



Management CIRCULAR No.

90

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Glasgow City Council
Education and
Social Work Services
Wheatley House
25 Cochrane Street
Merchant City
Glasgow G1 1HL

To **Heads of all Educational Establishments**

Dear Colleague

Freedom of Information in Scotland

INTRODUCTION

The Freedom of Information (Scotland) Act 2002 (The Act) came into force on 1 January 2005. The Act aims to increase openness and accountability by ensuring that people have the right to access information held by Scottish public authorities. People will be able to see and question how such bodies function and how decisions are made.

WHO DOES IT APPLY TO?

The Act applies to practically all public bodies in Scotland, including local authorities, the NHS, Colleges and Universities, the Police, the Scottish Parliament and the Scottish Government. It also applies to companies wholly owned by a public authority and, if designated, it may even apply to private companies carrying out a function for a public authority, for example under a contract. A full list of the organisations affected is set out in the Act and the Scottish Ministers can add further bodies.

WHAT DOES FREEDOM OF INFORMATION MEAN FOR THE COUNCIL?

Glasgow has developed a Publication Scheme in order that anyone can see what sort of information is held. Where information is not proactively made available, through such a scheme, the Council will have to respond to specific requests for information.

The Act allows anyone (individual or organisation), anywhere to request information. It does not matter how old the information is or why it was created, if the authority holds the information then it will have to give access, provided that an exemption does not apply.

MAKING INFORMATION AVAILABLE

Each public authority had to have a Publication Scheme in place before the Act came into force in 2005. The purpose of this is to provide information proactively in an easily accessible form, so that people can access it without having to make an individual request. The scheme sets out what classes of information the authority publishes or intends to publish, how the information is made available and whether there is a fee for the information. Glasgow's Publication Scheme was approved on 1 June 2004 and is now available on the Council web-site www.glasgow.gov.uk/en/yourcouncil/freedomofinformation.

EXAMPLE 1

An individual, who wants to find out information on Scotland's broadband strategy, could start by looking at the Publication Schemes of the Scottish Government and local authorities to see what policy information may be available. The Publication Schemes will tell them where to get this information and whether there is a fee involved. If the Publication Schemes do not provide all the information they are looking for, they can make a written request to the Scottish Government and the local authorities for further information.

Records Management

Good records management practices should assist authorities to meet their duties under the Act. If records are easy to locate, for example, then requests can be dealt with quickly. The Scottish Government has published a Code of Practice on records management. This provides guidance on records management policies, training and the retention, management and destruction of records in both paper and electronic formats.

How is a request made?

Any individual or organisation can make a request for information and will be entitled to receive it, provided no exemptions apply. The request does not have to be made by someone in Scotland. Authorities are obliged to provide recorded information, and this includes computer documents, handwritten notes and videos. It does not matter how old the information is. Requests must be in writing or in another permanent form, state the name and address of the applicant and describe what information is required. Authorities may charge a fee in accordance with fees regulations.

How should requests be handled?

Authorities are obliged to help anyone who proposes to make a request for information, as set out in a Code of Practice. Requests should be dealt with promptly and in any case within 20 working days. An authority can ask for more details to identify the information requested. An authority is not obliged to comply with a request if an exemption applies, or the cost of doing so would exceed the amount set by the fee regulations, or the information is not held by the authority. In these instances, it must notify the applicant. If an applicant is dissatisfied with the way their request is dealt with, they can request the authority for a formal review, and thereafter appeal to the Scottish Information Commissioner.

EXAMPLE 2

The individual in Example 1, who wants to make an access request, will need to write to each authority or contact them by e-mail or another permanent form. They need to provide their name and address and a description of the information being requested; in this case information on broadband strategy. If they are unsure how to make a request, authorities must provide advice and assistance, for example by explaining the rules.

When the authority receives the request it should determine whether a fee is payable and, if so, issue the applicant with a fees notice, it should establish whether any exemptions apply. It must ensure it responds within the timescale allowed.

How does Freedom of Information fit with other initiatives?

Prior to the Act coming into force, there were some rights to access information. Some of these rights are superseded by the Act, others continue to exist.

Non-statutory codes, which provide access to information, such as the NHS code, will cease to apply.

The Access to Environmental Information (Scotland) Regulations 2004

They are generally similar in structure to the Freedom of Information (Scotland) Act 2002 in that if someone requests environmental information which the Council holds, then unless an “*exception*” applies (these are similar to FOI exemptions) they are entitled to be given the information within 20 working days. As with FOI, a fee may be charged and the enforcement machinery is identical. There is also a duty to advise and assist applicants, as is the case with FOI. One major difference with FOI is that a request for environmental information can be made orally.

Exemptions - can information always be accessed?

No, there are exemptions in the Scottish Act but most of these are not designed to be applied on a blanket basis. There are two types of exemptions: absolute and non-absolute.

