



Local Government Association

delivering freedom of information

a practical guide to the Freedom of Information Act 2000

e-government



The Constitution Unit

Acknowledgements

Author: Jim Amos, Honorary Senior Research Fellow, The Constitution Unit

The guide covers the essential information you need to know about the Act, and gives guidance on what you need to do in normal situations to apply it. It cannot, however, replace the need to take legal advice, as appropriate, on the proper application of the Act.

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Association of Greater Manchester Authorities

Bedfordshire County Council

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Other bodies:

Department of the Environment, Food and Rural Affairs

The Audit Commission

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The National Archives

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preface

why is the LGA producing this guide?

The LGA exists to promote better local government. We work with and for our member authorities, to realise a shared vision of local government that enables local people to shape a distinctive and better future for their locality and its communities. The reputation of local government can be enhanced by ensuring that decision-making is not seen as secretive or unresponsive. Authorities need to ensure that decision-making is not seen as secretive or unresponsive. Authorities need to ensure that staff understand that any written or emailed request for information, will be a valid FOI request. This means that all staff dealing with the public must be trained in the handling of requests.

This guide is designed for local authority officers and councillors who will have responsibilities relating to information requests made to a local authority. These responsibilities could include involvement in decisions about policies, processes, training and monitoring of compliance with the Freedom of Information Act 2000 (FOI Act), as well as the other laws and regulations relating to openness. They could also include direct responsibility for decisions about whether to release or withhold particular information.

what should it be used for?

It is suggested that this guide be used as an aid to the training and awareness which will be needed to operate the FOI Act. The guide aims to give a succinct and easy-to-use introduction to the FOI Act and to be complementary to more detailed advice which is becoming available from the Information Commissioner (ICO), and the Department for Constitutional Affairs (DCA). The Local Government Association (LGA) provides a central point for up-to-date advice about the Act.

what is the currency of this guide?

This guide is being published in February 2004, with less than one year to go before full implementation of the FOI Act. It includes information about how to prepare for implementation, and how to handle and take decisions on requests for information when they are received in 2005.

The Office of the Deputy Prime Minister (ODPM) is currently reviewing the responses it received to consultation about the need for revisions to legislation, that applies to local government in the context of the FOI Act and to the associated guidance. Consideration is being given to how to achieve greater consistency between the categories of information that authorities can classify as exempt under Schedule 12A of the Local Government Act 1972 and the FOI Act. The ODPM review will also seek best practice around the concept of 'key decisions' in relation to local authorities' forward plans, and identify any action required by councils to ensure implementation of the FOI Act by January 2005.

There are parts of the Act which we expect to be clarified by case law as decisions from the Information Commissioner and the Information Tribunal are made available. In particular, interpretation of the public interest as required by section 2 of the Act. We intend that this guide will be useful to authorities over a two or three year period, provided that the sources of information listed in Annex C are consulted on a regular basis.

Further information: see Annex C for detailed website addresses for:
LGA - for information and links which will alert people to changes from the position described in this guide
ICO - for the latest guidance and information about cases
ODPM - information about legislation for local government
DCA - information about secondary legislation, including fees regulations and codes of practice

foreword

One of the paradoxes of the age in which we live is that, despite historically high levels of prosperity and well established democratic institutions, there appears to be a rising tide of apathy and, in many cases, cynicism about how the system works. Trust in government - which must be closely associated with the availability and integrity of information - is far too low. The Freedom of Information Act 2000 offers a golden opportunity for our public institutions and services, including local authorities, to address these trends.

To those who focus only upon the superficial complexity of the Act this may seem a surprising assertion. But the Right to Know, which creates an assumption of access to official information, is a direct challenge to cultures of unnecessary secrecy - in Whitehall and elsewhere. Freedom of Information encourages public bodies to publish information about themselves and their plans. This should ensure better information about matters which affect people's daily lives and help people make better choices. The Act will increase transparency and accountability at all levels of public life, promoting better administration. All this must lead away from apathy and cynicism and towards better-informed participation in debate about the issues of the day.

Authorities can choose to seize the opportunities presented by the Act and harness its benefits. Or they could focus on trying to exploit every ground for withholding information. The starting point should always be on disclosure wherever possible. If authorities fail to focus on the benefits, I fear they will be seen as ever more secretive and unaccountable.

It is in this context that I welcome this guide to *Delivering freedom of information*. I believe it will go a considerable way to equipping local authorities to deal with the technical challenges of the Act. But, much more fundamentally, it will help them rise to the challenges of regaining and retaining the trust of those they exist to serve.

Richard Thomas

Information Commissioner

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1. introduction

The FOI Act is part of a wider group of policies to modernise government and to ensure that decision-making is more open and accountable. Local government has had a head start over some other parts of the public service, as local authorities have been subject for some time to legislation requiring openness. For example, a high level of access to meetings and to most reports and minutes of decisions; and in the context of audit legislation, access to very detailed financial information.

As a result, local government is already operating with a high degree of openness.

Nevertheless the FOI Act will have a major impact on local authorities. It will enable people to delve deeper into the processes of an authority through accessing more of its information.

"The Act will bring about a step change in the range of information the public can request from their council and the way in which the council releases it to them."¹

It will also have an impact upon the way authorities manage their information and records and in the way they handle requests for information.

There are a number of reasons why the FOI Act is important, and why special attention and training is needed. The FOI Act will become the central vehicle for policies, processes, and training about openness, for the following main reasons:

- the principle is that all information held by an authority is accessible, unless one of the exemptions in the FOI Act applies;
- it applies to all written requests for information, whether or not the FOI Act is mentioned;

- over time, this Act is likely to create greater public awareness of the opportunities and rights of access to information than is the case with the current patchwork of legislation, regulations and policies. This is likely to lead to more requests for information, including more contentious requests; and
- as services are increasingly e-enabled and available on-line, public expectations that council information should be readily available electronically are rising significantly.

The Act provides new opportunities for local authorities to engage more fully with their stakeholders, to publish routinely more of the information they need and want, thereby enhancing their reputation for openness and gaining more trust.

But there are also risks to reputation and to budgets. The performance of an authority, in publishing information and responding to requests, will be easy to compare with that of other authorities. If the state of the records does not allow information to be found readily, the costs of finding the information will be carried by the authority. If information is refused without justification, the authority will similarly incur additional costs when the applicant appeals.

The FOI Act is being implemented in stages. The requirement for local authorities to operate a publication scheme came into force on 28 February 2003. Full implementation of all provisions, including the right of individual access will come into force on 1 January 2005. The Act will apply to all information 'held' at the time a request is made. It is therefore essential to plan thoroughly for implementation.

¹Office of the Deputy Prime Minister, *Access to Information in local Government*, September 2002, page 5.

2. how the FOI Act relates to other legislation requiring openness

2.1 Overview

" The Freedom of Information Act will provide an over-arching right of access to all information held by a local authority, over and above the existing statutes relating to specific service areas where authorities hold a large range of information."²

In essence the FOI Act can be considered as providing a framework within which all requests for information should be considered. The following aspects of the Act support this view:

- all written requests are FOI Act requests (section 8);
- if other legislation or EU regulation prohibits the provision of information, that prohibition is upheld by the Act (section 44);
- if other legislation requires information to be provided, that is upheld by the Act. (section 78); and
- if other legislation or EU regulation provides a discretion not to disclose information, that discretion must be exercised according to the terms of the FOI Act. This will often be subject to the public interest test in section 2.

Local authorities will also need to consider access rights under the following legislation:

- the Data Protection Act 1998 (DP Act) (requests for personal data);
- the Environmental Information Regulations 1992, amended 1998 (EIRs) (requests for environmental information)³;
- Audit Commission Act, and the Accounts and Audit Regulations 2003 (requests made under these provisions); and
- Local Government Act 2000, as well as Part VI of the Local Government Act 1974 (access to meetings and information relating to formal meetings).

2.2 Personal data

The Data Protection Act 1998 (DP Act) gives an individual the right to obtain a copy of any personal information held about him or her. This is known as the right of subject access. The DP Act also imposes other responsibilities upon those who collect and process personal information. These are known as data controllers. In particular they have to comply with the eight data protection principles listed in Schedule 1 of the DP Act.

The FOI Act will amend the definition of personal data so far as subject access rights are concerned. From January 2005 there will be a right of access to any information held by a public authority which identifies and relates to a living individual, with the sole exception of unstructured manual records relating to personnel and staffing matters. Authorities are not obliged to respond to requests for unstructured manual data (the information due to be brought into the scope of the Act for the first time) unless they are given a description of the data together with any information they reasonably need to locate the data. The fees that may be charged for this new class of data will be those permitted under the FOI Act rather than the £10 allowed under the DP Act.

Section 40 of the FOI Act means that if someone requests information about himself or herself, this automatically becomes a 'subject access request' under the DP Act. If someone requests information about someone else, then disclosure should be made under the FOI Act unless there would be a breach of any of the data protection principles. In practice, this means that information should be disclosed unless it would be unlawful, if it would be unfair to the data subject, or if, had the request been made by the data subject, an exemption in the DP Act would have applied.

Section 10 of the DP Act allows data subjects to issue notices to data controllers requesting that they cease processing their personal data or that they do not disclose it to a third party. One of the

² Office of the Deputy Prime Minister, *Access to Information in Local Government*, September 2002, page 12.

³ revised regulations will be in force from January 2005.

effects of section 40 of the FOI Act is that the public interest test must be applied before complying with such notices. The outcome of this provision is to stop collusion between public authorities and data subjects. This might occur, for instance, if an elected member issued a section 10 Notice to a council asking it not to disclose information about wrongly claimed expenses.

The organisation primarily responsible for holding the information (the data controller) carries responsibilities when its information is processed by a third party, for example, a pensions provider, or a contractor where a function such as housing benefit administration has been contracted out.

