

The Freedom of Information (Scotland) Act 2002

and the National Library of Scotland.

**A guidance document for staff, prepared by Graeme Hawley and
approved by the Information Management Group.**

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Introduction

The Freedom of Information (Scotland) Act received Royal assent in 2002, and became law on January 1st 2005. The Act (hereafter referred to as FOISA) grants a general right to request access to information that is held by a Scottish public authority. This is a right that any citizen of the globe can exercise.

There are exemptions to this general right, and some information will not be disclosed under the Act. However, it must be remembered that the emphasis is on allowing access to information, and where there is a conflict of interests, the decision will typically be in favour of the public interest.

The Act is enforced by the Scottish Information Commissioner, who has made it clear that he expects public authorities to reflect the spirit of the Act by promoting greater transparency in the corporate affairs of public authorities. A chief purpose of the Act is to allow citizens to see how public money is spent, and how their public institutions are managed.

This document acts as a general guide to FOISA for staff. However, should you have any questions, thoughts or queries regarding this guide or FOISA, then please do not hesitate in contacting the Library's Corporate Information Officer. Similarly, should you receive a request for information that you need more assistance with, please contact:

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FOISA facts

- **The Library has 20 working days to respond to a request for information.** This means that a clock starts ticking from when the request is first received, not from when it reaches the person best placed to answer it. It is therefore **crucial** that the date of initial receipt is marked on any written request for information.
- **Requests can be made without any reference to the Act, or even knowledge of it.** Therefore, any and every request for information is technically a FOISA request.
- **It is a personal criminal offence to destroy information that is subject to an information request, or to destroy information to prevent a request being made.** Some information must be kept for a period of time for legal reasons. Other information should be destroyed because it has ceased to serve any useful purpose, because it duplicates information unnecessarily, because it has no currency, or as part of normal “housekeeping” procedures.
- **The person making the request for information is referred to in the legislation as the applicant.**
- **Requests for information must be made in a recorded format in order for them to qualify for treatment under the FOISA legislation** (such as a letter, email, or tape recording).
- **However, a request for environmental information can be made verbally.** Access to environmental information is governed by separate legislation, the **Environmental Information Regulations (Scotland) 2004**. Although requests can be made verbally, it is important that the Library staff accurately record what has been asked for and date it.
- **People making a request for information do not need to specify that they are making a request, justify their request, prove their identity, or even use their own name** (unless they are asking for access to personal

information about themselves, in which case the request should be treated as a Subject Access Request under the **Data Protection Act**)

- **FOISA gives a right to request access to information to any global citizen.**
- **A person who has made a request (the applicant) can appeal against the Library's decision.**
- **The Scottish Information Commissioner can overturn the Library's decision.** The current Commissioner has made it very clear that he favours the release of information.
- **Any recorded information held by the Library is subject to the Act.** This includes policy documents, budget reports, tendering documents, emails (including emails in "personal" folders), catalogues, minutes of meetings, handwritten memos, and Word documents. It also includes our **stock**.
- **Some information in material covered by the Act is exempt from disclosure and can be withheld. NOTE: This information is very narrowly defined, and some of it may have to be disclosed (even in cases of "confidential" information) where there is a greater public interest in disclosing the information than in withholding it.**
- **If an applicant requests information in a specific format because they have a disability, the Library *must* provide the information in that format without passing on the cost to the applicant.**
- **Any member of staff could receive a request for information that needs to be treated as a FOISA request, even if it doesn't mention FOISA, or even if it is the kind of request you have received prior to the Act.** Because a request could be sent to anyone, and because the 20 working day limit starts when the Library receives the request, **all staff should use the Out of Office message to notify applicants that their email has not been received. Please ask for assistance if you are unfamiliar with the process to set up the Out of Office message.**

- **Any material that is held by the Library, but not owned by it, is exempt from the Act.** This would mean that items within the Library's collections on deposit from the owner, would not be covered by the Act. The Environmental Information (Scotland) Regulations apply to all environmental information held by the Library, however, regardless of ownership.
- **Disclosure must be in the interest of the public and not just of interest to the public.**
- **Guidance on the interpretation of the Act and its associated codes of conduct is still evolving. Much is still uncertain.**

What is a FOISA request and what's not?