If an absolute exemption applies, the authority will not have to release the information. Some absolute exemptions apply to areas that you would expect, such as national security or confidential material. Other absolute exemptions apply to information which is available via another route, for example, if information is contained in an authority’s Publication Scheme.

If a non-absolute exemption applies then the authority will have to apply a public interest test to establish whether the information should be released. There are 17 categories of exempt information covering areas such as government interests and relations, public sector administration, national security and defence, law enforcement and commercial interests.

EXAMPLE 3

In Example 2 the authority may have information from third parties such as telecoms providers. If this information became public knowledge it may affect the third parties’ businesses as there is an exemption in the Act for trade secrets. There are also exemptions where information is obtained, in confidence, from another person and where disclosure of this information would substantially prejudice the commercial interest of that person. The authority will need to carefully consider these exemptions before claiming them, as its starting point should always be to favour openness. It should take into account the Code of Practice on handling requests and any guidance from the Scottish Information Commissioner.

Authorities should favour disclosure wherever possible and this is where the balance should lie. If an exemption applies, the applicant should be given a written refusal notice, which explains why the request was refused, and inform the applicant of the right to apply for a review of the decision.

How does Freedom of Information fit with Data Protection?

The Data Protection Act 1998 aims to secure an individual’s right to privacy by protecting information held about them. Any authority that handles personal data must comply with the Data Protection principles which include, amongst others, that personal data should be fairly and lawfully processed. Individuals have the right to ask for a description of the personal data held about them: known as a subject access request and to receive a copy of this information.

A request by an individual for information about himself or herself will be exempt under Freedom of Information legislation and will continue to be handled under Data Protection. However, certain amendments will be made to the Data Protection Act. At present the Data Protection Act only covers computerised information and some manual files. This will be changed so that when an individual makes a subject access request they will be given all recorded information held by an authority, including information in unstructured files. If individuals want access to unstructured data they must describe the information so that the authority can find it.

If someone makes a request for information about another living individual, this will be handled under the Freedom of Information (Scotland) Act, but certain Data Protection considerations will still apply, e.g. the authority will not have to provide the information if the disclosure would breach the Data Protection principles. If the authority decides that it may wish to disclose the information, then it should usually notify the individual and take account of their wishes, although the authority does not have to be bound by the views of the individual.

WHAT HAPPENS IF A PUBLIC AUTHORITY DOES NOT PROVIDE INFORMATION?

The Scottish Information Commissioner, will enforce the Act. The Commissioner has a wide variety of powers under the Act to ensure compliance and an authority could be found in contempt of court if it fails to comply with a notice issued by him.

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

Complaints concerning requests can only be made to the Commissioner once an applicant has exhausted the authority's review procedure. If an applicant is dissatisfied with the response from the authority, they can take their complaint to the Scottish Information Commissioner.

If the Commissioner decides to proceed he will invite comments from the authority and then decide if the complaint is valid. The Commissioner will notify both the applicant and the authority of his decision.

On occasions the Commissioner will require more information before he can make a decision concerning a complaint and so he will issue the authority with an information notice. The Commissioner also has the right to apply for a warrant to enter an authority's premises and seize documents but such incidents are likely to be very unusual.

ENFORCEMENT AND PROSECUTION

On occasions the Commissioner may become aware that an authority is not complying with its duties under the Act. In this situation he can issue an enforcement notice, informing the authority which part of the Act it is failing to comply with and what it needs to do to put things right.

Although the Information Commissioner is primarily responsible for overseeing the Act, there are a small number of occasions when the courts may become involved. It is a criminal offence for an authority, or its employees, to destroy or erase information after a request has been received. Such cases will be dealt with in the Sheriff Court and the offence carries a fine of up to £5,000.

In most cases the Commissioner will make the final decision regarding what information should be released, but there is one exception. The First Minister can overrule the Commissioner when it relates to certain decisions taken by the Scottish Administration.

WHAT DOES IT COST?

Authorities may charge for handling a request. Fee regulations will deal with the detail of this but it is likely that requests that cost an authority up to £100 to deal with will not be charged for. There will be a maximum limit on the cost to an authority, beyond which they will not be obliged to provide information.

KEY POINT

The key point for staff to be aware of is that any request for information may be an FOI request. It is important to recognise one because:

- the clock starts ticking;
- we may need to start considering if we need to provide advice and assistance;
- the material that is being asked for might be in a publication scheme and can be readily asked for; and
- we may need, even at that stage, to consider getting help from colleagues who know more about information management issues in the organisation.

LINKS TO FURTHER INFORMATION

Glasgow City Council

www.glasgow.gov.uk/en/yourcouncil/freedomofinformation

Scottish Government

www.scotland.gov.uk/about/foi

Scottish Information Commissioner

www.itspubliknowledge.info/home/scottishinformationcommissioner.asp

Yours sincerely

Margaret Doran
Executive Director: Education and Social Work Services