2.3 Environmental information

The Environmental Information Regulations 1992 (EIRs), as amended in 1998, currently provide a right of public access to a wide range of environmental information held by public authorities. This includes any information which relates to the state of the land, including water, air, flora or fauna; any activities which adversely affect the environment (including light, noise, and other emissions and nuisances); and any measures which are designed to protect the environment. These regulations are being revised in order to implement the UNECE convention on access to information

and the new EU Directive on public access to environmental information.⁴ We expect these regulations to be brought into effect in January 2005 in line with the FOI Act.

The revisions make clear that environmental information is defined very broadly. In addition to information which is obviously environmental, as shown above, it includes; plans, programmes, cost-benefit and other economic analyses which relate to environmental information. On this basis a large amount of the information held by local authorities could be considered to be environmental. For example, information relating to: roads, traffic, maintenance, land use planning, development control, buildings and estates. Defra and the DCA acknowledge the similarities and are working to ensure, as far as possible a seamless regime.

In many respects the EIRs are aligned quite closely with the FOI Act. Requirements are similar for records management, publications schemes, advice and assistance, and the powers of the Information Commissioner. The Commissioner's general advice is that in most cases, given the similarity between the two, it is best to adopt a unified approach to the FOI Act and the EIRs, while bearing in mind that there are some important differences. These are summarised in the table below:

FOI Act	EIRs
Request must be in writing	Request need not be in writing
Exemption where cost of compliance exceeds the 'appropriate limit' as defined in the Fees Regulations	No equivalent exemption. However 'reasonable' charges can be made
Information held on behalf of another person is not included	All information which is held is included, whether it is held on behalf of another person or not
Some exemptions are not subject to the public interest test	All exemptions are subject to the public interest test
Information which would prejudice commercial interests can be withheld if the public interest in withholding it is greater than the public interest in release	Where a request relates to information on emissions into the environment, it cannot normally be refused

Further information about the DP Act, see Annex C for web address.

⁴ UNECE, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention)* EU Directive 2003/4/EC of 28 January 2003.

The EIRs provide fewer exemptions than the FOI Act, and the public interest test will apply to all categories of exemption under the EIRs. This means that information which could be exempt under the FOI Act may nevertheless have to be released under the EIRs, which take precedence over domestic legislation.

If environmental information is made available in accordance with good practice under the processes established for implementing the FOI Act, an authority will normally find itself also in compliance with the revised EIRs. When an authority decides to refuse to provide environmental information, it will need to be clear that its refusal is based upon exemptions within the EIRs and that it has applied the EIR exemptions in a 'restrictive way' and weighed the public interest.

2.4 Annual audit

In the context of the current regulations which relate to audit of the accounts of a local authority, electors and 'interested' persons already have the right of access to detailed information relating to the financial transactions of an authority.⁵

An elector may inspect and make copies of any statement of accounts prepared by a local authority in whose administrative area he or she lives. The electoral role should be checked to verify that the person seeking to exercise these rights is a local government elector for the administrative area of the council concerned. This right is unrestricted in terms of when it may be exercised. It is a criminal offence to obstruct this right.

During the audit process, any person 'interested' may inspect the accounts to be audited including all books, deeds, contracts, bills, vouchers and receipts relating to them. They may also make copies of documents. The right is not constrained by issues of commercial confidentiality. The right of inspection extends to documents supplementary to a contract. For example, schedules of rates.

The right is constrained by timing and timescale limitations, in that it must be exercised in a particular window of 20 working days. The right does not extend to inspection of personal information about the employment or payments or benefits paid to any member of staff.

An 'interested' person is not defined but it is thought the person should have some legal or financial interest in the documents. This lack of definition or useful recent case law means that a view will have to be taken on a case by case basis as to whether a person is 'interested'. A person 'interested' and by implication an elector is entitled to employ an agent who is knowledgeable about accounts if they wish.

The FOI Act does not require the disclosure of more detailed financial information than is available under the audit regulations, but it does enable any person to request detailed financial information at any time. For example, an authority would have to consider under the FOI Act, a request by a person who is not an elector of the authority, for information available to an elector or an 'interested' person under the audit regulations, say, in the previous month.

2.5 Local government legislation - access to meetings

There has been a public right of access to local authority meetings, reports and background documents for several years, under access to meetings and information legislation specific to local government. This is subject to provisions for confidential and exempt information, and gives local authorities duties to publish certain information, or make it available for inspection. While this puts local government ahead of other parts of the public sector in terms of openness, it is by no means a comprehensive access regime.

The Local Government (Access to Information) Act 1985 provides for access to meetings of the council, committees or sub-committees, except where confidential or exempt information would

Further information:
about the EIRs, is available
on the Defra website. See
Annex C for details

⁵ See **Audit Commission Act 1998, sections 14, 15, 16, and Accounts and Audit Regulations 2003, regulations 11-18. Also, designed for applicants, the Audit Commission's booklet Council Accounts - Your Rights.**

be disclosed. The public has a right to inspect copies of the agenda for such meetings, along with associated reports and background papers, at the council offices at least three days before the meeting. A report can be edited and papers withheld, to exclude information which will be discussed in private at the meeting. After the meeting, the public has a right to inspect the minutes (except for items discussed in private) and to be given a written summary of the proceedings dealing with exempt information.

This openness regime was extended to cover decision-making processes under the new executive arrangements. The Local Government Act 2000, and, for England, regulations⁶ made under this Act, make provisions covering access to meetings and decisions of a local authority executive. It also covers access to decisions made by a committee of the executive and by an individual executive member or officer. A written record of decisions must be made as soon as possible after a meeting, including the reasons for these decisions, and all the options considered.

Reports and background papers must be available for inspection (subject to exemptions) after the meeting: reports for six years and background papers for four years. These limits do not apply to the FOI Act. A 'key decision' taken by an officer under delegated powers must also be recorded, together with reasons for the decision, and all the options considered. Although the local government legislation doesn't require publication of officer decisions which are not key decisions, these will be subject to disclosure under the FOI Act.

A forward plan of key decisions to be taken by the authority's executive over the coming four months must be published and updated monthly. It must be available for inspection at the council's offices. A document must be published annually in the local press and made available at the council offices giving information about the forward plan, where documents can be obtained from, and how they may be requested when they become available.

Publication schemes offer an opportunity to publish this information. This will go a long way to meeting a high standard of openness. The ODPM (ex DTLR) guidance pack on new council constitutions, gives more detailed explanation and advice to councils in England on the provisions for access to the decision-making process, under executive arrangements (see chapter 7 of that guidance on 'Accountable decision-making').

Further information about legislation specific to local government is available on the ODPM website. See Annex C for details

⁶ Local Authorities (Executive arrangements) Access to information - (England) Regulations.

3. overview of the Act

3.1 Which authorities does the FOI Act apply to?

The Act applies to all local authorities in England, Wales and Northern Ireland. It also applies to any company which is wholly owned by a public authority. In the local authority context, this includes companies where every member of the company is a member of the local authority. (section 6)

Also included are over 400 bodies individually named in the Act, including, for example, the Local Government Commission, the Audit Commission and the Local Government Ombudsmen in England and Wales.

The EIRs apply to all these public authorities and, in addition, they apply to bodies under the control of any public authority which has public responsibilities or provides public services in relation to the environment. This includes, for example, contracted street cleaning services, waste disposal contractors, caterers, vehicle and building maintenance contractors and pest control companies.

The secretary of state may also designate by order as a public authority subject to the FOI Act, 'any person' who appears to be exercising functions of a public nature or is providing services under contract to a public authority. (FOI Act, section 5)

The Act applies to a very wide range of public bodies, recently estimated as about 100,000, including parish councils, and all maintained schools.

Scottish local authorities are not subject to the UK FOI Act. They are subject to the Freedom of Information (Scotland) Act 2002, which is very similar to the FOI Act and is enforced by the Scottish Information Commissioner.

Further information:
about bodies covered by the Act, see Schedule 1 of the FOI Act for initial schedule of bodies covered. Check DCA and HMSO websites for information about secondary legislation. See Annex C

Further information:
about guidance on publication schemes is available on the ICO website. See Annex C

3.2 General right of access to information

The right of access applies to 'any person'. This could be an individual, or a legal entity such as a company. The Act makes no distinction between a resident, local elector, UK citizen, or citizen of any other country. The applicant does not have to give a reason for the request.

The right applies to any written request for information which is made to the authority, whether or not mention is made of the FOI Act. It applies to information recorded in any form, which is 'held' by the authority at the time of the request. This includes information which is held by another body, for example, a contractor, on behalf of the authority.

Requests for environmental information do not have to be in writing, and under the EIRs all information which is 'held' by the authority, including information held on its behalf and on behalf of others, is potentially available subject to the EIRs.

3.3 Publication schemes

These are a central feature of the Act, and they provide an opportunity for local authorities to engage with the public and stakeholders, explain how FOI works and applies in practice, and proactively release a substantial amount of information.

The Act requires public authorities to adopt and maintain a publication scheme, approved by the Information Commissioner, and from time to time to review it. All local authorities were required to have such schemes approved and operational by 28 February 2003. Four year approval has been given to all of these schemes and they are subject to renewal.

3.4 A request and when the authority must respond

The right applies to *any* written request for information which is made to the authority, whether or not mention is made of the FOI Act. It applies to information which is 'held' by the authority at the time of the request. A request can be in electronic form, but must contain the following:

- name of applicant and address for correspondence; and
- description of the information requested.

Normally, public authorities will have to respond to requests within 20 working days. If an exemption applies and the authority has to consider the balance of the public interest before deciding whether or not to release the information, then it is allowed a 'reasonable' time within which to respond fully. However the authority must still let the applicant know within the 20 day period that an exemption applies and give an estimate of the date by which it will make a decision.

