

The Campaign for Freedom of Information in Scotland

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The Draft Code of Practice under section 60 of the Freedom of Information (Scotland) Act 2002

**Response to a Consultation by
the Scottish Executive**

November 2003

Introduction

We welcome the draft code of practice and recognise the positive spirit in which it is expressed. We have a number of specific comments about the text itself, as described below, and of course have no objection to this response being made public.

Training

The passage on Training appears in the “Introduction” to the Code rather than the body of the Code itself. We hope it will be made clear that this Introduction forms part of the Code itself - otherwise the Commissioner would be unable to issue a “practice recommendation” in relation to an authority’s failure to train staff. (This is unfortunately the position under the UK Freedom of Information Act, where the fact that training is dealt with only in the UK Code’s “preamble”, which is explicitly stated to not form part of the Code itself, limits the Commissioner’s ability to address shortcomings in training.¹)

Duty to provide advice and assistance

In paragraph 6, the guidance might expand on how “potential applicants” are to be advised and assisted. Not all potential requesters will have some preliminary discussion or correspondence with the authority at which advice can be provided. Most can only be assisted by the *proactive* publication of information. This should cover (a) information about the procedures which the authority has put in place for complying with the Act (and other access rights) (b) guidance on access to records for which the authority knows there is particular demand, and (c) a description of the information which the authority has previously released under the Act.

A ‘*disclosure log*’ of the kind referred to at (c) would help applicants understand the potential use that can be made of the Act. It would help to publicise important precedents, reducing the chances of authorities spending time reconsidering from scratch complex issues that have already been decided. It would also increase the chances of similar requests perhaps to other branches of the authority or other authorities being dealt with consistently.

Paragraph 7 states that “*staff should be prepared to explain the key provisions of the Act to potential applicants requiring assistance.*” It may be more helpful to refer to applicants who “*might benefit from assistance*”.

Authorities should be advised to draw the Act to the attention of people who are seeking information but appear to be unaware that the Act exists and provides them with legal rights.

¹ Lord Chancellor’s Code of Practice on the Discharge of Public Authorities’ Functions Under Part I of the Freedom of Information Act 2000, November 2002.

Paragraph 9 refers to authorities which “*depart*” from the Code’s guidance. This might be rephrased to refer to authorities which “*fall short of*” the guidance (to make clear that it does not apply to authorities who go *beyond* the Code).

Translation

Paragraph 11 suggests that in responding to FOI requests authorities should take account of the need to disseminate information to ethnic communities in their own languages. However, FOI requests normally involve disclosure to an *individual* applicant, not the wider community. Any discussion of the need for guidance should be directed at (a) publication schemes (which are addressed to the community at large) and (b) the translation of information requested by a non-English speaking applicant, bearing in mind that such applicants may or may not be part of an ethnic community and may or may not live in the UK.

Request log

Paragraph 14 encourages authorities to keep a log of requests for information not covered by their publication schemes and suggests they consider adding new classes to their schemes to cover such requests. Authorities should also be encouraged to publish the log itself, as part of their publication scheme.

Procedures for handling requests

Paragraph 15 suggests that an authority’s publication scheme “may” include details of its procedures for handling requests for information. Such information is surely essential, and should not be referred to so tentatively. The Code should follow the UK Code in stating that authorities “*should publish their procedures for dealing with requests for information*” (para 6). The Code should also advise authorities to publish their arrangements for reviewing requests.

Advice to requesters

Because the provision of advice is a statutory duty and not merely a matter of good practice we suggest that the “should” in paragraph 16 be replaced by “must”. (“*Every public authority must be prepared to provide advice and assistance to those making requests*”)

In the second sentence of paragraph 16 it may be helpful to replace “advice” with “guidance”. This would (a) help to avoid confusion with the “advice” referred to in the preceding sentence and (b) reflect the statutory requirement of section 60 which is that the Ministers must issue a code of practice providing “guidance”.