The short answer is that everything is a FOISA request. The Act did not define what a request should be, and stated that a person making a request for information does not have to refer to the Act or even know about it. This can cause problems for public authorities, but before we look at those and how to overcome them, perhaps we should consider why the Act was designed like this to begin with:

- Firstly, if a person had to proclaim their request for information under the terms of FOISA, this assumes that they know FOISA exists. FOISA is about widening access to information, so it is important that there are no barriers to access, such as awareness of, and understanding of, complex legislation.
- Secondly, every request for information should be treated professionally and fairly, and the nature of our response should not be affected in any way by whether the requester knows about the Act or not. The Library cannot withhold information because it is concerned about bad publicity or how the information will be interpreted.

Despite these commendable reasons, the fact that every request for information is technically a FOISA request has serious implications for the Library, whose business is in receiving requests for information and making information available. FOISA's primary purpose was to make the operation of public institutions and the spending of public money more transparent. But consider the differences in the two scenarios below:

Public authority A is a council depot for road repairs. Its stock is gravel, shovels, safety gear, road signs, temporary traffic lights, etc. The information it holds is information about the stock, about the costs, about suppliers, about the staff in the department, about strategic planning and about current, past and future projects.

Public authority B is the National Library of Scotland. Its stock is books, journals, newspapers, theses about council road repairs, CD ROMs, letters, photographs, maps, etc. The information it holds is mainly its stock, and also information about its stock in the form of catalogues and collection descriptions, information about its staff, infrastructure and users, costs, suppliers, information about its corporate planning and history, and about its strategic direction.

For some public authorities, it will be clear when a request for information is being made, because their corporate information is so physically different from their stock. But for the Library, so accustomed to receiving requests for access to information, should:

*“Can I see *Divine precepts, being the last dying sayings of that reverend divine Mr. Baxter?*”*

be treated as a normal customer service request, or should it now be treated as a FOISA request? Does it matter?

Indeed, for this very reason, it would have been simpler if FOISA had exempted the stock and focused only on corporate information. However, since it didn't, the best thing to do could be to ask, **“What is the best way to serve the customer?”** Because the Library is so skilled in its work, a high proportion of the requests for information will be dealt with in a manner that far exceeds the expectations of the FOISA legislation. Many requests for information will be made verbally, in person, at one of the Library's customer service points. It is likely that a high percentage of these will be stock-related requests.

It is important to remember, as regards enquiries concerning our stock, that Library staff are not employed to do researchers' work for them. Our job is rather to provide advice and guidance on sources available. FOISA is not designed to change this. This is recognised by many of the emerging Guidelines for public authorities (e.g 'Archives and the Freedom of Information Act, Scotland, 2002, produced by the Scottish Council on Archives).

1. Verbal stock-related requests

The recommendation is that these requests should be dealt with as they were prior to the new legislation, **unless:**

- **You intend to refuse access to information**
- **You do not think that you can provide the information within 20 working days**
- **You are concerned that releasing the information may have implications for complying with FOISA or other legal obligations such as the Data Protection Act, confidentiality, etc**

2. Verbal corporate information related requests

The recommendation is that these should be perceived as FOISA requests, although it may be that they can be answered as they were prior to the new legislation. FOISA states that requests must be made in a recordable format for them to carry the authority of a FOISA request. The Library has a duty to inform people making requests for information (that are not requests for environmental information) that if they make a written or recorded request for information, the Library is bound by legislation to release the information within 20 days, unless the information is covered by an exemption. However, if somebody asks, verbally, what time the Library closes, or who funds the Library, and the member of staff knows the answer, then it would be unnecessary to convert this into a written request for the purposes of processing as a FOISA request. The recommendation is therefore that these requests should be dealt with as they were prior to the new legislation, **unless**:

- **You intend to refuse access to information**
- **You do not think that you can provide the information within 20 working days**
- **You are concerned that releasing the information may have implications for complying with FOISA or other legal obligations such as the Data Protection Act, confidentiality, etc**
- **The verbal request becomes a written request**

3. Written stock-related requests

The recommendation is that these requests should be dealt with as they were prior to the new legislation, **unless**:

- **You intend to refuse access to information**
- **You do not think that you can provide the information within 20 working days**
- **You are concerned that releasing the information may have implications for complying with FOISA or other legal obligations such as the Data Protection Act, confidentiality, etc**

4. Written corporate information related requests

It is recommended that all written or other recorded requests for corporate related information be passed to the Corporate Information Officer, **unless you...**