3.5 'Absolute' exemptions

If one of these exemptions applies there is no need to consider the balance of the public interest as set out in section 2. The authority may simply refuse to provide the information citing the exemption and the reasons it applies. There are eight exemptions which are in whole or part 'absolute' ones. The following are the five which we considered most relevant to local authorities:

(note: the full list of exemptions is in annex B)

Information accessible to the applicant by other means (section 21)

Although this is written as an exemption, it does not mean that the applicant cannot obtain the information. It means that the authority does not have to respond to the individual request, because the information is readily available in the public domain. The authority can direct the applicant to

the information, normally in its publication scheme. However the authority may need to give advice and assistance to applicants who need it to assist them to access the published information.

Court records etc (section 32)

This includes information in documents served for the purposes of legal proceedings, filed with a court, or held by a person conducting an inquiry or arbitration. This exemption leaves unchanged the normal rules for obtaining court records.

Personal information about the person making the request (section 40)

This section simply acts as a gateway to the DP Act, which applies to such requests. The FOI Act exemption does not mean that the authority does not have to comply with the request. What it means is that a decision on disclosure must be made under the provisions of the DP Act.

Information provided in confidence (section 41)

This applies if releasing the information would amount to an actionable breach of confidence at the time a request is made. This means that you need to understand and apply the common law test for breach of confidence which includes an inherent public interest test.

The Access Code (s.45) states that a public authority should only accept information in confidence from third parties if it is 'necessary' to obtain that information in connection with any of the authority's functions. An authority would be open to criticism by the Information Commissioner if it agreed unjustifiably to receive information 'in confidence'. The ICO has confirmed that information provided in confidence may have to be disclosed using the public interest defence available in the law of confidence.

Prohibitions on disclosure (section 44)

This applies to information the disclosure of which is prohibited by any legislation, or European Community obligation, or if disclosure would be a contempt of court.

The fact that an absolute exemption applies does not always mean that an authority should refuse to disclose the information. It means that the disclosure is not required under the FOI Act. So, for example, disclosure of personal information may be required under the provisions of the Data Protection Act.

3.6 'Qualified' exemptions (subject to the public interest test)

If an authority decides that one or more of these exemptions applies in a particular case, it must still release the information unless it concludes that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. We consider below the exemptions which are most likely to be relevant to local government, and discuss the public interest test on page 15.

(note: the full list of exemptions is in Annex B)

Information intended for future publication (section 22)

This applies where the authority plans to publish the information in the future, normally in its publication scheme and it is reasonable, at the time the request was made, not to disclose it until then.

Investigations and proceedings conducted by public authorities (section 30)

This exemption covers information relevant to criminal investigations and proceedings, and information obtained from confidential sources for criminal or civil proceedings.

Law enforcement (section 31)

This applies to a wider range of investigations and proceedings not covered by section 30. For example, information which will prejudice the prevention or detection of crime, concerning the assessment or collection of any tax or duty, or relating to regulatory and enforcement activity.

Prejudice to the effective conduct of public affairs (section 36)

This exemption can only be exercised by a 'qualified person'. This means by a minister of the Crown or a body or person explicitly authorised by a minister. It could be employed by a local authority only after a minister of the Crown has authorised the authority or an officer of the authority as a 'qualified person' for the purposes of this section. Currently we have no information about any intentions of ministers in this matter.

Health and safety (section 38)

This exemption applies to information which would, or would be likely to, endanger the physical, or mental health or safety of any individual.

Environmental information (section 39)

This section operates as a gateway to revised Environmental Information Regulations (EIRs) which will be introduced in January 2005 to implement the provisions of the EC Directive on Environmental Information. The revised EIRs will define a regime for environmental information which is in some respects more open than that defined in the FOI Act. For practical purposes the revised EIRs and the FOI Act are quite closely aligned. Access to environmental information is considered in more detail on page 9 of this guide.

Personal information concerning a third party (section 40)

Broadly, requests for personal information about someone else will be dealt with under the FOI Act. Disclosure should not be made if this would breach any of the data protection principles contained in the DP Act.

Legal professional privilege (section 42)

This exemption applies where a claim to legal professional privilege could be maintained in legal proceedings. While information relating to ongoing litigation would almost never be disclosed, there may be a public interest in disclosing general legal advice, for example, about interpretation of a statute.

Commercial interests (section 43)

This exemption applies to trade secrets and to information, the disclosure of which would, or would be likely to, prejudice the commercial interests of any person. This is the exemption which would be relevant to most commercially sensitive information held by local authorities. It first requires a 'prejudice' test to be satisfied. If that is satisfied, the authority must then apply the public interest test.

3.7 Duty to confirm or deny

Most exemptions in the FOI Act include a provision under which the authority is able to refuse to confirm or deny that it even holds the information requested. This applies if letting the requester know that it holds the information would have the effect of disclosing information which the exemption is designed to protect. For example, if someone requests "information relating to the Director of Housing's breach of employment contract", you could probably refuse to confirm or deny that the information exists.

Where this provision is included in exemptions which are subject to the public interest test, then this test must be applied in deciding whether or not to 'confirm or deny' that the information requested is held.

3.8 The public interest test

If an exemption applies to information which has been requested, but it is not subject to one of the 'absolute' exemptions, the authority will still have to consider releasing the information, unless the balance of the public interest supports the maintenance of the exemption.

The public interest test in section 2 of the FOI Act provides that the authority must release the information unless,

"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

This requires the authority to make a judgement about the public interest. Where the balance between disclosure and withholding the information is seen as equal, the information must be released.

In the Introduction to the Freedom of Information Act 2000, the Commissioner lists the following public interest factors that would encourage the disclosure of information:

- furthering the understanding of and participation in the public debate of issues of the day;
- promoting accountability and transparency by public authorities for decisions taken by them;
- promoting accountability and transparency in the spending of public money;
- allowing individuals to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions; and

- bringing to light information affecting public safety.

Similar or identical factors can be found in the case law from other countries and some useful insights come from the way the public interest has been considered overseas.

The Australian Law Reform Commission in 1995 identified factors in favour of disclosure:

- the public interest in government information being accessible;
- whether the document would disclose reasons for a decision;
- whether disclosure would contribute to a debate on a matter of public interest;
- whether disclosure would enhance scrutiny of government decision making processes and thereby improve accountability and participation; and
- potential or actual embarrassment [to government] is not a valid factor in determining the public interest.

The Information Commissioner in Ireland, in his 1999 report, weighed the public interest in a number of his decisions:

- In a case brought by a newspaper relating to the expenses paid to members of the Irish Parliament, he decided that the public interest in ensuring accountability for the use of public funds greatly outweighed any right to privacy in relation to details of expense claims.
- In a case brought by vehicle suppliers to the government, he decided that the public interest in terms of openness and accountability of disclosing tender prices outweighed the possible harm to tenderers.

- In a ruling on a request for a list detailing companies in which jobs were at risk, he found that the public interest favoured withholding the information.

3.9 Advice and assistance

Public authorities must provide such advice and assistance as it would be reasonable to expect to those who have requested information or who propose to do so. However, this could be considered an important element in a larger plan to engage more positively with the public in the context of the FOI Act. Guidance on complying with this duty is included in the Access Code (s.45). If an authority has conformed to this code in providing advice and assistance, it will have complied with its legal duty as set out in section 16.

The code requires that procedures for dealing with requests should be published. It specifies that applicants be helped to frame requests and to describe clearly the information requested. It explains that appropriate assistance could include an outline of the different kinds of information which might meet the terms of the request, and detailed catalogues and indexes where these are available.

Where information is refused on cost grounds an indication should be given of what information could be provided within the cost ceiling. It should be noted that under the EIRs there is no provision for refusal on cost grounds. However requests which are 'manifestly unreasonable' may be refused.

This may be an onerous obligation for some authorities. To meet it effectively will require well trained staff with access to indexes of information resources of the authority. It would be helpful to develop and publish procedures making clear to applicants how they can obtain advice and what they can expect. These may already be included in publication schemes.

3.10 Refusals

A public authority must either provide the information or notify an applicant that their request has been refused within 20 working days. The authority must disclose all information which is not exempt. This will sometimes involve disclosing some of the information requested even if the rest is withheld.

If the authority refuses to disclose any or all of the information requested, it must specify the exemption relied on, and state why the exemption was applied in the particular case. Where the public interest test has been applied, then an explanation of how this was decided should also be provided.

If the refusal is based on the cost of complying with the request or because the request is judged to be vexatious or repeated, then it must notify the applicant of this, and give the reasons.

When notifying an applicant of refusal to supply information for any reason, the authority must give the applicant details of its own complaints procedure for dealing with complaints. It must also provide information about the right to appeal to the Information Commissioner for a decision under section 50.

3.11 Complaints

The Access Code (s.45) specifies that each public authority should have a complaints procedure for dealing with complaints about its publication scheme, about the way a request was handled or with the outcome of a request. Any written reply from an applicant expressing dissatisfaction with an authority's response to a valid request should be treated as a complaint. This provides another opportunity to engage with the public, address complaints professionally and learn lessons from a study of complaints. They can be a valuable source of feedback to the authority about how its systems and procedures are working.

Details of the authority's complaint procedures should be made available to applicants in connection with all decisions taken under the Act. Complaint procedures must be capable of changing or amending initial decisions. Complaints should not be handled by persons who participated in making the original decision.

If a complaint is upheld and information should be disclosed, this should be done as quickly as possible. If a complaint is upheld indicating a failure to follow the proper procedures in considering a request, the authority should apologise for this lapse and indicate how the problem will be remedied.

If the complaints procedure upholds an initial decision not to disclose information, the applicant should be advised of his or her right to appeal, and the steps involved to take the matter to the Information Commissioner.

