

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 AND ENVIRONMENTAL INFORMATION (SCOTLAND) REGULATIONS 2004

1. Introduction

1.1 The following resolution was approved by the 2005 Annual General Meeting:

“This AGM instructs Council to draft and issue guidance to Local Associations on the use of the Freedom of Information (Scotland) Act 2002 and Environment Information (Scotland) Regulations 2004.”

1.2 Both FOISA and EIR regulations came into effect from 1 January 2005. At a conference held in December, at which the Institute was represented, the Scottish Information Commissioner intimated that his office had received 490 FOISA appeals and 59 EIR appeals. Therefore, the legislation is having significant impact on the work of Scottish public authorities.

1.3 This advice provides an outline of both FOISA and EIR. Thereafter, the advice sets the legislation in the context of other avenues open to Local Associations to elicit information from Scottish public authorities and on the potential impact of requests made to Scottish public authorities. At this stage, it is clear that FOISA requests have raised issues for local authorities.

1.4 Finally, the advice recognises the potential for members to seek legal support on individual FOISA requests.

1.5 It should be noted that, at the time of preparing this advice, the Scottish Executive was undertaking a consultation on the operation of FOISA and that detailed guidance is awaited from the Executive on the operation of EIR.

2. Freedom of Information (Scotland) Act 2002

2.1 FOISA gives an entitlement to a person who requests information from a Scottish public authority to be given that information subject to certain exemptions. The following paragraphs provide an outline of the Act. (More information can be found on the Scottish Information Commissioner’s website www.itspublicknowledge.info.)

2.2 Scottish public authorities include the Scottish Executive, all Scottish local authorities and institutions of further and higher education. Individual schools are not public authorities within the meaning of the Act. FOISA also does not apply to trade unions. It does not apply to the Scottish Negotiating Committee for Teachers nor to COSLA, the umbrella organisation for Scottish local authorities. It is, however, open to Scottish Ministers to add or remove other bodies to the list of Scottish public authorities.

2.3 An applicant “requesting” information is required to put the request in writing or by electronic means. Public authorities have a duty to provide reasonable advice and assistance to the applicant. To prepare for FOISA public authorities were encouraged to undertake an information audit, to decide which information should be published and developing appropriate information management systems and processes.

- 2.4 FOISA requests have to be responded to within 20 working days. If an applicant requires additional information to process the request the “clock” does not start counting down until the public authority receives that additional information from the applicant. The clock also stops if the authority requires the applicant to make a fee payment. (It is assumed that no charge will be made if the cost of processing the request is less than £100).
- 2.5 The request must, subject to the caveats set out above, be responded to within 20 days by releasing the information requested, issuing a refusal notice setting out which exemptions apply to the request and why or by issuing a formal notice that the public authority doesn’t hold the information.
- 2.6 It is open to authorities to decide whether to charge a fee. However, authorities can set a fee based on staff time up to a maximum of £15 per hour to retrieve information and reasonable costs for photocopying.
- 2.7 It is open to authorities to decline requests by applying the exemptions set out in FOISA. Some categories of information are completely excluded, for example, documents related to legal matters. The main test to be applied by an authority is whether it is in the public interest to release the information or whether there would be public harm to the authority if the information is released. This is defined as substantial prejudice. It is also open to authorities to refuse to process requests which cost more than £600 to process.
- 2.8 Personal information is exempt. Such information is covered by the Data Protection Act 1998 and if a FOISA request could contravene any of the data protection principles or section 10 of the DPA, which covers the right to prevent processing likely to cause damage or distress, the request may be refused.
- 2.9 FOISA should not interfere with the effective conduct of industrial relations between employing public authorities and trade unions. Where a FOISA request would interfere with sensitive negotiations exemption may be sought under clause 30(c) of the Act, Prejudice to the effective conduct of public affairs, or clause 36(2) Confidentiality where disclosure would breach negotiations which parties consider to be confidential to allow effective negotiations.
- 2.10 If a FOISA request is refused then an applicant can ask for the public authority to review its decision and authorities are under a duty to set out review procedures. An applicant may also seek a review if the authority has failed to provide assistance with making the request or if a fee is believed to be unreasonable.
- 2.11 It is open to a public authority to refuse to review a decision if it considers the original request vexatious or very similar to a previous request from the applicant.
- 2.12 An applicant who is dissatisfied by the review of the request, or has not received an outcome to the review request within 20 working days, may appeal to the Scottish Information Commissioner. The Scottish Information Commissioner is independent of the Scottish Parliament, the Scottish Executive and other Scottish public authorities. The Commissioner has a duty to promote observance of the Act and a duty (unlike his counterpart in England and Wales) to promote good practice by Scottish public authorities. The Commissioner may give an authority a practice recommendation to assist the authority in conforming with the Code of Practice.