- **have absolutely no concerns about releasing the information with regard to FOISA compliance, Data Protection Act, confidentiality, etc.**
- **AND you are confident that you can provide the information within 20 working days**
- **AND you are confident that you have supplied ALL of the Library's corporate information on that topic which is permitted to be made publicly available**
- **AND you are confident that you have charged the applicant the appropriate fees under the FOISA legislation.**
- **AND you have logged the request, with the date received and will keep a copy of the response and the date it was given.**

In scenarios 1, 2 and 3, if you decide **not** to process the request as you would have done prior to the new legislation, then this is what to do:

- If the request is in a recorded format, write the date the request was initially received, and pass the request to the Corporate Information Officer.
- If the request is not in a recorded format, but you think that the person would benefit from making a formal "FOISA" request, then ask if it would be possible for them to put their request in writing, and to send to the Corporate Information Officer at the Library.

If in doubt, treat as a FOISA request and pass to the Corporate Information Officer. The following are the type of things that may make you consider treating a request as a FOISA request:

- you are not sure how to deal with the request
- the request will be or has been answered late
- you are unsure who is the correct person to answer the request
- it is a persistent, repeated information request (for example you recently received an identical or very similar request from the same applicant)
- there is evidence that the request is part of a campaign (for example you are receiving identical or very similar requests from different applicants). (An appropriate response in this case would be to post the information requested on the NLS publication Scheme).
- The customer insists that you undertake a large-scale research-based enquiry, despite having been made aware of the implications of doing so due to the extent of our collections.

- you are unhappy about releasing some or all of the information
- the request asks for information of a sensitive nature, for example
 - for meeting minutes when an issue of staff discipline or the behaviour of a member of the public was discussed
 - for papers about a major Library policy decision
 - for material from our collections that may be governed by some restriction on access, such as commercial research, maps of militarised areas, or embargoed collections.
 - the request is about a Human Resources issue, for example one colleague asking how much another colleague earns
 - the request is for personal data (i.e. it is a data protection request), *unless* you are confident that you know how to deal with requests for personal data, *and* you are confident that the applicant is the person who is the subject of the requested data
- you have a problem regarding the format the applicant has requested
- you have any other queries or uncertainties about the request

What is exempt?

Exemptions are narrowly defined, and not always guaranteed. They fall into two categories:

- Absolute
- Non-absolute

Absolute exemptions are not open to negotiation. FOISA has stated that anything with an absolute exemption can be withheld from disclosure. If an authority felt that the information that had been requested fell under one of the 5 absolute exemptions, they could simply inform the applicant that the information is exempt. **As with all responses, the applicant can still ask us to review our response, and if necessary can appeal to the Scottish Information Commissioner.** Although the Commissioner could not change an exemption, he could say that it had been incorrectly applied, and ask us to change our response.

Non-absolute exemptions are more complex. The application of these depends on the **Public Interest Test (PIT)**. The exemptions have to pass through three stages:

1. Is the information covered by one of these exemptions?
2. Would disclosing the information cause substantial prejudice or harm to an individual or group?
[If no, then the exemption should not be applied and the information should be released. If yes, then the exemption process must go to stage three]
3. Is the public interest in withholding the information greater than the public interest in disclosing it?
[If no, then the exemption should not be applied and the information should not be released. If yes, then the exemption should be applied and the information should be withheld]

The Act and subsequent guidance has not clarified what substantial prejudice or harm amounts to, but many observers believe that it indicates that actual and serious damage must be likely as a result of disclosing information. So, in relation to commercial interests, anything that could cause loss of business or revenue might be considered substantial prejudice or harm. It is certainly a more narrow definition than the equivalent UK Act, which does not stipulate “substantial”. This means that the ability to apply the non-absolute exemptions is reduced under FOISA.

The Public Interest test is even more complex. A good interpretation is that this should reflect what is in the interests of the public at large, not simply what the public, or a section of it, might be interested in. For example, if, by disclosing information, the Library put at risk its ability to provide a public service, or jeopardized the future sustainability of its collections, it would not have served the public interest.