3.12 Codes of practice

The Act in sections 45 and 46 provides for two codes of practice to be issued and from time to time revised. The Lord Chancellor currently is responsible for both. Initial versions of these codes were issued in November 2002. They define good practice which it would be 'desirable' for authorities to follow in the areas described. One of the functions of the commissioner is to promote the observance by authorities of the provisions of these codes. It is possible that section 45 code will be revised before 2005 and may incorporate advice on compliance with requests under EIR's.

Access code (section 45)

This code must cover the following matters:

- provision of advice and assistance to applicants;
- transfer of requests from one authority to another;
- consultation with anyone to whom the information relates or is likely to be affected by disclosure;

- inclusion of terms relating to disclosure of information in public contracts; and
- provision of a complaints procedure.

Records management code (section 46)

This code is required to set out desirable practice 'for the keeping, management and destruction' of the records of public authorities.

The code itself covers matters such as:

- responsibility for the records management function;
- the requirement to have in place a policy statement relating to records management;
- the selection, training and development of staff and their responsibilities;
- record creation, keeping, and maintenance;
- record closure and disposal arrangements; and
- advice about the management of electronic records.

3.13 Role of the Information Commissioner and the Tribunal

The Information Commissioner

The commissioner is an independent officer who reports directly to parliament. He has the central role in ensuring compliance with the Act and giving the public information about the Act. His duties include:

- promoting the observance by public authorities of good practice and, in particular, of the requirements of the Act and of the provisions of the codes of practice;
- providing information to the public about the Act;
- reporting annually to parliament on the exercise of his functions under the Act; and

- considering complaints from applicants that authorities have not dealt properly with their requests.

The Commissioner's powers under the Act include:

- serving a decision notice on an authority which the commissioner has decided has failed to respond properly with a request for information under the Act. A decision notice must specify the steps which the authority must take to comply. This could include the release of information an authority decided should be withheld;
- serving an information notice requiring a public authority to provide him with specified information to enable him to discharge his duties under the Act;
- serving an enforcement notice if the commissioner is satisfied that a public authority has failed to comply with any of the requirements of Part 1 of the Act. An enforcement notice may be served even if the commissioner has not received a specific complaint;
- approving and revoking publication schemes;
- giving advice, issuing reports, and with the consent of any public authority, assessing whether that authority is following good practice (with the consent of the secretary of state, the commissioner may charge a fee for services under this section of the Act).

We understand that the commissioner intends to encourage greater proactive disclosure through publication schemes and make full use of practice recommendations in order to promote good practice. He also intends to promote the Act to the public beginning with publicity around publication schemes in the early part of 2004 and rights from the end of 2004.

There will be cases where an authority does not release all the information requested and where the applicant exercises his or her right to complain. Providing that they have exhausted any local

complaints procedure, and with the exception of frivolous or vexatious complaints, the commissioner will make decisions as to disclosure or refusal of information. Both parties will be given the opportunity to agree a preliminary decision notice, leading to the withdrawal of a complaint.

Decision notices issued by the commissioner are binding and, unless there is a successful appeal to the Information Tribunal, failure to comply is punishable as a contempt of court.

In most cases, upon receipt of a complaint, the commissioner will require a public authority to provide him with a copy of all its internal documentation setting out the reasons for the refusal of a complaint, copies of relevant internal procedures (for instance a schedule of charges to be made for responding to requests), and a copy of all the information which has been withheld. Authorities are encouraged to volunteer this information to the commissioner to enable him to carry out a swift determination of complaints.

However the commissioner has the power to issue information notices placing authorities under a statutory duty to provide him with the relevant information. These too are appealable to the Tribunal, as with Decision Notices and Enforcement Notices non-compliance is punishable as a contempt of court.

The Information Tribunal

A new Information tribunal will be set up under the Act. An applicant or a public authority may appeal to the tribunal against a decision of the commissioner. There is no right of appeal for third parties (ie third parties who may be affected by disclosure). The Tribunal has powers to allow or dismiss an appeal or to substitute a notice that could have been served by the Information Commissioner.

There is a further right of appeal from the tribunal to the High Court but this can only be made on points of law.

There are thus four tiers of appeal for dissatisfied applicants:

- the internal complaints system of the authority;
- the Information Commissioner;
- the Information Tribunal; and
- the High Court (on a point of law).

3.14 Fees

An authority will be able to charge a fee for dealing with requests for information. Fees will have to be calculated in accordance with regulations made under the FOI Act, except where other legislation gives the authority a power to charge for disclosing the information, in which case that legislation applies.

The draft fees regulations specify that the maximum fee should not be more than ten per cent of the 'prescribed costs' (costs reasonably incurred in locating and retrieving the information), plus 'disbursements' (the actual direct costs of communicating the information to the applicant, such as copying and postage charges). The cost of deciding whether to disclose the information, including any consultations with third parties or legal advisers, is not taken into account.

Where the cost of locating and retrieving the information are over the 'appropriate limit' the authority does not have to comply with the request. However if it decides to comply it may charge the 'prescribed costs' in full for amounts over the appropriate limit.

If a public authority intends to charge someone for the information requested, it must notify the applicant of the proposed charge and may require payment before retrieving the information.

These fees relate to individual requests for information. They do not apply to charges which an authority can make for information provided in accordance with its publication scheme.

If a request is for environmental information, there is no 'appropriate limit'. However 'reasonable' charges can be applied in line with a published schedule of charges. These are not subject to the restrictions defined in the FOI Act fees regulations.

The Act specifies that there will be an upper limit for responding to a request, however authorities will only be permitted to pass on a percentage (likely to be 10 per cent) of the costs of looking and retrieving the information to the applicant. Full details of the fees regulations are expected later in 2004 and further information will be made available through the LGA website.

4. preparing for implementation

4.1 Introduction

The FOI Act became law in November 2000. The right of access to information will come into force on 1 January 2005, so authorities will have had over four years to prepare for implementation. The requirement for each local authority to adopt and maintain a publication scheme came into force on 28 February 2003. Part of the rationale for the earlier implementation of publication schemes was to allow authorities to publish more information, which stakeholders want, reducing the potential volume of individual requests in 2005.

Authorities are expected to be well-prepared for the full implementation of the Act in January 2005. The Information Commissioner has said:

“The Act received Royal Assent in November 2000. The period for preparing for implementation has been more generous than in any comparable jurisdiction anywhere in the world. The public will simply not accept that after all of this public authorities are not properly geared up for meeting their obligations.”

4.2 Records management

Good records management is an essential element to enable the effective management of any organisation. The Lord Chancellor, as required by the FOI Act, has issued the Records Management Code (s.46), and authorities are expected to comply with this code.

In essence, compliance will enable an authority to know what information it holds, where it is and how to access it in response to a request. It will also stimulate review of policies for retention, disposal and destruction of records.

The National Archives have published a number of model action plans for developing records management compliant with the Records Management Code (s.46). One is designed specifically for local government.

They also provide a detailed set of standards and guidance about all aspects of records management, including the management of electronic records. The model action plan for local government with these sets of standards and guidance are essential sources for staff and managers with responsibilities relating to this subject.

4.3 Publication schemes - review

Now that the initial schemes are operational, the question to address is the ongoing management and development of these schemes. In this context it is helpful to look again at the potential benefits to an authority of a positive approach to their schemes. These benefits arise mainly in three areas:

- savings in costs and time: authorities do not have to send an applicant information which is reasonably accessible in accordance with its approved publication scheme;
- reputation: an authority which publishes the information its stakeholders want, in a clear and easy to access way, may expect to gain or enhance a deserved reputation for openness and professionalism; and
- avoidance of mistakes: a systematic management process can be applied to decide which information should be published. By comparison, individual requests must be addressed without delay so as to meet the timescale required by the Act, normally 20 working days. Requests may come at a time when there are other pressures on key staff, during periods of leave.

A review of the publication scheme of an authority should address the following questions:

- is it easy for people who want information, to identify what is included in the scheme and to understand how to access it? If not they will require help and assistance or may make otherwise unnecessary individual requests;

More information:
for access to the National
Archives website visit:
www.nationalarchives.gov.uk

- should more classes of information be added to the scheme before January 2005, with the aim of reducing potential individual requests further? and
- is the system for the regular review and updating of the publication system in place? Such a system will enable an authority to respond to changes in the pattern of requests or a surge of requests about a particular topic, by placing the information requested in its publication scheme.

If it is not already in place, consideration should be given to the process by which stakeholders in general and users of the scheme in particular are encouraged to provide feedback about the information they would like to see published and their experiences in using the scheme.

Also, if not already in place, a class defined on the lines 'selected recent FOI requests and replies' provides the framework for the authority to respond very quickly to a sudden surge in requests about a current topic.

4.4 Implementation plan - checklist

An implementation plan will provide the framework for managing the introduction of the FOI Act. The following headings are intended as a checklist of the most important items to consider, rather than as a complete model plan. The key elements of such a plan include:

Organisation, responsibilities, and budget

This should cover nomination of the senior officer responsible, staff allocated, budget and terms of reference, including timescales. One question to be considered is how the project of ensuring effective implementation will phase into the first year of operation.

Further information:
advice about publication schemes, see the Information Commissioner website. Details of web addresses are in Annex C

Stakeholder engagement

Processes for gaining a regularly updated understanding of the needs and wants of stakeholders may already be in place for local authorities including:

- Suggestion schemes
- Community plans
- Citizen's panels or juries
- Focus groups and
- Service user forums

The application for approval of the publication scheme also required details of 'exercises, consultations and initiatives' carried out in order to assess what information is of public interest.

An essential element of planning to handle correctly requests for information is to have a view about what stakeholders need, want, and are likely to request. This information will change over time and there may be sudden unpredicted demands. However the ability to prepare for example, either by enhancement of the publication scheme or by more extensive training of staff in key areas, will enhance the ability of the authority to comply with the Act in a managed and economic way.