Electronic requests

Paragraph 17 states that “Any request for information must be made in writing or any other format *capable of being used for subsequent reference* (this includes requests transmitted by *electronic means*)”. This merely repeats the formal language of section 8. It may be helpful to add that “electronic means” includes emails and faxes and that authorities should always be capable of retaining these for subsequent reference. Where authorities’ web sites provide a means for the public to submit comments etc to the authority this would presumably also provide an opportunity for valid requests to be made.

Assistance to the disabled

Paragraph 18 suggests in some circumstances (presumably when the requester has a disability which precludes the making of a written request) the authority might offer to take a note of the request on the telephone and then send the note to the applicant for verification adding that such a request would only be valid “*once verified by the applicant and returned*”. We wonder whether it is reasonable to expect an applicant whose disability prevents him or her making a written request in the first place to sign and return the authority’s note, which may require the very activity which precluded the making of a request in the first place. Verification by telephone may be sufficient.

Reasons for requests

We are unhappy with the suggestion in paragraph 19 that where a request is unclear “*it may be helpful to clarify the applicant’s reasons for requiring information*”. Though it is not intended to do so, we think this advice is likely to lead to intrusive and unnecessary questioning putting applicants under pressure to reveal their intentions. Authorities may then find it difficult not to take these intentions into account when applying exemptions, undermining what should be a ‘purpose blind’ approach to the legislation.

Instead of asking applicants *why* they are making the request it would be more helpful to ask *what in particular* the applicant is looking for. We prefer the approach in paragraph 9 of the UK code on this point, which states “*Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant.*”

Vexatious requests

Paragraph 22 deals with vexatious requests and states: “*irritation and nuisance caused by the applicant, should not, by themselves, justify deciding that an application is vexatious*”. We think this is misleading: “irritation” and “nuisance” are not relevant factors at all and authorities should not be encouraged to take them into account, even as supporting evidence.

“Irritation” is a purely subjective matter. Someone who regards the FOI Act itself as an unwelcome distraction will be irritated by *all* requests. The “nuisance” caused by a request may depend on officials’ workload. A single modest request may be an irritating nuisance to someone who feels they have no time for it, but entirely unremarkable to a well organised FOI officer. Such factors should be entirely irrelevant to the issue of “vexatiousness” and authorities should be advised to disregard them.

If a potential definition of a “vexatious” request is needed we think it should refer to (a) a request which has been shown to be groundless as a result of a prior decision of the Commissioner (b) the previous decision involved or is otherwise familiar to the applicant (c) the fruitless request is nevertheless resubmitted either through an obsessive unwillingness to accept reality or for the purpose of disrupting the authority’s work.

Multiple requests

Where information is not supplied because the cumulative cost of dealing with multiple requests from a single applicant exceeds the cost threshold (paragraph 26) authorities should be reminded of the need to (a) provide advice and assistance to applicants, to help

them make a request which can be complied with and (b) to disclose so much of the information as can be provided without exceeding the threshold.

Transferring requests

It would be helpful to point out in this section (paras 28-32) that where an authority holds a *copy* of a record produced by another authority it “holds” the record for the purposes of the Act and is required to deal with a request itself and not transfer it to the originating authority.

Paragraph 30 refers to an applicant who explicitly asks the authority to transfer the request to another authority if it does not hold all the requested information. It suggests that it “*may be of assistance*” if the authority agrees to transfer such a request, having first confirmed that the other authority in fact does hold it. This seems unduly tentative. In many circumstances an authority will immediately recognise that the request relates to the functions of a neighbouring authority, and to a type of information (e.g. number of staff at a particular school), which that authority is bound to hold. If the requester has already asked for such a request to be transferred where necessary, the authority may be *required* do so as part of its duty to provide assistance.

Data Protection Act

We agree with the reference in paragraph 32 to the authorities’ responsibilities under the Data Protection Act. However, this may not be readily understood without further explanation. It would worth pointing out that an applicant who makes a request to one authority may have reasons for not wishing the request to be circulated to other authorities. Moreover the request may contain personal data about the requester and the requester’s identity (if an individual) may itself be personal data. Authorities should be sensitive to such possibilities and in confirming whether another authority holds the requested information not disclose the applicant’s identity unless it is clear that the applicant is content for this to be done.