Below is a table that lists all of the exemptions, with the section of the Act that details them. A brief description is given, as is the length of time the exemption stands for. Some information ceases to be exempt after 30 years of its existence, for example. **It might be worth pointing out that much of the information that the Library holds is covered by the first exemption, “Information otherwise accessible”.**

Section	Exemption	Description	Class	Exemption period
25	Information otherwise accessible	Applies to information readily available in a published book or document, or information on our publication scheme, for example.	Absolute	Does not fall away
26	Prohibitions on disclosure	Applies to information whose disclosure is prohibited under an enactment, or where disclosure would constitute a contempt of court.	Absolute	Does not fall away
27	Information intended for future publication	Applies to information that will be made available within 12 weeks of the request, or information that is part of an ongoing programme of research, where disclosure would substantially prejudice the programme, its participants' interests, and the interests of the authority that holds the information. Subject to PIT .	Non-absolute	Does not fall away
28	Relations within the United Kingdom	Exempt if disclosure would prejudice substantially relations between any administrations in the United Kingdom. Subject to PIT .	Non-absolute	30 years
29	Formulation of Scottish Administration policy	Information held by the Scottish Administration is exempt if it relates to policy development, advice provided by law officers, ministerial communications, or the operation of any Ministerial private office. Subject to PIT .	Non-absolute	30 years
30	Prejudice to the effective conduct of public affairs	Information is exempt if its disclosure would inhibit substantially the free and frank provision of advice or exchange of views or would otherwise prejudice the effective conduct of public affairs. Subject to PIT .	Non-absolute	30 years
31	National security and defence	Information is exempt if it is required for the purposes of safeguarding national security or where disclosure would substantially prejudice the defence of the British islands or any colony or the capability or security of any relevant forces. Subject to PIT .	Non-absolute	Does not fall away
32	International relations	Information is exempt where its disclosure would substantially prejudice the UK's international relations or interests. Subject to PIT .	Non-absolute	Does not fall away
33	Commercial interests and the economy	Information is exempt if it constitutes a trade secret or if its disclosure would substantially prejudice the commercial interests of any person. Subject to PIT .	Non-absolute	30 years.

	Commercial interests (continued)	Information is exempt if its disclosure would substantially prejudice the economic interests of the whole or part of the United Kingdom, or the financial interests of its administrations. Subject to PIT		Does not fall away
34	Investigations by Scottish public authorities and proceedings arising out of such investigations	Information is exempt if it is held for the purposes of criminal investigations. Subject to PIT .	Non-absolute	Does not fall away
35	Law enforcement	Information is exempt if disclosure would substantially prejudice the prevention or detection of a crime, or the apprehension or prosecution of offenders, or the administration of justice. Subject to PIT .	Non-absolute	100 years
36	Confidentiality	The first part of the exemption applies to any information about which a claim to confidentiality of communications could be maintained in legal proceedings. Subject to PIT .	Non-absolute	30 years
		The second part of the exemption applies to information that was obtained by a Scottish public authority from another person that, if disclosed by the Scottish public authority that obtained the information, would constitute a breach of confidence actionable by the person who gave the information to the authority, or by any other person.	Absolute	30 years
37	Court records	Information is exempt that is only held as part of the documentation for a court or tribunal case or a statutory enquiry.	Absolute	30 years
38	Personal information	Information is exempt from FOISA if it is the personal data of the applicant where they are the subject. Requests should be treated as Subject Access Requests under the Data Protection Act. Personal data requested by a third party is exempt information if disclosure would breach any of the eight data protection principles. Personal census information or a deceased person's health records are also exempt from disclosure under FOISA. Where a request for information to be disclosed that would not contravene any of the above, the PIT should be applied.	Absolute	Does not fall away (Census records – exemption falls away after 100 years)
39	Health, safety, and the environment	Information is exempt if its disclosure would endanger the physical or mental health or safety of an individual. Subject to PIT . Environmental information is exempt, and should be dealt with under the Environmental Information Regulations 2004 .	Non-absolute	Does not fall away
40	Audit functions	Information is exempt where it is held with a statutory duty to audit the accounts or examine the economy, efficiency and effectiveness of the use of resources of other public authorities and where disclosure would substantially prejudice those functions. Subject to PIT .	Non-absolute	30 years
41	Communications with Her Majesty, etc.	Information is exempt if it relates to communications with Her Majesty, members of the Royal Family or Royal Household, or the conferring of Honours. Subject to PIT .	Non-absolute	30 years (60 years for Honours)

It is important to note that exemptions apply to information, not to entire documents or folders necessarily. Do not expect to be able to apply exemptions in a blanket manner. It may be that on a page of five paragraphs, four are exempt from disclosure, but the one that is not must be disclosed. An example would be committee minutes, where one section deals with a staff disciplinary matter. In cases such as this, the exempt material should be removed from the document and the rest of the document released, with an explanation for why only part of the information requested has been released. One way to remove the exempt material would be to photocopy the page(s), block out the exempt information with paper or tippex, then photocopy the amended page, and send the photocopy of the amended page to the applicant.