Understanding of stakeholders needs and wants may be expected to give a fair medium and longer term understanding of what they might request. It could also be useful to add a consideration from senior managers within the authority of the questions they expect, including problematic ones and ones they assume would be refused.

Such a list of questions allow a 'dry run' of the systems and processes before implementation.

Advice to third parties

An important part of the information held by local authorities will have been received from third parties or could affect them, if released. Examples include, information submitted in relation to contracts, development proposals and information held for licensing and regulatory purposes.

In many cases, in line with the provisions of the s.45 code of practice, it will be necessary to consult third parties before taking a decision to release or withhold such information.

Many of the third parties potentially affected by the FOI Act, especially small companies, may not be aware of the implications for them. It would be good practice to consider advising them on the most relevant aspects. These include:

- making them aware that all the information they have provided and provide in future to the authority will be subject to the Act;
- when they provide information to the authority which they believe would prejudice their interests if released to an applicant, they should be advised how to mark and bring this information to the attention of the authority;
- associated with this, they should appreciate that simple marking of information with words such as 'commercial in confidence' only has the effect of bringing to the attention of the authority that an exemption could apply under the FOI Act. The issue will be not the marking but whether a duty of confidence applies or whether release 'would or would be likely to prejudice' their interests;
- when they wish to propose a confidentiality agreement or that a duty of confidence should apply to particular information, they should do so in full knowledge of the relevant terms of the code of practice, so that they make such claims based upon reasons which address the requirements of the code; and

- they should be advised to ensure that the authority has up-to-date contact details for the person who will respond to any request by the authority for consultation prior to taking a decision about release. Also that they will need to respond quickly or the authority will take its decision without their input

Advice to staff - the implications of the DP Act for them

Requests will be received for information which may include personal information about officials and staff, for example names, job functions and contact details relating to their job. It is sometimes thought, that such information is exempt under the DP Act. The focus of the DP Act is upon the prevention of damage or distress to an individual acting in a personal or private capacity.

Basic information about an individual acting in an official or work capacity should not normally be withheld unless there is some risk to the individual concerned.

If it has not been done previously, it would be good practice to develop a policy about the circumstances in which staff details would be released or withheld and make it available to all staff. This should include the process for staff to follow if they believe information about them ought to be withheld.

Key supporting policies

There are a number of key supporting policies which need either to be established or reviewed in the context of the FOI Act. These include:

Communication, press and PR policies

The introduction of the FOI Act may be expected to have a significant public impact. It will apply equally to a broad range of public authorities and one of the duties of the commissioner is to give information about the Act to the public.

This is an opportunity for an authority to take a proactive and positive stance in relation to its implementation of the Act, and plan communication, press and PR policies to make this visible in its community.

Charging for information

Charging policies will already have been established for the publication scheme. It is assumed that no charges will be made for downloading information from a website. However charges may be made for paper copies, and special provisions made where multiple copies, or postage overseas is involved.

The fees regulations specify the maximum charges which may be made. They also specify what may be charged when an authority decides to comply with a request which could be exempt because the costs exceed the 'appropriate limit'.

In all cases staff who are responsible for deciding upon release will be helped by policies on how costs shall be estimated, so that each significant request does not need to involve an individual costing exercise. Authorities may decide not to charge where the charges would, if calculated by the fees regulations, come to less than say £10 or £20.

Translations

Many authorities currently have policies about what support they provide for specified languages. The FOI Act relates to information which is 'held' at the time of a request, and includes no requirements to create or translate information for the purpose of satisfying a request.

However, many authorities will wish to apply their current language policies to requests, and it will be helpful to study the implications of this in advance. The result might be an increase in work and cost but a greater involvement of the community as a whole.

Further information on the current Fees Regulations are available on the DCA website, advice on charging, is on the www.informationcommissioner.gov.uk. See Annex C

Accessibility

Help for disabled people is already well-established in the policies and practices of authorities. The application of these policies to the FOI Act will need to be carefully planned.

Significant information may also be held and easily provided electronically from the council website or by email. The policy of how to help those who do not have these facilities need consideration including the question of what charges to apply, if any.

Key supporting processes

A number of processes will need to be designed, validated and ideally checked out with a 'dry run' in advance of live use. There are a number of higher level processes which will be needed. These include:

- handling of requests
- handling of complaints
- feedback and updating of publication scheme, policies and processes.

We have made two broad assumptions about how an authority is likely to organise itself to handle FOI requests. These include:

- the availability of a specialist FOI resource or resources. A person or people whether part-time or full-time, is trained how to handle FOI requests and when to refer to legal advice; and
- the resource or resources could be deployed in a central place or devolved according to the policy of the authority. However, if devolved, we assume that the same policies, standards and recording systems are applied to all.

Handling of requests

The outline process chart provided in section 5.2 below identifies the 10 processes needed and the linkages between them. These are:

- 1 Initial receipt of requests
- 2 Advice and assistance

- 3 Receipt by specialist FOI resource
- 4 Easy/fast track process to release
- 5 Complex - part A - preliminaries
- 6 Complex - part B - collect and consult
- 7 Complex - part C - review exemptions
- 8 Public Interest Test process
- 9 Refusal process
- 10 Release process

Handling of complaints

Local authorities have well-established systems for the handling of complaints. It would be prudent to review existing procedures to ensure that they comply with the FOI Act and the Access Code (s.45).

The process for handling complaints should include; making the process visible to all applicants; ensuring, where possible that complaints are handled by people not party to the original decision; and that target times and success in meeting them are published.

Feedback and updating of publication scheme, policies and processes

The Act includes a specific requirement for an authority 'from time to time to review its publication scheme' (section 19.(1) (c)). There are also benefits in developing a feedback system to facilitate the enhancement of the publication scheme, based upon the pattern of individual requests. [see 4.3 above]

The Access Code (s.45) includes a requirement that authorities have procedures in place, 'for monitoring complaints and for reviewing, and, if necessary, amending, procedures for dealing with requests ...'

It would in any case be good practice for authorities to review on a regular basis, the entire operation of the processes which relate to

compliance with the FOI Act. The purpose being to ensure that they continue to provide a responsive and cost-effective basis, for meeting the needs and wants of stakeholders and compliance with the Act.

Recording of requests

The only formal requirement in this area relates to the recording of complaints and their outcome. This is in section XII of the Access Code (s.45).

However it is in an authority's interests to record and track requests because:

- records which provide evidence of what was requested, when, and how the request was handled, are essential if there is an appeal to the Information Commissioner;
- you can monitor the relationship between the publication scheme and individual requests if you collect reliable and useful statistics; and
- aggregate information and examples of information released are evidence of your authority's increased openness and compliance with the legislation.

Proper records are vital if a complaint is to be handled properly either within the authority's own process or if the applicant appeals to the commissioner. A complaint may relate to an alleged failure to comply with any aspect of the Act. It could, for example: relate to timescales, charges, adequacy of the advice and assistance, refusal to accept that the information is not 'held' and refusal to provide the information.

When a complaint is received, the people considering the complaint need certain basic information to enable them to assess it. For example, who made what request to whom and when, then what happened to this request. Information of this type will need to have been recorded before it is known whether or not a complaint will be made.

The vast majority of requests reflect the everyday business of the authority and are easily satisfied. There is no need to add an expensive and bureaucratic process to requests for leaflets, brochures and information intended for use by the public.

There are a number of possible criteria to use when deciding the policy for which requests should be recorded. These include:

- requests which the first line of the organisation are not able to satisfy and are passed to the specialist FOI resource;
- requests which mention the FOI Act, DP Act, EIRs, or indeed any legislation which the applicant refers to; and
- requests which have any elements of 'complexity', eg:
 - large volume of information requested
 - consultation necessary
 - likely to charge more than a standard fee
 - may need to consider refusal.

There are benefits for an authority in having an effective recording system. It will not only assist when a complaint is made to the Information Commissioner but provides evidence for the regular reviews of the processes which relate to compliance with the Act.

Guidance documents for staff, staff training and awareness

All the staff in the authority who will handle requests from the public need guidance and training. Those who will receive the more complex requests, including in particular the central resource, require more detailed guidance and training.

We suggest that awareness training is given to all members, senior officers, managers and those staff where this will be relevant. Senior people need to

have a reasonable level of awareness of the FOI Act and its implications.

Training plans for staff and management should be considered in the context that the Act is intended to bring about a substantial change of culture within public authorities, and to achieve a much more positive attitude towards release of information to the public. Authorities can take advantage of the need for training to ensure compliance, to promote their policies, to engage more fully with the public and progress this culture change.

Guidance for the public and plans to raise public awareness

The commissioner has a duty to give information about the Act to the public. In effect to promote it. (FOI Act, section 47)

The Act applies to a very wide range of public authorities. Because the commissioner has this duty it should be expected that the public, press, business and campaigning groups, will become familiar with its features and how to use it.

An authority may find it worthwhile to take an active role with its electors to explain its policy and practice with regard to openness and promote how they may most easily approach the authority for information. This could be a key element in a wider policy to engage more fully with stakeholders.

4.5 Trial runs, audit of plans and processes

Having appointed and trained the staff, carried out the preparatory tasks, and produced the guidance, there may be significant benefit in carrying out some trial runs of possible questions. Also by using people who have not been directly involved with the planning, to audit the results, guidance and processes.

This need not be an onerous exercise but could give senior officers greater confidence that the authority is well-prepared.

Further information:
check the DCA and ICO sites
for guidance on this subject
(Annex C)

5. handling requests and complaints

5.1 Summary of relevant parts of the Act and the Access Code (s.45)

The Act specifies some of the essential requirements relating to the handling of a request. These include:

- the request must be in writing and include sufficient contact information for the authority to be able to reply. But note that requests made under the EIRs do not need to be in writing. However it would be good practice to ensure that there is no misunderstanding about the request and this could involve written confirmation;
- the timescale for response is normally 20 working days;
- where the applicant expresses a preference for the information to be communicated in one of a number of forms described in the Act, the authority is required to comply 'so far as reasonably practicable'. (FOI Act, section 11); and
- a duty to provide advice and assistance (FOI Act, section 16).