Repeated requests

The Act permits an authority to refuse to comply with a request if it is substantially similar to one made by the same applicant unless a “reasonable period” has passed since the previous request.

Paragraph 23 says that what is “reasonable period” involves a “*subjective assessment*” by the authority. We think that term is unhelpful and may encourage authorities to pluck figures out of the air without proper consideration. The “reasonableness” of the period will depend on the circumstances of the case and on factors such as the frequency with which the information changes, its potential significance or the imminence of any decision based on it. The more rapidly the information changes, or the nearer the decision becomes, the shorter the “reasonable” period is likely to be.

The code could also make clear that periodic requests for information which is periodically generated (monthly statistics, minutes of a quarterly meeting) should not be capable of being treated as “substantially similar” for these purposes.

Confidential information

The discussion of confidential information is in effect spread out over three distinct sections (a) paragraphs 33 to 35 (b) paragraph 38 and (c) paragraphs 41 to 49. It would be helpful to merge these sections, with a separate subsection on contracts, and treat the discussion on consultation (latter part of para 35 to para 37) as a related but separate issue. Paragraph 39 refers to consultation about an entirely unconnected matter and should be rehoused to as distant a location as possible.

It may also help to have a single paragraph describing in one place the main elements of an actionable breach of confidence. These are presently dispersed across the discussion. The first requirement is that the information must be confidential in nature (there is an indirect reference to this in paragraph 38). The second is that the information must have been communicated to the authority in circumstances which create an obligation of confidentiality (these are referred to in the bullet points in para 34). The third is that there must be unauthorised use to the detriment of the confider - a point which can be clarified by consulting the confider (paragraph 35).²

(There are additional tests, for example, the information must not be trivial, and an obligation of confidence cannot apply to information whose disclosure is necessary in the public interest.)

In relation to paragraph 33:

- The statement that “*Information received by an authority in confidence attracts an absolute exemption*” is probably not helpful as it reduces the concept of an *actionable breach of confidence* to “*information received in confidence*”. If the information is not confidential in nature it cannot be exempt under section 36(2) regardless of whether the authority agrees to hold it in confidence.
- Paragraph 33 states “*Issues of confidentiality also apply...where the release of information would [be] likely [to] substantially prejudice the commercial interests of any person*”. This could be omitted. There is no reason to suggest that information which falls within the commercial interests exemption in section 33(1)(b) will necessarily involve any issue of confidentiality. It could, for example, have been supplied to the authority without any expectation of confidentiality or even generated by the authority itself. The exemptions for confidentiality and commercial prejudice operate independently of each other.
- “*Authorities should always consider carefully any request to have information covered by a confidentiality clause and should resist the request unless there is a clear justification for the confidentiality....*”. The reference to a “confidentiality clause” implies that a contract is involved, in which case this would be better in the discussion in paragraphs 41-49. In the present context, it might be better to refer to “*any request for information to be held in confidence*” and to make clear that the authority cannot

² “Three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the Saltman case [(1948) 65 R.P.C. 203] on page 215 must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.” (Megarry J, in *Coco v. A.N. Clark (Engineers) Ltd* [1969] R.P.C. 41, 47)

guarantee that information will be withheld unless the requirements of section 36(2) or some other exemption are met.

The first sentence in paragraph 34 (“*Any information can be made subject to confidentiality*”) is not strictly correct, since an obligation of confidence can only apply if the information itself is confidential in nature. Information which is in the public domain cannot be exempt under section 36(2).

Paragraph 38 states: “*Information should only be accepted in confidence if it is necessary for the authority to obtain that information in order to carry out its functions. At the end it would be helpful to add “and it would not otherwise be provided or could not otherwise be obtained.”* (See para 47 of the UK code, which includes the first part of this rider.) Authorities should not accept information in confidence, however essential it is to their work, if they can readily obtain the same information from other sources without restriction.