Simply stamping "PRIVATE" or "CONFIDENTIAL" on a document does not mean that it is exempt from disclosure under FOISA. Every request must be considered on its own merits, and the information must only be withheld if it complies with the legislation as outlined above.

PARTICULAR AREAS FOR CONSIDERATION

The Library has a long tradition of making the information it holds available to the public, and recent developments such as the new strategy have stated a commitment to widening access. Recent corporate developments have also been visible to the public through consultation and publicity. The Library is already supporting the spirit of FOISA, and has provided clear routes for people to make their requests. However, such is the unique position of the Library (it is the only copyright library affected by FOISA) that some aspects of the legislation are unknown, and the exact interpretation of the legislation is still developing. Some guidance is given below.

Embargoed stock

Some of the information that the Library holds is not made available to users immediately, at the request of the publisher. This could be because the stock is commercially sensitive, such as price listings for second hand cars. This is information that we hold, and stock that belongs to the Library's collections, so it is covered by the terms of the Act. We might want to apply an exemption to allow us to withhold this stock so as to satisfy the terms of the publisher's embargo. Possible exemptions could be:

- Section 25 – information is otherwise available (much of the car trade information for example appears on websites). In order for something to qualify for confidentiality, it must carry the necessary quality of confidence. If the information were already in the public domain, it would be very difficult to sustain a decision to withhold on the grounds of confidentiality.
- Section 27 – information intended for future publication. The problem here is that the material has already been published, and because of our legal deposit rights, the publisher has been obliged to deposit a copy. The real feature here is that this was material intended for future circulation. If the embargoed stock was withheld because of an ongoing programme of research, and disclosure would seriously damage that programme of research or the interests of any participants, then the exemption may apply.
- Section 33 – commercial interests and the economy. The fact that this information had been published might make it very difficult to claim an exemption from FOISA, although the Library could apply the exemption and explain that as a Copyright Library it had certain rights that would oblige a commercial party to offer up its information. Furthermore, releasing

information that publishers had asked us not to release would jeopardise the ability of the Library to fulfil its depository function, because it may result in publishers not publishing their information, but making the information available through internal business circulars instead. The result would be that the public interest would not have been served.

- Section 36 – confidentiality. The above comments regarding serving the public interest also apply here. The ability to build the Library’s collections largely depends on good relations between the Library and the publishing industry. Breaking agreements regarding confidentiality could damage these relations, damage future collections, and therefore damage the public interest. Apart from which, the Library may have entered into a formal agreement to treat some stock confidentially, or have agreed to limitations on the use of the stock. If it were likely that the Library could be successfully tried in court for breach of confidence or contract, then this exemption could be applied.

A far better approach would be to contact the publishers that are involved in these arrangements and explain to them the implications of the Act, and ascertain whether these embargo periods really need to apply, or whether they can be relaxed a little. Each request for information should be treated on its own merits, and it might be that the publisher is happy to review the embargoes accordingly. It is important that the Library does not adversely affect its current customer service operations and collection policies by releasing information, but it is also important that the Library seeks to remove unnecessary barriers to the right to access information it holds.

Deposited stock (not legal deposit)

FOISA does not apply to deposited material when the public authority is not the owner of that material. Therefore, many of the Library’s deposited collections are not covered by the terms of the Act. However, as part of the Library’s excellent service to the public, these deposited collections are typically made available, with the added value of curatorial expertise. Where restrictions have already been agreed with depositors they should be honoured, but in future when drawing up deposit agreements we should not agree to restrictions on access without careful consideration, and should explain to the depositors the implications of the new legislation. However, it should be borne in mind that these depositors are not obliged

to deposit their collections with us, and enforcing terms on them could discourage them from approaching the Library at all. Discouraging depositors from leaving their collections to the Library would not be in the public interest. However, we should also remember that when we hold other people's material, it costs the Library in terms of storage space, preservation and maintenance, and curatorial work, creating a case for the public interest.

