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Response to the Scottish Government's Consultation on

A Revised Code of Practice for Scottish Public Authorities

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1. INTRODUCTION

We welcome the revised code of practice under the Freedom of Information (Scotland) Act (FOISA) and the Environmental Information (Scotland) Regulations (EIRs) and, in particular, the positive guidance on disclosure of information about contracts.

However we think:

- the draft code's approach to requests which are phrased in terms of 'documents' rather than 'information' is restrictive and undermines the Scottish Information Commissioner's guidance on this issue

- the guidance on the provision of advice and assistance could be strengthened

- the loss of specific Scottish Government guidance on the EIRs may have unintended consequences

- the draft code may lead to confusion between the FOISA exemptions on breach of confidence and substantial prejudice to commercial interests

- authorities should not be entitled to ignore a request for internal review which has not been made to a designated person.

2. INVALID REQUESTS

The draft code refers to a request for specified *documents*, as opposed to the *information* in them, as "invalid".[1] This generalisation is in our view based on an unnecessarily rigid reading of a recent Court of Session judgment. It cannot be described as "best practice" and is likely to undermine the Scottish Information Commissioner's recent guidance on this matter.

The starting assumption should be that a request for a document is a valid request for the information in that document and should be dealt with in the normal way. This is in line with the Court of Session ruling which stated:

> "Where the request does not describe the information requested, as required by section 8(1)(c), but refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant."[2]

The Scottish Information Commissioner's guidance states:

> "where an applicant has asked for a copy of a document and it is reasonably clear in the circumstances that it is the information recorded in the document which the applicant wants, the public authority should respond to the request as a request properly made under FOISA."[3]

The reference in the draft code is likely to undermine this guidance. It will encourage authorities to refuse requests for specific reports and insist on them being resubmitted so as to ask instead for "*the information contained in the report"* (which some authorities have already done). This creates an artificial obstacle to

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[1] The Draft code states at page 8, section 1.4: "Authorities must provide appropriate advice and assistance to enable applicants to describe clearly the information they require. This is particularly important where an applicant has made *an invalid request* (for example by failing to clearly describe the information sought or *by requesting particular documents rather than information*)." (emphasis added)

[2] *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73, paragraph 45

[3] Scottish Information Commissioner, Guidance on validity of requests following Court of Session Opinion on 30 September 2009, paragraph 3.4

access which will be seen as serving no purpose other than to frustrate the applicant.

The code should make clear that a request for a document should be treated as a valid request for the information in the document unless an applicant expressly states that he or she will not accept anything other than a copy of the document itself.

Clarification of requests

In the same paragraph the draft code states:

> The authority must provide appropriate advice and assistance to enable an applicant to word their request in a way which will identify precisely the information they want.[4]

Here too the emphasis appears to be on correcting the "wording" of the request even if its *meaning* is clear. Where it is clear, there should be no need for rewording - and no need for advice and assistance.

This paragraph continues by stating that while some requesters, such as solicitors acting for commercial clients, may be expected to describe precisely what information they require, individual requesters *"cannot be expected to express themselves with such precision and…need more support".* This too appears to relate to the Court of Session's comments on the distinction between "information" and "documents".

However, a more common problem is that requesters (no doubt including solicitors) sometimes cannot frame their request because they do not know what information an authority holds. The draft code does not address this problem in the same helpful way as the 2004 code. Indeed, it omits crucial guidance which was

[4] Draft code, page 8, section 1.4, 1st paragraph

expressly relied on by the Lord President of the Court of Session in its CSA judgement.[5]

The relevant passage in the 2004 code states that where a requester has not formulated the request sufficiently clearly, the authority should respond by, for example:

> "• providing an outline of different kinds of information which might meet the terms of the request;
> • providing access to detailed catalogues and indexes, where these are available, to help the applicant to see the nature and extent of the information held by the authority;
> • providing a general response to the request setting out options for further information which could be provided on request"[6]

It continues:

> In seeking to clarify what is sought, authorities should always bear in mind that applicants cannot reasonably be expected to possess identifiers, such as a file reference number or a description of a particular record, unless this information is made available by the authority for the use of applicants.[7]

We think these passages should be reinstated.