Contracts

Paragraph 41 suggests that the code’s provisions on contracts are to apply only to contracts or agreements between a public authority and “a non-public authority body”. The phrasing may have the unintended implication that public authorities *can* reach agreements between themselves to restrict information in ways not permitted by the Act. This could be addressed by omitting the reference to “a non-public authority body”.

Paragraph 42 states that the “exemption at section 33...concerns the need to protect from disclosure *sensitive commercial information*” and refers again to “*commercially sensitive*” and “*commercial sensitivity*” in this and the following paragraph. This may wrongly suggest that “*commercial sensitivity*” is part of the statutory test. It would be better to avoid this term (or at least to avoid its repetition).

Paragraph 42 refers to sensitive commercial information which would “*adversely affect*” those to whom it relates. This should refer to “*prejudice substantially*”. The reference in paragraph 43 to “*prejudice to the competitive position of a third party*” and in paragraph 45 to “*prejudice the competitive position of the contracting company*” should also be amended to “*prejudice substantially*”.

Paragraph 43 implies that for exempt information to be disclosed the public interest in disclosure should “*clearly outweigh*” the potential harm. “*Clearly outweigh*” is a more demanding test than section 2 actually requires.

Paragraph 45 states: “*it is in the public interest to make information available unless there is evidence that doing so would prejudice the competitive position of the contracting company or the position of the authority in future tendering exercises*”. Under the Act, the public interest may require disclosure *even if* there is substantial prejudice to either of the specified interests.

We note that section 60(2)(d) of the Act states that the Code must make provision relating to “*the inclusion in contracts...of terms relating to the disclosure of information*”. That should not refer solely to assurances about the *protection* of information but also to terms advising contractors of the information *that will be released*. In addition to the helpful comments in paragraph 45, an appropriate reference to the information that *will be*

disclosed should be included in contracts, referring to the need to comply with the Act and to account for public expenditure.

Paragraph 46 advises authorities to reject confidentiality clauses which apply to the terms of a contract, its value and performance. It would be helpful to add to this list: arrangements for monitoring progress and performance under the contract, incentives for early completion and penalty clauses for failing to meet targets.

We think details of contracts should normally appear in publication schemes, and note that the Department of Trade and Industry's scheme involves the provision of information (including the name of the contractor and contract value) for all contracts over £500.³

Paragraph 47 suggests that a schedule of information that is not to be disclosed could be included in contracts. Any such schedule should apply only to information which is properly exempt, and should always include the proviso that information which is not in fact exempt, or whose disclosure is required on public interest grounds, may have to be disclosed regardless of any agreement.

In addition, we think publication schemes should include details of *all confidentiality clauses* appearing in contracts, so that the public know where these exist and can bring pressure to bear on those which appear unduly broad.

Personal data

Paragraph 50 merely advises authorities to "carefully read" the relevant section of the Act, but as the section in question is amongst the most incomprehensible in this (or any other) legislation, it may be more humane to provide some explanation. For example, it may be helpful to explain that personal data about the applicant is exempt under the FOI Act only because it is to be treated as a subject access request and dealt with under the Data Protection Act. Authorities should not refuse to deal with such a request or ask the applicant to reapply citing the DPA but should process any request in accordance with the DP subject access provisions.

Fees

This section might include a statement similar to that found in paragraph 13 of the UK Code, stating that where the applicant is not prepared to pay the required fee "*the authority should consider whether there is any information that may be of interest to the applicant that is available free of charge.*"

Monitoring

We agree with the statement in paragraph 54 that it may be difficult for authorities to monitor all requests made to them and with the suggestion that monitoring of refusals, fees and compliance with time limits may be more appropriate. However, we think the guidance should be more emphatic. Currently it merely states: "*it will be for each public authority to determine what information can most effectively be recorded under their administrative procedures*" and that particular indicators "*could*" be monitored. We think the guidance should convey a stronger expectation that refusals, fees and exceeded time limits *should* be monitored, except perhaps in the case of the very smallest of authorities. Such monitoring

³ <http://www.dti.gov.uk/SMD3/finance-and-procurement.htm#Contracts%20awarded>

will be necessary if the authority is to satisfy itself that it is complying with the law and may be needed to respond adequately to enquiries by the Commissioner.