The Public Interest

Many of the exemptions hinge on whether the public interest is best served by releasing or withholding the information. The Act did not specify what the public interest was, but the Scottish Higher Education Information Practitioners have suggested some questions that could be asked in order to establish what was in the best interests of the public. These are:

- Would releasing the information enhance public scrutiny of decision-making?
Example: Releasing the minutes of a meeting where a major policy decision was taken could be seen as in the public interest as it would help public scrutiny of decision-making and the institution's accountability.
- Would releasing the information enhance the institution's accountability?
Example: Information about the admissions criteria for an HE course should be released, even if it would disrupt the effective conduct of public affairs, as people have a right to know the reasons for decisions that affect them.
- Would releasing the information violate an individual's right to privacy?
Example: a request asking for an identifiable member of staff's home address and how many children they have would violate the member of staff's right to privacy, whereas a request about any speeding offences incurred by an institution's driver whilst driving on institutional business would not, because the request is about an aspect of their job.
- Would releasing the information help ensure effective use of public funds and that the public obtain value for money?
Example: releasing information on the evaluation (but not details) of a successful bid to provide services for the institution might be in the public interest, as it helps demonstrate how public funds are being used effectively and the public are obtaining value for money. However, releasing the details of unsuccessful bids

(covered by the commerciality exemption) would probably not be in the public interest, as by definition, public money is not being spent on them.

- Would releasing the information allow individuals to understand decisions and, in some cases, assist them in challenging these decisions?

Example: releasing information on criteria for staff upgrading exercises might be in the public interest, whereas releasing minutes of a meeting where two internal candidates for a chair were discussed would be unlikely to be in the public interest.

FOISA charging structure

A charging structure has been introduced which should be implemented with the new legislation. The Library already provides access to its collections through its catalogues and the research and assistance offered by its staff, and it was decided that continuing this approach (including current reprographics charges) was the best way to ensure the highest levels of customer service and best use of resources. There was no structure in place for access to corporate information, however, and the FOISA fee structure was welcome. The Library anticipates that the vast majority of requests for access to its corporate information can be satisfied free of charge. The structure states that:

- Any request for information that would cost more than £600 does not have to be undertaken by a public authority, on the grounds that it is too costly. The law requires public authorities to help applicants formulate cheaper requests for information that come within the £600 threshold.
- Any requests up to £600 can be charged for.
- The first £100 of any costs cannot be passed on to the applicant.
- Of the remaining costs up to £600, the public authority can only charge the applicant 10%
- This means that the most a public institution can recover per request for information is £50 (which would mean a cost recovery loss of a possible maximum of £550).
- Costs are comprised of staff time spent in locating, retrieving and providing the information, and any copying, postage and packaging costs that may arise.
- The maximum hourly rate that can be charged for staff time is £15 per hour.

- If a request for information would cost more than £600, the Library can choose to undertake this, and is able to recover the full amount of any costs above £600.
- The fees should be estimated as accurately as possible, and any overcharging should be refunded.
- VAT should not be added to the fee
- Where provision is made in other legislation for fees that may be charged for the disclosure of information, such fees continue to apply rather than the new charging structure.

If a fee has to be paid by the applicant, then a notice should be sent to them. When this is sent, the clock stops ticking on the 20 working days time limit. When the Library has received the fee, the clock starts again. If the Library does not receive the fee after 3 months, the FOISA request lapses.

Copyright

Section 50 of the Copyright, Designs and Patents Act 1988 states that releasing information in order to comply with another Act of Parliament (in this case FOISA) does not infringe copyright. However, the CPDA will continue to protect the rights of the copyright holder once the applicant receives the information.

Use of surrogates

FOISA is about access to information, which does not necessarily equate to access to actual documents. Wherever it is “reasonably practicable” to do so we should provide material in the format requested. However, access may be restricted for preservation reasons. It is acceptable to provide surrogates as substitutes for fragile historical material (e.g.: Mary, Queen of Scots last letter), or to provide a summary of the information, where producing it may cause damage to the original. If an applicant specifically asks to see the original, each case should be considered on its merits. If copies of material not suitable for copying are requested, it is acceptable to ask enquirers to come in to see the original. In all such cases, we should be prepared to produce a Conservator’s report in support of our decision.