The Access Code (s.45) produced by the Lord Chancellor elaborates on some of these matters and includes good practice requirements in other areas. This code addresses the following topics:

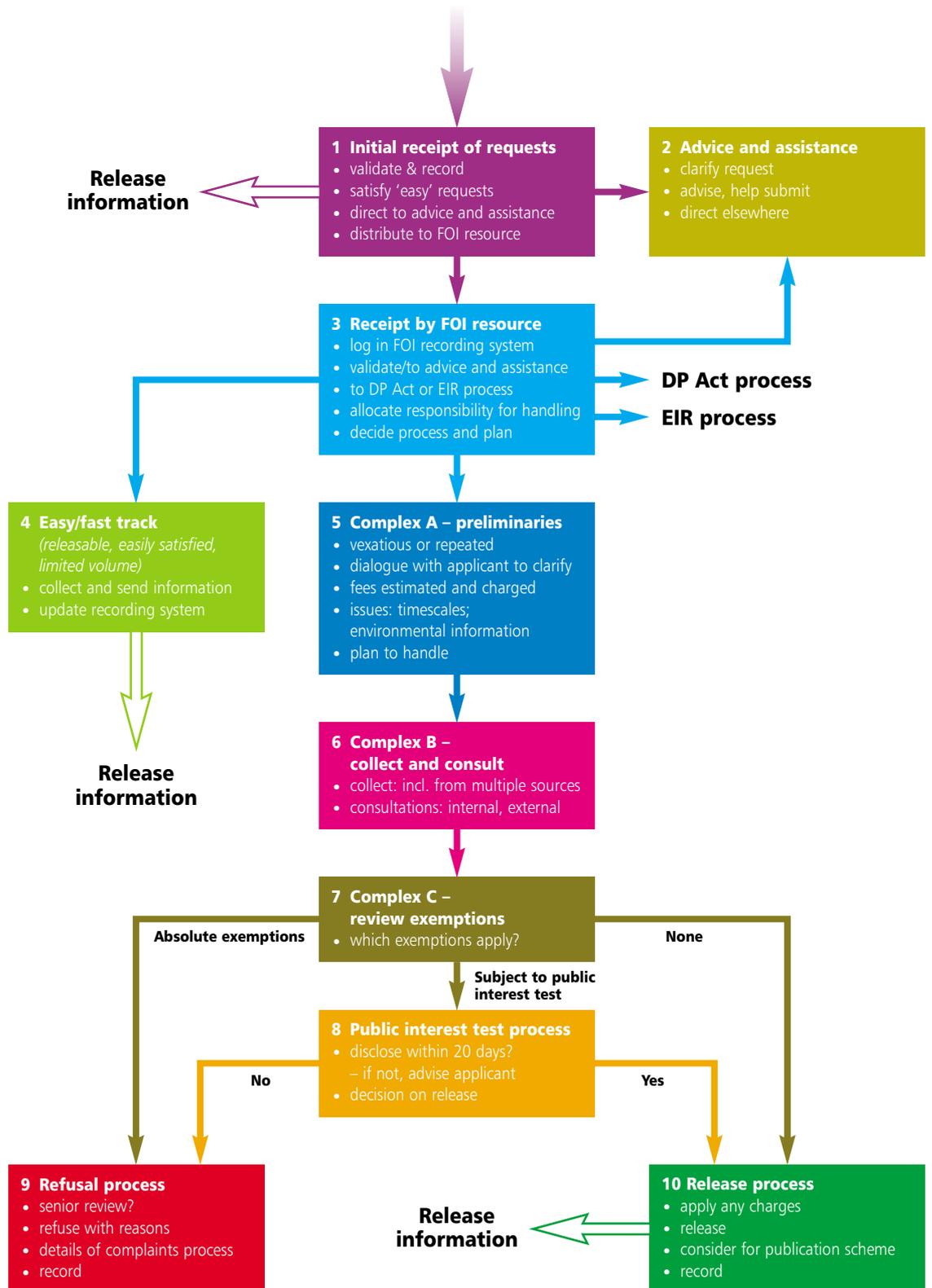
- provision of advice and assistance
- handling requests which appear to be part of an organised campaign
- timeliness in dealing with requests
- charging fees
- transferring requests
- consultation with third parties
- public sector contracts
- accepting information in confidence from third parties

- refusal of requests
- complaints procedure.

5.2 Process chart

The following process chart illustrates the 10 main logical processes which are required to handle a normal range of requests from receipt through to release of the information or refusal. It is assumed that related processes are available to handle subject access requests under the DP Act and those areas where there are differences between the FOI Act and the EIRs.

Handling requests under the FOI Act 2000 – key processes



5.3 Notes relating to the process chart (numbers and colours relate to stages on the chart)

1 Initial receipt of requests

Requests for information can arrive in any part of the organisation. Most authorities already encourage the public to approach a central help or information point when they want to make contact to find information.

The vast majority of requests will reflect the normal business of the authority are easily satisfied and there is no need to add any additional process or bureaucracy to the handling of these simple requests. Examples are requests for leaflets, or which department to approach.

People dealing with such requests need to be trained to distinguish between different types of request. To recognise the kind of FOI Act requests which should be directed to the FOI person or resource, or to the FOI Act publication scheme of the authority, and when they should direct requesters to the advice and assistance unit. This training should also include how to recognise which requests for environmental information should be transferred to the FOI resource.

2 Advice and assistance

There is an obligation to provide this to applicants where appropriate. This process needs to comply with the Access Code (s.45) and be supported by policy decisions, for example with regard to the handling of languages.

The question of transfer of requests where the information is not held by the authority either as a whole or in part, may be handled as part of advice and assistance, or as part of process 3 below by the FOI resource.

3 Receipt by FOI resource

The volume of requests received by the FOI resource should be relatively small compared to the total arriving in the authority. However they

may still cover a wide range from very easy to satisfy to very difficult and complicated.

All requests which are received by the FOI resource should be logged and their processing to completion recorded. The initial tasks are to validate the request, if appropriate, direct to advice and assistance or the DP process and decide whether the requests should be handled using the fast track or complex request process.

Responsibility for handling each request should be allocated to an individual who decides which process should be applied and who will manage the process through to completion. In many cases this will be the FOI person but it could be allocated to a trained person in a department.

Transfer to DP Act process

This process should be applied to all requests for 'subject access', where the applicant seeks information about himself or herself. Local authorities already deal with subject access requests under the DP Act.

The main difference is that the amendments made to the DP Act by the FOI Act mean that the records which must be considered for release are now defined more broadly. This means that for practical purposes, all records which contain personal information, with the exception of unstructured records relating to personnel matters, should be regarded as potentially releasable under the DP Act (see section 2.2 on page 8).

Transfer to EIR process

Requests for environmental information may be transferred to the EIR process at this stage. However, according to how the authority has chosen to handle such requests, they could progress through the remainder of the FOI process, so long as the request is clearly identified as for environmental information, and the differences in requirements are handled properly (see section 2.3 on page 9).

4 Easy/fast track process

This process recognises that many requests raise no issues, are easily satisfied and only the most minimal process is needed. For example, simply providing the information and recording that this was done.

If a large number of such requests are being handled at this stage, then it would be useful to review the handling of the initial receipt of these requests (stage 1), with two possibilities in mind:

- review the training and processes which apply to the initial receipt of requests, with a view to handling more of these requests at this stage; and
- consider whether some of the information requested should be included in the publication scheme.

5 Complex A – preliminaries

It is useful to resolve some preliminary matters before incurring the costs of collection of the information, undertaking consultations and reviewing exemptions. If there is a possibility the request might be considered ‘vexatious’ or ‘repeated’ then these questions should be resolved first.

If the request is not totally clear or for a large quantity of information, where potentially the cost could exceed the fees limit, then it would be valuable to engage in a dialogue with the applicant. (this is formally advice and assistance see page 16). This is not to ask for reasons for the request, but to establish what is really wanted, that this is within the cost limits⁷ or what the applicant is prepared to pay, and subject to consideration of exemptions and the public interest, could be provided. This may require an exchange of correspondence or telephone calls with the conclusions confirmed in writing, to clarify understanding about the precise terms of the request.

The output of this part of the process is a clear understanding of exactly what has been requested,

agreement about any costs which may apply and a plan with timescales for the rest of the process to decision.

According to the policy of the authority and most commonly where a significant fee is likely to be required, this can be charged to the applicant and collected before any substantial effort is undertaken.

At this stage it might be clear that consideration of the public interest will be required and that more time than the 20 days will be needed to enable this to be carried out. If so, then a notice should be given to the applicant with an estimate of planned timescale for decision on release.

6 Complex B – collect and consult

The information should be collected from wherever it is held within the organisation. In some cases this will involve copying documents, but increasingly will involve simply accessing information held in electronic form.

Where consultation is required this needs to be handled to short and planned timescales. This can be of two types:

- internal, where the officers who best understand the issues are consulted. For example, procurement officers in relation to contract information, finance officers in relation to accounting information. The purpose is to understand whether one or more of the exemptions might apply, and the nature of any likely ‘prejudice’; and
- external, where third party suppliers of information, or people and organisations who might be affected by release of the information, are asked whether they believe they would or would be likely to be prejudiced by release in any way, and if so, why exactly and how.

In both cases, where they explain that prejudice might be suffered, it is important to establish to which specific parts of the information this applies,

⁷ There is no cost limit for environmental information. If the authority has a policy to comply so far as it reasonably can with all requests, and apply the charges for requests beyond the ‘appropriate limit’ defined in the FOI Act Fees Regulations, then charges for FOI and EIR requests could be the same.

so that removal (redaction) of just that part of the information can be considered.