- 2.13 In dealing with appeals Scottish Information Commissioner will investigate the complaint but can refuse to do so if the applicant has failed to use the authority's review procedure fully or if the request is frivolous or vexatious. Where the Scottish Information Commissioner investigates the complaint a decision will normally be reached within 4 months from the date of the appeal. The Scottish Information Commissioner may issue an information notice on a Council which requires the Council to provide specified information in relation to its conformity to the Code.
- 2.14 In addition to a power to reach a decision in relation to any appeal brought by an individual applicant (decision notice) the Scottish Information Commissioner has the power to issue an enforcement notice against any Scottish public authority which has failed to comply with the Act.
- 2.15 Appeals against decisions of the Scottish Information Commissioner, made by Scottish public authorities or by applicants, are normally dealt with by the Court of Session.

3. **Environmental Information Regulations**

- 3.1 The Environment Information Regulations came into effect on 1 January 2005 and apply to requests for environmental information which fall outwith FOISA. (The following paragraphs provide an outline of the Regulations. Further information can be found on www.itspublicknowledge.info.)
- 3.2 EIR not only applies to public authorities covered by FOISA but apply to some private companies, including companies involved in energy, water, waste and transport.
- 3.3 Environmental information covers information on the state of the environment including air, water, soil, land, flora and fauna, diversity, genetically modified organisms; information on admissions and discharges, noise, energy, radiation, waste and other such substances; measures and activities such as policies, plans and agreements; reports, cost benefit and economic analyses; the state of human health and safety, contamination of the food chain; and cultural sites and build structures (as these may be affected by environmental factors).
- 3.4 EIR requests are subject to the same public interest test which applies to FOISA. Where information is not to be released it is for public authorities to justify the refusal to disclose information and refusals must set out the authority's view on the "substantial prejudice" which would follow from releasing the information.
- 3.5 Where a request has been made the public authority has a duty to assist the request and must respond within 20 working days, other than where the request is particularly complex and voluminous. It should be noted that, unlike FOISA, requests can be verbal requests.
- 3.6 EIR Code of Practice lays an obligation on Scottish public authorities to have proactive dissemination of information regimes in place.

4. **Trade Unions Access to Information**

- 4.1 FOISA and EIR have been introduced to allow individuals to access information. Trade unions enjoy collective rights to access information from employers. Therefore, it is recommended that Local Associations should not see FOISA or EIR as a first resort.
- 4.2 In obtaining information from employers for collective bargaining purposes trade unions should seek to use the ACAS Code of Practice 2, Disclosure of Information to Trade Unions for Collective Bargaining Purposes (1977). The Code derives from the Employment Protection Act 1975 and both the Code and the Act apply to employers operating in both the public and private sectors but not to collective bargaining between employers associations and trade unions. (The Code is appended).
- 4.3 The information to be disclosed covers (i) pay and benefits, (ii) conditions of service, including policies on methods such as redeployment and redundancy, (iii) manpower, (iv) performance, including productivity data and (v) finance.
- 4.4 The information to be disclosed is “that without which a trade union representative would be impeded to a material extent in bargaining and which it would be in accordance with good industrial relations practice to disclose for the purpose of collective bargaining.” (Paragraph 5).
- 4.5 While there are restrictions within the Code on types of information which may be disclosed the Code provides a vehicle for obtaining information. Trade unions should routinely receive information for trade union purposes. For example, trade unions should be advised of budgetary matters before Councils finalise budget positions. Access to such information should be made under ACAS Code 2.
- 4.6 In March 2005 the Information and Consultation of Employees Regulations (2004) came into effect. These regulations lay obligations on employers to provide information to employees on certain matters and to have clear arrangements to consult with employees.
- 4.7 It is possible for pre-existing agreements to be considered valid arrangements. A standard information and consultation procedure covers the following points:
 - (a) the recent and probable development of the undertaking’s activities and economic situation,
 - (b) the situation, structure and probable development within the undertaking and on any anticipatory measures envisaged – in particular where there is a threat to employment within the undertaking,
 - (c) decisions that are likely to lead to a substantial change in work organisation or in contractual relations including business transfers and collective redundancies.

DTI has issued guidance to provide further information on the nature of information.

- 4.8 The SNCT has no direct locus in consultation and information arrangements at local authority level but, following a challenge in one council area, the Joint Secretaries issued advice to all LNCTs.