Duty to clarify

The draft code states that where an authority is unclear about what information the applicant wants it *"can"* obtain clarification by performing its duty to provide advice and assistance. It should state that the authority *"must"* provide advice and assistance in these circumstances.[8]

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[5] Common Services Agency and Scottish Information Commissioner, [2006] CSIH 58, paragraph 10.
[6] Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002, September 2004, paragraph 20.
[7] Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002, September 2004, paragraph 21
[8] Draft code, page 8, 2nd paragraph of section 1.4

The applicant's identity

The draft code states that:

> "the identity of the applicant…*will* be relevant in determining whether the application is vexatious" (emphasis added)[9]

The applicant's identity is not *always* relevant to the issue of vexatiousness. For example, there may be cases where, even if two 'different' applicants turned out to be the same person, the requests could all nevertheless be answered without "significant burden" and thus could not be vexatious.[10] It would be more correct to say that the applicant's identity *"may"* be relevant in these circumstances, which is how the Court of Session ruling puts it.[11]

3. ADVICE AND ASSISTANCE

Where the cost limit is exceeded

Where a request is refused because the estimated cost of providing the information would exceed the £600 limit, we think that the code should advise authorities to explain to the requester (a) what estimate they have made of the cost of complying with the request and (b) how that estimate has been reached.

At present it is common for authorities merely to state that the cost limit has been exceeded and suggest that the requester may wish to resubmit a narrower request.

However, to reformulate the request effectively, the applicant needs to know by what margin and for what reasons the request has exceeded the cost limit. If the estimated cost of responding is, say, £650 the applicant may only need to make a

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[9] Draft code, page 9, section 1.7
[10] Scottish Information Commissioner, Exemption Briefing Series, Vexatious or Repeated Requests.
[11] See paragraph 75 of the judgement: "Knowledge of the applicant's identity may also be relevant in considering whether a request is vexatious…"

slight adjustment. If the estimated cost is thousands of pounds, a completely revised approach may be needed.

The applicant also needs to know whether particular elements of the request are disproportionately expensive - in which case they may be prepared to omit just those elements. Without this information, the applicant may be unable to judge how to submit an effective alternative request.

This is the approach of the Information Tribunal which has held that:

> Given that the [Fees] Regulations are quite specific about the costs that a public authority is allowed to take into consideration in estimating its cost of compliance, and about the notional hourly rate to be applied, a public authority seeking to rely on…[the cost limit] should include in its refusal notice, its estimate of the cost of compliance and how that figure has been arrived at, so that at the very least, the applicant can consider how he might be able to refine or limit his request so as to come within the cost limits.[12]

Explaining how the cost estimate has been reached will also allow the requester to detect any possible errors in the authority's approach. For example, it may have included costs which it is not entitled to consider (such as the staff time needed to decide whether exemptions apply) or have aggregated the costs of different requests, instead of treating them individually as the Act requires. Knowing how the estimate has been reached may permit applicants to challenge an unjustified estimate at internal review, which may lead to speedier resolution of some complaints.

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[12] EA/2007/0114, Mr David Gowers & Information Commissioner & London Borough of Camden, paragraph 68

Partial disclosure when cost limit reached

The draft code states that where the cost limit would be exceeded (or where the applicant is unwilling to pay any fee), authorities should consider what information could be provided below the limit (or free of charge).[13] The code should add that in these circumstances authorities should not unilaterally decide to disclose *some* of the requested information, and withhold other parts of it - as this may prevent the applicant specifying the particular information they are most interested in. Instead, authorities should set out the options for disclosure within the cost limit (or without a fee), and allow the applicant to choose between them.

Acknowledgement of request

The draft code states that authorities should communicate with the applicant about the progress of a request and says that this "may" include acknowledging receipt of the request.[14] It is *always* good practice to acknowledge a request and the code should state that this "*should*" (not "may") be done.

Providing additional information

The draft code is incorrect in stating:

> "Although there is no specific requirement in either regime to provide information in the form of a summary or digest if such a summary does not exist at the time of the request, an applicant may ask for information to be provided in this form."[15]

Section 11(2)(b) of FOISA expressly *requires* an authority to provide a digest or summary of requested information (even if one does not exist) if the applicant asks for it and it is reasonable practicable for the authority to do so.