It is important to establish whether an explicit or implicit duty of confidence applies to any of the information. If so, the third party to whom such a duty is owed should be asked if they will agree to release.

7 Complex C – review exemptions

A systematic consideration of the exemptions which might apply should be undertaken. If a number of exemptions apply, there may be no need to consider them all in detail but care should be taken to consider the main ones. In the past the Ombudsman criticised organisations that come forward with new exemptions after they have ruled that the one presented does not apply. It would be prudent to expect the Information Commissioner to take a similar view.

If it is clear that one of the absolute exemptions applies, after consideration of whether redaction would enable some of the information to be released the request should be passed to the refusal process.

If the exemption to be considered is subject to the public interest test (PI test) then the request moves to the PI test process. If no exemptions apply then the request is passed to the release process.

8 Public interest test process

The first matter to address is the timescale required to complete this process. If more than the 20 days in total from receipt of the request is needed, then if the appropriate notice has not been given to the applicant, such a notice should be sent now.

For more detail on this process see section 3.8 on page 15. Once it has been completed and any appropriate redaction applied, the request should be passed to the release process (10) or the refusal process (9).

9 Refusal process

Authorities may wish to adopt a policy to define which type of requests can be refused at what level in the organisation. This could be combined with a policy to review all refusals of a certain type at senior level to ensure consistency and that they have the support of senior management.

Refusal should be communicated formally to the applicant, together with details of their rights to complain. The statement of refusal should include reasons and be handled in conformance with Access Code (s.45).

Detailed records of the refusal and reasons should be maintained and reported, also in conformance with this code.

10 Release process

Any estimated fees should be collected unless this happened previously. Normally an authority will expect to collect any significant fees before engaging in the task of collection and retrieval of the information. This would be at (5) on page 30.

Information released should be recorded and considered for addition to the publication scheme. This can comprise both publishing the request and information supplied in full or summary form and consideration of whether to include information of this type in the scheme in future.

5.4 Other areas relating to the handling of requests

Communication with the applicant

Where the request is unclear or where it is for a large amount of information, it can be helpful both to the applicant and the authority to engage in a dialogue to establish clearly what the applicant wants which is both deliverable and affordable.

The Information Commissioner in Ireland reported that a common problem was time wasted because what an applicant really wanted was misunderstood. It may well be found that a friendly telephone conversation will turn a problematic request into one which is easy to satisfy and meets the real needs of the applicant.

However, the applicant should not be pressed for the reason he or she wants the information. Sometimes a request for information is used as another resort in an attempt to get attention for some grievance. In such cases where the applicant volunteers that this is the case, then addressing the grievance may be the most satisfactory solution.

Redaction of documents

The FOI Act provides a right to information not to documents. This means that where a lengthy document contains some information which is properly exempt, the response cannot be to refuse the document as a whole.

If the exempt information can be removed (redacted) from the document while still leaving meaningful information to be communicated, then this should be done.

In such cases it is important for the authority to keep records of the original document, the redactions and the reasons for each redaction. This will assist it to present its case to the commissioner in the event of an appeal.

There are some technical issues with redaction. For example, if information is deleted from a Microsoft Word file it may be easily restored by the recipient. If a masking substance is applied to a paper document, the printing underneath can sometimes be detected.

It is important for IT specialist advice to be sought about how to safely redact information from electronic documents both for supply to individual applicants and for publication on the website. The use of Adobe Acrobat is one solution. But there are others. With paper documents, it is important to use completely opaque masking material.

5.5 Complaints

Each local authority should already have a complaints procedure in place to handle complaints relating to its publication scheme, and this scheme must be able to handle all complaints relating to the FOI Act from January 2005.

The Access Code (s.45), section XII, provides details of the requirements. This is designed to enable people who consider that their request has not been properly handled or are otherwise dissatisfied.

- When communicating any decision relating to a request public authorities are obliged to notify the applicant of their rights of complaint.
- Any written reply from an applicant expressing dissatisfaction with an authority's response to a request should be treated as a complaint.
- This is so, even if, the applicant does not state his or her desire for the authority to review their decision.
- The review should be handled by a person who was not party to the original decision. Complaints should be acknowledged and the complainant should be informed of the authority's target date for determining the complaint.

- There is a requirement for each authority to publish its target times for determining complaints and information as to how successful it is with meeting those targets. Records should be kept of all complaints and their outcome.

Procedures should be put in place to monitor complaints, for reviewing and if necessary amending procedures for dealing with requests where such action is indicated by the outcomes of complaints.

If the outcome of a complaint is that the initial decision to withhold information is upheld, the applicant should be informed of his or her right to apply to the commissioner and be given details of how to do this. Overall the complaints system provides important feedback to assist an authority to monitor its performance and see what it needs to do to improve.

annex A

Case study 1: commercial information - request for contract details

1. The request

Company A has asked for full details of a development contract placed with company B, including details of prices, timescales, and performance standards, together with any penalties for failures.

2 Context

Company A tendered for this contract, is believed to be most unhappy at losing and could be considering legal action. There have been articles in the local press raising doubts about the way the contract was awarded and concern that the terms upon which the authority acquires a sports facility in return for agreeing the development proposal might not be exactly as expressed in the press release.

There is no explicit confidentiality agreement in place between the authority and company B.

3. Points to consider

a) Should company B be consulted?

Yes, unless for example, company B tendered on terms which made clear that information of this type would be made public. Consultation should comply with section VII of the code of practice.

b) What do you need to know from company B?

Whether they wish to produce any evidence and arguments that release of this information 'would or would be likely to prejudice' its commercial interests and if so, to which specific parts of the information would this apply, what is the nature of the prejudice and how likely is it to occur?

c) Can company B appeal against your decision to release the information?

No, if the authority decides, in compliance with the Act that it must release the information, then if company B objects, its only recourse is to the High Court to seek injunctive relief.

d) How much of the costs can be passed to the applicant - copying, consulting with company B, consulting with legal advisers?

In line with the current draft Fees Regulations, 10 per cent of the cost of finding and retrieving the information plus the photocopying costs. The costs of consultation cannot be charged to the applicant.

4. Comment

Many of the problems and issues which arise with requests of this type, could be avoided, if, for example, the invitation to tender made clear that exactly which information would be placed in the public domain after the contract was awarded. However if any tenderer wished to claim that some aspects should not be revealed, then this should be negotiated and if appropriate, agreed in advance, subject to the Act.

This would not avoid the authority having to examine a request to release such information but it would simplify the task. Consideration of the public interest as required by section 2 may require the release of some or all of the information. Also the passing of time may have made the information less sensitive.

Local authority legal teams should review standard terms and conditions of contract to ensure they are consistent with the FOI Act and draw relevant clauses to attention of contractors.

Case study 2: environmental and personal information

1. The request

Ms A has written to the Director of Environmental Services and asked for:

- all reports held by Environmental Services into waste disposal in the last year;
- the name of the manager responsible for refuse collection in her street; and

- any information the council holds about her and her complaints to the council.

2. Context

Ms A is known to the environmental services department, having complained by telephone and using the website complaints form on a number of occasions, to complain about uncollected rubbish, and the apparently reduced standard of maintenance, with streets not cleaned as frequently as previously, since a new contractor was appointed.

The department is well aware of the problem, and has recently produced a confidential report analysing the service and reviewing the options open to the council. It is confidential because the council does not want to reveal its negotiating position to the new contractor.

3. Points to consider

a) Should the request for Scrutiny Panel reports be considered under the FOI Act or the EIRs?

A refusal must be justified according to the terms of the EIRs. The exception in the EIRs relating to commercial interests is not identical to that in the Act and it is not certain that the council would be able to justify withholding information, if only its own (rather than the contractor's) commercial interests are at stake.

b) Should the name of the manager be released?

This needs to be considered under the terms of the FOI Act but in accordance with Data Protection Principles set out in the DP Act. This is a request for information about a person in their business role and not in their personal or private life. It would normally be in accordance with these principles to release the information, unless there was considered to be a risk to the individual.

c) Should the information held about Ms A be released to her?

Some of the notes about her complaints held on file include some negative comments about her, with references to her being 'time-consuming' and a 'nuisance'.

The matter must be decided in accordance with the DP Act, and it is likely that it would all have to be released including the negative comments.

4. Comment

This seems to be a case where the requests for information reflect frustration at not having a complaint addressed. Ms A may well be thought a nuisance since she is making more noise about the matter than others, however, on the facts, she seems to have a genuine complaint. In parallel with consideration of the requests, it would be advisable to review how her earlier complaints were handled, and if inadequately, then they should be addressed properly now. There seems nothing which would qualify as vexatious in the request, and the fact that officers might find Ms A to be a nuisance is not a relevant consideration.

Case study 3: social services - request for information relating to a specific case

1. The request

Solicitor A has written to social services on behalf of Mr B who has been assessed as in need of care and attention that is not otherwise available to him, for the purposes of section 21 of the National Assistance Act 1948. S/he has requested:

- a statement of reasons why Mr B's placement was denied
- a copy of the policy on council placements;
- any legal advice taken on the decision to refuse a placement; and
- a copy of the advice.

2. Context

There is no suitable accommodation available, and a request to fund a placement in a neighbouring borough has been refused on the grounds that out of area placements are not funded. The policy is old and has been under review. A revised version which would fund out of area care is being considered, but is some months away from approval, and it may be changed before it is approved.

3. Points to consider

a) Should the statement of reasons be provided?

Much of the content would qualify as subject access under the DP Act. However some of the information could be subject to the exemption in the DP Act relating to health, education and social work.

b) Should a copy of the policy on council placements be provided?

This is a straightforward FOI Act request. Such a policy might well be included in the publication scheme of the council (in which case it should be made available under the terms set out in the scheme). Whether or not in the publication scheme it should be provided.

c) Should any legal advice be released?