- 4.9 The Health and Safety at Work etc Act 1974 requires employers to consult safety representatives. This provision has been strengthened by the Safety Representatives and Safety Committees Regulations 1977 (SRSCR).
- 4.10 These regulations allow recognised trade unions the legal right to appoint workplace safety representatives. Under the regulations employers are required to consult with safety representatives on any measure being introduced to the workplace which may substantially affect health and safety, including new technology. The employer has to plan and organise health and safety training and appoint competent people to assist on health and safety and to implement procedures for serious and imminent risk.
- 4.11 In addition, under regulation 7 of the SRSCR safety representatives are entitled to full information from their employers. The approved Code of Practice to the regulations sets out what the employer should make available. There is provision in the ACOP for certain matters not to be disclosed. These restrictions are similar to restrictions in FOISA or EIR.
- 4.12 Therefore, on health and safety matters, it is advised that local secretaries and local association HASAW representatives should use HASAW, SRSCR and the ACOP rather than FOISA or EIR in the first instance. This will elicit no less information than FOISA or EIR but breaches of HASAW or SRSCR bring legal remedy and, significantly, legal protection for safety representatives from being victimised when carrying out their duties.
- 4.13 The use of FOISA and EIR for collective bargaining purposes should only be pursued by local associations when the established procedures set out above have been exhausted. Before lodging a request under FOISA and EIR local association secretaries should discuss the matter with the Area Officer or EIS HQ. The costs of any FOISA request made by the Local Association to an authority lie with that Local Association. Any decision to appeal decisions by the Information Commissioner on FOISA or EIR matters will be solely for the Employment Relations Committee, in line with the EIS Case Handling Protocol.
- 4.14 Local association secretaries may be approached by members who wish to make FOISA and EIR requests. Employees are entitled to make such requests from their employer. If the local association believes that the information is relevant to collective bargaining matters then the local association should pursue the matters through its established machinery or make the request through the ACAS Code in the first instance. If the local association believes that the information is relevant only to that member the member should be advised it is an individual matter which they have a right to pursue on a personal basis. Arising from that decision legal representation would not normally be provided should the member wish to appeal decisions as far as the Court of Session.

5. **Impact on Members**

- 5.1 Most queries to the EIS relating to FOISA requests are regarding requests made to local authorities for information which is not held by the local authority at authority level. Such information may be publicly identify teachers indirectly, or in some circumstances, identify teachers but would not be deemed to be in breach of the Data Protection Act.
- 5.2 The DPA, 1998 covers the protection of individuals with regard to the processing of personal data and sensitive personal data. Where a FOISA request can, directly or indirectly, identify

an individual it is clear that sensitive personal data, which is biographical in detail, will almost certainly be exempt.

- 5.3 Personal data may not be exempt since the DPA permits disclosure under statutory legislation, such as FOISA. Two examples may illustrate this complex area. One council released information to disclose the number of complaints lodged against a head teacher. The decision was that such information was not sensitive personal data, did not relate to the Headteacher in a biographical sense and was consequently not exempt. In another case, a FOISA request seeking qualifications of staff within a local authority area was refused and appealed to the Information Commissioner. He held that it was in the public interest to divulge the qualifications of the most senior members of that department. It will be some time before there is sufficient authority and case law on the interaction of FOISA and DPA, both of which are the responsibility of the Information Commissioner. However, it should not be assumed that DPA offers total protection to information relating to members being released under FOISA requests.
- 5.4 The EIS is concerned that local authorities have asked schools for information at very short notice to comply with FOISA requests. If the information is not held by the local authority the information request should be resisted by that authority. However, it seems likely that local authorities will hold and publish more information. This will generate a further bureaucratic demand on schools. Local association secretaries should raise this matter locally. LA secretaries should also seek information on the council's publication policies.
- 5.5 Further, the Institute is concerned that FOISA will generate league tables within and across authorities relating to exam results, exclusions and dismissals of teachers. Since the information released will have to comply with the terms of the request it may not be possible for such information to be accompanied with adjusted data which places the information in context. In that regard FOISA will politicise education.

6. Conclusions

- 6.1 FOISA and EIR provide information upon request to individuals. Therefore FOISA can be used by local associations to elicit information from councils.
- 6.2 However, local associations should be able to access such information under the ACAS Code of Practice 2, Disclosure of Information to Trade Unions for Collective Bargaining Purposes, the Information and Consultation of Employees Regulations, the Health and Safety at Work Act and the Safety Representatives and Safety Committee Regulations. These pieces of legislation should be used first, failing which FOISA should be used, taking advice from Area Officers or EIS Headquarters.
- 6.3 It is recognised that FOISA and EIR have potential implications for individual members and schools. Local association secretaries should seek information from Councils on publication regimes and should raise workload demands with councils. Where FOISA requests impact on individual members at school level EIS HQ should be kept informed.