reports on implementation of the Act, background information on the Act, Codes of Practice, a list of all secondary legislation made under the Act and links to that legislation. The guidance to government and NDPB/quango bodies on publication schemes is also there together with an archive for those who really want information overload. The equivalent page for data protection is at www.lcd.gov.uk/foi/datprot.htm

4.6 European FoI

www.rz.uni-frankfurt.de/%7Esobotta/FoI.htm

Contains a very basic but useful collection of primary European Community material on FoI with links direct to the texts of the relevant legislation, community materials and caselaw. It does not appear to be up-to-date though. For the official Council of Europe site on data protection go to www.coe.int/T/E/Legal_affairs/Legal_co-operation/Data_protection (note the underscores in the address) which has loads of official materials in this area. The official EU site on the same subject is at http://europa.eu.int/comm/internal_market/en/dataprot/index.htm which contains the materials relevant to EU law including the legislation forming the basis for the UK 1998 Act and other measures. For the Irish Information Commissioner site, see www.oic.gov.ie

4.7 International aspects of FoI

www.freedominfo.org

The editor of this site says: "This site is a one-stop portal that describes best practices, consolidates lessons learned, explains campaign strategies and tactics, and links the efforts of freedom of information advocates around the world. It contains crucial information on freedom of information laws and how they were drafted and implemented, including how various provisions have worked in practice. freedominfo.org is a virtual network that links these movements as they struggle for greater openness. It is the online institutional memory of freedom of information campaigns throughout the world".

4.8 Campaigns for FoI.

www.cfoi.org.uk/scotland.html

This is the site of the Campaign for Freedom of Information in Scotland. It is packed with now mainly historical material on the Freedom of Information (Scotland) Act 2002. In addition, there is a very clear list of links to all the official material relating to the Bill such as parliamentary debates, lists of amendments, official reports etc. Go to www.cfoi.org.uk for the equivalent for the English legislation, which site has lots more material and more links. For the Friends of the Earth pages on FoI see www.foe-scotland.org.uk/nation/foi.html

4.9 Other sites on Data Protection and FoI.

<http://pages.britishlibrary.net/rwong/index.htm>

This site is an example of one of the joys of the web: a one person site (maintained in this case by Rebecca Wong) focusing on an particular issue (here being data protection) where for no apparent reason (other than enthusiasm and interest perhaps) loads of free material is provided, much of which would be difficult to track down any other way. So in this site, there is a small list of links to official sites on DP issues, a huge list of links to a variety of unofficial sites (some being rather better than others...), some very interesting links to sites about genetic privacy, a list of online and papers journals on information and privacy issues as well as various web discussion sites and email alert services.

Conventional contact details

Freedom of Information Unit, Scottish Executive:

4th Floor South West
St Andrew's House
Regent Road
Edinburgh EH1 3DG

Tel: 0131 244 5210

Email: foi@scotland.gsi.gov.uk

Scottish Information Commissioner

The office of the Scottish Information Commissioner will be located in St Andrew's, Fife. Until that office is operational, his temporary contact details are:

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