Saying that you have taken legal advice will inform the requester that the decision has been thoroughly considered. If legal professional privilege is claimed then section 42 of the FOI Act provides an exemption which could apply. However, this exemption is subject to the section 2 public interest test and this means that the information must be released, unless the public interest in withholding the information is judged greater than the public interest in releasing it. In the event of an appeal to the Information Commissioner, he could weigh the balance of the public interest differently and as a result require release of information the council has decided to withhold.

4. Comment

This is another situation where a request for information arises directly from dissatisfaction, whether justified or not with one of the services of the council.

The request must be addressed properly, but a request of this type should stimulate a review of whether the case has been handled adequately.

Handling such requests can be onerous and time-consuming but if a clear feedback loop is established to review the underlying problems, then an additional mechanism can be established for review and modification of services to make them more friendly to users.

Case study 4: a request from a 'difficult' applicant

1. The request

Ms A has written and asked for:

- everything the council holds about her; and
- all papers the council holds about a particular supermarket.

2. Context

Ms A is well-known to many people in the council. In the past she has threatened a parking services employee, is believed to think her local councillor has a vendetta against her, and has approached the licensing department to request that the supermarket be closed down since she believes it is running a covert sex shop. There are a great many papers about the supermarket held in different departments, and many of these are substantial documents, each of several hundred pages.

3. Points to consider

a) Can you just refuse outright on the grounds the request is vexatious?

The first part of the request for personal information about her should be addressed under the DP Act, and the issue of vexatiousness doesn't arise. For the second part it would depend upon how the request is phrased. So far there is little guidance in this area, but it is clear that it is the request which must be considered vexatious, not the applicant.

If it is a simply expressed request as defined above, then it will need to be considered under the FOI Act. If, however it includes wild claims, then consideration could be given as to whether the request may be vexatious.

b) How should the request for papers about the supermarket be handled?

There may be some significant charges which could properly be applied in accordance with the fees regulations. It would be useful to estimate these, and if the threshold for compliance is exceeded, the request could be refused on these grounds. However, in accordance with the code of practice, the applicant should first be advised what could be provided within the 'appropriate limit'.

c) Should advice and assistance be offered?

Yes, if compliance will exceed the fees limit, and if the applicant appears to need assistance in order to frame a deliverable request. It may be advisable to offer this at the start, explaining what could be provided at what charge.

d) Should fees be charged in accordance with the fees regulations?

This may be an important practical help to an authority in this situation. Even a small fee, with payment requested in advance, may be very helpful in reducing the impact of requests made in these circumstances. However, it is important that the application of any such charges are fully in accordance with the published policies of the authority, and is in conformance with the fees regulations.

4. Comment

This is a difficult and not uncommon situation. An applicant who wishes to use all means to progress an issue in a way and to a degree which does not appear logical or reasonable to staff in the authority.

All such cases will have individual qualities, but factors to consider include:

- proactive offer of advice and assistance; and
- in this context finding the right person to discuss the real issue with the applicant; and
- use of the provisions in the fees regulations, which may resolve, calm or slow down the situation.

In all of this it is important to apply the legislation objectively. This does allow for a firm refusal, where justified, and a requirement for fees to be paid in advance. It is particularly important that such requests are handled by staff with good knowledge of the relevant legislation, who as a result have the confidence to be clear and professional in applying the provisions.

annex B: FOI Act exemptions - the full list

information accessible to the applicant by other means (absolute) section 21

For example, information which the authority is required by law to communicate, or publishes in the context of its approved publication scheme. It must be 'reasonably' accessible to the applicant.

information intended for future publication (public interest test) section 22

This applies where publication was planned at the time the request was made.

information supplied by or relating to bodies dealing with security matters (absolute) section 23

This only applies to information supplied by or relating to one of the security bodies listed in the section.

national security (public interest test) section 24

Information that is not covered by section 23 above, but exemption is needed to safeguard national security.

defence (public interest test) section 26

Information likely to prejudice national defence or the armed forces.

international relations (public interest test) section 27

Information likely to prejudice the UK's international relations or interests.

relations within the United Kingdom (public interest test) section 28

Information likely to prejudice relations between the UK administrations: the UK government, the National Assembly for Wales, the Scottish administration, and the executive committee of the Northern Ireland Assembly.

the economy (public interest test) section 29

Information likely to prejudice the economic interests of the UK or part of the UK, or the financial interests of the government or any of the national administrations in the UK.

investigations and proceedings conducted by public authorities (public interest test) section 30

Information held for the purpose of criminal investigations and proceedings, and information obtained from confidential sources relating to these or civil proceedings arising out of them.

law enforcement (public interest test) section 31

Information not covered by section 30 above, and which is likely to prejudice a wider range of investigations and conduct, including prevention of crime; assessment and collection of any tax; regulatory enforcement; health and safety; any civil proceedings.

court records (absolute) section 32

Information that is only held as part of the documentation for a court or tribunal case, or a statutory inquiry.

audit (public interest test) section 33

Applies to information held by public authorities which have functions relating to audit or examining the economy, efficiency and effectiveness of the use of resources of other public authorities; information is exempt if its disclosure is likely to prejudice those functions.

parliamentary privilege (absolute) section 34

formulation of government policy (public interest test) section 35

Information held by a government department or the National Assembly for Wales, relating to the formulation of government policy.

prejudice to the effective conduct of public affairs (absolute for information held by either House of Parliament; for all other information covered by this section, public interest test) section 36

This section applies to information held by any public authority. However with the exception of statistical information, a 'qualified person' is required to operate the exemption. For authorities not listed in the section, including local authorities in England and Wales, this is either a minister of the Crown or someone authorised for this purpose by a minister.

communication with Her Majesty etc. & honours (public interest test) section 37

This applies to information that relates to communications with Her Majesty, member of the Royal family or Royal household, or the conferring of honours.

health and safety (public interest test) section 38

Information that would, or would be likely to, endanger the physical, or mental health or safety of any individual.

environmental information (public interest test) section 39

Environmental information does not fall within the FOI Act if it must be released in accordance with Environmental Information Regulations which will be introduced to implement the Aarhus Convention. However, if the information is subject to a discretionary exemption under the environmental regulations, then the FOI Act public interest test would apply.

personal information (absolute exemption for subject access requests and in certain other situations; the public interest test applies to third party requests) section 40

This section operates as a gateway to the Data Protection Act 1998. Subject access requests are decided under the terms of the DP Act. Third party requests for personal information are decided in accordance with the data protection principles, but within the overall framework of the FOI Act.

information provided in confidence (absolute) section 41

This exemption applies where disclosure would constitute an actionable breach of confidence.

legal professional privilege (public interest test) section 42

This exemption applies where a claim to legal professional privilege could be maintained in legal proceedings

commercial interests (public interest test) section 43

This exemption applies to trade secrets, and to information which if disclosed would, or would be likely to, prejudice the commercial interests of any person, including the authority holding it.

legal prohibitions on disclosure (absolute) section 44

Information, the disclosure of which is prohibited by any other enactment, is incompatible with any community obligation, or would be a contempt of court.

annex C: sources of further information

Detailed website addresses are available in this section of the guide. The FOI section of the LGA website at <http://www.lga.gov.uk/foi.asp> will provide updated information and links.

Freedom of Information Act 2000 (HMSO ISBN 0-10-543 600-3)

<http://www.legislation.hmso.gov.uk/acts/acts2000/20000036.htm> HMSO website providing information about legislation

Department for Constitutional Affairs

<http://www.dca.gov.uk/foi/foidpunit.htm>
DCA Information Rights Division home page
<http://www.dca.gov.uk/foi/secleg.htm>
Secondary legislation, including fees regulations, orders relating to commencement, and additional public authorities

<http://www.dca.gov.uk/foi/codesprac.htm>
Codes of Practice issued under section 45 and section 46 (management of records)
<http://www.dca.gov.uk/foi/foidoirpt.htm>
Interim report on statutory provisions relating to section 75 power to repeal or amend provisions which prevent the release of information
<http://www.dca.gov.uk/foi/bkgrndact.htm>
Background information about the FOI Act

The Information Commissioner

<http://www.informationcommissioner.gov.uk/>
Home page

Office of the Deputy Prime Minister

http://www.odpm.gov.uk/stellent/groups/odpm_localgov/documents/sectionhomepage/odpm_localgov_page.hcsp
Local government page including legislation specific to the sector

Defra

<http://www.defra.gov.uk/environment/pubaccess/index.htm>
Guidance on the Environmental Information Regulations and the new EC directive

Local Government Association

<http://www.lga.gov.uk/foi.asp>
FOI page - briefings, documents, resources and discussion forum

The National Archives

<http://www.nationalarchives.gov.uk/footer/freedom.htm>
Information and advice about FOI and records management

<http://www.pro.gov.uk/recordsmanagement/access/map-local.rtf>
For the local government model action plan

<http://www.pro.gov.uk/recordsmanagement/standards>
For standards and guidance

The Audit Commission

<http://www.audit-commission.gov.uk/>
Information about audit regulations

The Constitution Unit

The Constitution Unit
School of Public Policy
University College London
29/30 Tavistock Square
London WC1H 9QU
Tel 020 7679 4948
Fax 020 7679 4978
Email constitution@ucl.ac.uk
Website www.ucl.ac.uk/constitution-unit

<http://www.ucl.ac.uk/constitution-unit/foidp/index.htm>
Research publications, FOI events, consultancy and advice about the implementation and operation of the FOI Act

Campaign for Freedom of Information

<http://www.cfoi.org.uk/>
Information about FOI questions and issues, with international links

For further information, please contact
the Local Government Association at:
Local Government House
Smith Square, London SW1P 3HZ

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LGA queries 020 7664 3131
Fax 020 7664 3030
Email info@lga.gov.uk
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