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[13] Draft code page 9, sections 1.8 and 1.9
[14] Draft code page 10, section 1.11
[15] Draft code, page 10, section 1.10

Training

The draft code refers to training but only in the context of enabling staff to explain the legislation to requesters.[16] It should make clear that training is necessary to ensure that staff comply with their FOI/EIR obligations.

4. GUIDANCE ON THE EIRS

We note that it is intended that the draft code will supersede Scottish Ministers' current guidance on the Environmental Information (Scotland) Regulations and the current statutory code of practice under the EIRs.[17] However, the draft code contains minimal guidance on the EIRs. We appreciate that in part this has been done to avoid overlap with the SIC's own guidance. However, the loss of this specific guidance may be significant:

- Although the Scottish Information Commissioner (SIC) has produced his own guidance on the EIRs, there is a particular value in guidance as to what the *Scottish Ministers* consider to be best practice, particularly in relation to what is expected of the *Scottish Government* itself. It may also be important for bodies which are not subject to the FOISA but are covered by the EIRs to know what standards the Scottish Government, as well as the Scottish Information Commissioner, expects to be adopted.

- The code is said to describe "best practice as it has developed over the past 5 years".[18] By omitting the previous specific guidance on access to environmental information, there may be an implication that this is no longer considered to be best practice.

- The SIC has express powers to issue practice recommendations where a public authority has failed to comply with the code of practice issued under regulation

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[16] Draft code page 7, section 1.1

[17] Consultation by Scottish Ministers on a revised Code of Practice for public authorities on the discharge of their functions under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004, 8 December 2009, page 3, paragraph 2.

[18] Draft code, page 3, paragraph 4

18 of the EIRs.[19] If there is to be no code of practice under the EIRs, and reduced references to environmental information in the new code, the scope for the SIC to issue practice recommendations in relation to environmental information may be curtailed.

One significant issue involves charges for the provision of environmental information. The draft code merely mentions the statutory requirements that a reasonable fee may be charged and that the charges should be published.[20] It fails to mention other statutory requirements on the matter (such as the fact that no charge can be made where access is provided by inspecting information in situ). It omits important passages from the existing guidance including a significant section aimed at encouraging authorities to avoid or minimise any charges they make for environment information.[21] We think the existing guidance and code of practice should either be retained and updated or that a more substantial attempt should be made to incorporate specific EIR guidance into the revised code of practice.

5. CONSULTATION WITH THIRD PARTIES

When consultation is unnecessary

In section 3.3 on page 14 we think the first two bullet points could be amended by adding the italicised words:

- The first bullet point should say that consultation will be unnecessary where the authority does not intend to disclose the information ("for example, because it considers - *based on reasonable evidence* - an exemption/exception to apply)";

- The second bullet point could be amended to state that consultation will be unnecessary "where the authority already has evidence from the third party that disclosure would, *or would not,* prejudice their interests."[22]

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[19] The power to issue practice recommendations is found in section 44 of FOISA and applies in relation to the EIRs by virtue of Regulations 18(5) and 18(6)(c).
[20] Draft code, page 5, second bullet point
[21] Scottish Executive, Guidance on the Implementation of the Environmental Information (Scotland) Regulations 2004 November 2004 Paper 2004/18, paragraphs 57-61
[22] Draft code page 14, section 3.3

6. CONTRACTS

"Sensitive information"

The draft code repeatedly uses the term "sensitive information" to refer to information which may be covered by the Act's exemptions for substantial prejudice to commercial interests (s 33) or breach of confidence (s 36(2)). We think this leads to some confusion between the two exemptions.

For example, the draft code states:

> In particular…public authorities must not agree to hold information in confidence unless it is genuinely sensitive in nature (e.g. disclosure would be likely to prejudice substantially the commercial interests of any person).[23]

This conflates the two separate provisions. An authority's agreement to hold information in confidence is not relevant to the commercial interests exemption, as this implies. It is only relevant to the breach of confidence exemption.[24] However the test of harm under the breach of confidence exemption is whether disclosure would cause "detriment" not whether there would be substantial prejudice to commercial interests.