Similar monitoring should be done of requests for information under the Environmental Information Regulations and the Data Protection Act.

The results of this monitoring should be published, and authorities should include them in their publication scheme.

Requirement for review

Authorities may sometimes refuse to supply requested information without providing a proper refusal notice and without notifying the applicant of the right to require a review. The code should make clear that applicants are not to be prejudiced as a result of such a failure. If the applicant has not been made aware of his or her rights to a review but nevertheless questions the refusal in writing, that should be deemed to be a requirement for review under section 20. If the authority again fails to provide the requested information within the statutory period the applicant would then be entitled to appeal to the Commissioner.

It may be helpful to remind authorities that, if they refuse a request, the Act requires them to notify the applicant not only of the right to require a review but *also* of their subsequent right to appeal to the Commissioner. Authorities should not assume that at the initial stage they need only inform the applicant of the right to review and can defer mentioning the right of appeal to the Commissioner until the review has been completed.

It may be worth considering a provision from the UK code (para 57) which permits the review to be waived where the initial decision was taken by the person at the top of the organisation (e.g. the minister) and there is no prospect of it being reversed by anyone else or by requiring the original decision-taker to reconsider. In a number of Open Government cases, the initial refusal has been accompanied by a comment that the decision has been carefully considered at ministerial level, and that rather than bother everyone with a pointless review, the applicant should feel free to turn directly to the Ombudsman.

Paragraph 61 should also say that where the review confirms a refusal, the notice to the applicant should mention the time limits within which an application to the Commissioner must be made (i.e. those in section 47(4)).

Refusal of request

Paragraph 62 should state more clearly that, if information is refused, authorities are required to cite the exemption on which they rely *and (if it is not self-evident) the reason why the exemption applies*. This should involve more than merely repeating the text of the exemption itself.

Substantial prejudice

Paragraph 63 states that in determining whether disclosure would cause “substantial prejudice” authorities “*should consider, in the first instance, disclosing the information unless the prejudice caused would be real, actual and of significant substance*”. The reference to “*should consider*” is inappropriate, since in these circumstances disclosure would be a statutory requirement.

Public interest

Paragraph 64 states that the decision on whether disclosure is in the public interest requires authorities “to make a *subjective judgement*”. The term has far-reaching implications and we do not believe it to be appropriate. It would imply that the authority’s view on where the public interest lies could not be challenged by the Information Commissioner except on limited judicial review grounds. We assume that this is not the case and that the Commissioner can substitute his decision for the authority’s if he considers that the authority is wrong on the merits. Decisions on the public interest require authorities to look at what course of action would best serve the common good – not to act subjectively. Decisions on the public interest may be complex and - particularly in the early days - uncertain, but they should not be described as *subjective*.

We welcome the broad range of public interest factors listed in paragraph 65, and the helpful list of factors which should *not* be taken into account.

The presentation of the second bullet point in the list of public interest factors might be looked at again, since it is the only one in which both sides of the argument are mentioned. It might therefore be taken to imply that in the law enforcement area, the test involves comparing the *benefits* to law enforcement or the administration of justice against *harm* that might be done to the same interests. Although this will often be the case, the test might equally involve balancing the public interest in *accountability* (or other factors) against any possible harm to law enforcement.

Other public interest headings which feature in decisions under overseas FOI laws or actions for breach of confidence include the public interest in:

- revealing malpractice
- correcting misleading claims
- ensuring fairness in relation to applications or complaints

In most cases the potential countervailing public interest can be identified from the text of the exemptions themselves.