The problem appears again later:

> In particular, bidders should be made aware that an authority is not able to hold information in confidence unless it is genuinely sensitive in nature and therefore is exempt from release (for example because commercial interests may be harmed, or its disclosure would constitute an actionable breach of confidence).[25]

An authority cannot agree to "hold information in confidence" on the grounds that "commercial interests may be harmed". An agreement to hold information in confidence is only relevant to the section 36(2) exemption for breach of confidence.

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[23] Draft code page 17, last paragraph of 'Principle 3'
[24] Section 36(2)
[25] Draft code page 18, paragraph 2.2

Possible harm to commercial interests is part of the section 33(1)(b) exemption. Moreover "genuine sensitivity" is not the key to either of these and its use may confuse authorities as to the correct approach. We think it would be better to deal with each of the two exemptions separately and in their own terms.

Disclosure provisions in contracts

The code should advise authorities to ensure that all new contracts contain express provisions giving them the power they need to obtain information from contractors for the purpose of responding to FOI requests. This may go beyond provisions entitling authorities to obtain information for the purpose of overseeing the performance of the contract.

Environmental contractors

Authorities should be encouraged to notify contractors whose contracts involve environmental functions, responsibilities or services that they may themselves be directly subject to the EIRs in relation to those contracts.

7. HANDLING COMPLAINTS

We disagree with the draft code's suggestion that if an authority has told an applicant to address a request for review to a particular person, a request for review made to anyone else can be treated as invalid. That would be unlawful. Section 20(3) of FOISA specifies the conditions that must be complied with for a request to be valid, none of which require the request to be made to a designated person.

Some requesters will address a request for review to the FOI officer with whom they have been corresponding about their request. There is no reason for such a request to be treated as invalid. In many cases the official who has been dealing with the request and the official responsible for any internal review will work in the same or an adjacent room, and the request can be passed on without inconvenience.

In any event, the suggestion that a request for review is invalid if not sent to the nominated person is incompatible with the statement in the next paragraph that *any* written questioning of the authority's decision describing the grounds for dissatisfaction is a valid request for review, even if a review is not expressly requested.[26]

8. STATISTICS & DISCLOSURE LOGS

The draft code states that authorities should monitor the proportion of requests answered within the statutory timescales.[27] Where these timescales are exceeded, we think the length of time taken to respond to requests (and requests for review) should also be monitored.

Authorities should be expected to proactively publish their FOI monitoring data.

We welcome the guidance on disclosure logs.[28] However, we think 'best practice' in this area would be not merely to describe previously released information but, where feasible, to provide direct online access to it.

9. OTHER DRAFTING POINTS

- The draft code states that the decision on whether information which is not available through a publication scheme is "reasonably obtainable" is *"a subjective one"*. The term "subjective test" normally refers to a test which depends on the individual's state of mind, rather than on the facts of the case, and is not appropriate here.[29] The section 25 test must take account of the particular applicant's own circumstances, but it is not a subjective test.

- The introduction to the draft code explains that some information is not subject to the FOISA/EIR regimes and cites as an example "information that isn't

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[26] Draft code page 22, section 5.2
[27] Draft code page 24, section 6.1
[28] Draft code page 24, section 6.2
[29] If the test was subjective the only relevant question would be whether the applicant (or perhaps the official dealing with the request) *genuinely believed* that the information was reasonable obtainable by the applicant. It would disregard the question of whether that belief was well-founded.

held".[30] That may not be the most helpful example to cite (since the EIR exception for information which is not held is, strangely, subject to the public interest test.[31]) A more useful example may be information supplied in confidence by the UK government, which is explicitly excluded from both regimes.

- The draft code refers to the Commissioner's powers to deal with an authority which fails to comply "with the Commissioner's decision in relation to an appeal to him…".[32] It may be simpler to refer to an authority which fails to comply with a "decision notice".

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[30] Draft code page 5, first bullet point.
[31] Environmental Information (Scotland) Regulations, regulations 10(1)(b) and 10(4)(a)
[32] Draft code page 6, 5th paragraph