Defamation

Some material may include derogatory or negative comments about individuals. Providing such information in response to an enquiry could mean individuals claim

we have defamed them and that the Library is taken to court. FOISA provides some protection against this. The Library cannot refuse to answer an enquiry because the response would disclose defamatory material, but as long as that material was supplied by a third party, we would not be liable for defamation. However, if the defamatory material was written or created by Library staff, then the Library would be liable.

ENVIRONMENTAL INFORMATION

Requests for environmental information are exempt from FOISA, because they are covered by the Environmental Information (Scotland) Regulations 2004 (EISR).

The definition of “environmental” is very broad. It includes recorded information held by the Library on:

- the elements of the environment – air, water, soil, landscape, habitats natural sites, flora and fauna, including cattle, crops, GMOs, wildlife and biological diversity - and any interaction between them.
- any factor such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases affecting or likely to affect the state of the elements of environment or any interaction between them.
- effects of the environment on the conditions of human life, including food, buildings, and the preservation of buildings
- the visual aspect of the environment (such as the impact a planned new building on a view)
- the state of human health and safety, conditions of human life, the food chain, cultural sites and built structures, which are, or are likely to be affected by the state of the elements of the environment and the interaction between them.
- environmental reports and economic analyses, including on the impact of environmental legislation
- measures and activities affecting or likely to affect, or intended to protect the state of the elements of the environment and the interaction between them. This includes administrative measures, policies, legislation, plans, programmes and environmental agreements.
- cost benefit and other economic analysis used in environmental decision making.

The Library holds a considerable amount of environmental information in the form of, particularly, maps, but also in the form of journals, books and theses on environmental issues, official publications concerning environmental issues and legislation, Manuscripts holdings of estate archives, farm diaries, and records of

agricultural improvements, and corporate information, such as plans for the Library's buildings, records of waste, and spending on increasing energy efficiency.

The EISR legislation also came into effect on January 1st 2005, and has been bracketed with FOISA because it shares certain features, such as the role of the Scottish Information Commissioner. However, there are key differences between the two pieces of legislation, notably:

- **Requests for environmental information do not have to be in a recorded format.** They could be made verbally. However, it would be good practice for the Library staff involved to accurately record the request at the time of it being made, to ensure that there was a record of the request for the Library to refer to.
- **20 working days response time.** This can be extended to 40 days for complex requests involving a large volume of material.
- **EISR covers a wider range of organisations, including private organisations and public private partnerships involved in environmental services** (such as waste disposal, water, energy, transport, recycling, and environmental consultancy).
- **Any information concerning emissions must be disclosed.**

There are also **exemptions** to the general rule of disclosure, some of which are very similar in nature to FOISA. The best guidance on these can be found on pages 18-26 of the Scottish Executive document *Guidance on the implementation of the Environmental Information (Scotland) Regulations 2004* which can be found at the following website <http://www.scotland.gov.uk/library5/environment/aeig-00.asp>

Environmental information includes information contained in documents, pictures and records, where records are taken to include registers, reports, returns, computer records and other non-documentary records. Maps will generally contain environmental information. Arrangements may have to be made over time with producers of maps to prevent restrictions that might otherwise arise over copyright and property rights. The provision of information under EISR does not give the person who received the information the right to re-use that information in a manner that infringes any copyright legislation.

HOW SHOULD STAFF RESPOND?

When you receive an information request, consider the following questions.

Is the date of receipt clearly marked?

Requests for information are time related. The Library will only have 20 working days during which to respond to a request for information. The date the request is first received is therefore crucial in determining whether the Library has responded in time. If you have to contact the applicant to ask for clarification, the date you sent the letter or email should be recorded, as this will indicate when the clock stopped. Similarly, the date the customer replies should be recorded to mark when the clock began ticking again. Requests for environmental information must also be answered within 20 working days. This may be extended to 40 working days for complex requests involving voluminous quantities of material. Subject Access Requests under the Data Protection Act must be answered within 40 calendar days.

Who is the appropriate person to deal with the request?

It may be that the person who receives the request is not the best person to respond to it. Also, where information is held broadly across the Library, it might be that several people need to be included in responding. Ask yourself, can you answer the question without reference to anyone else, confident that in responding you have satisfied the various legal frameworks such as FOISA, Data Protection, and EIR; can you be confident that you have provided all of the information relating to the request that the Library holds; and, can you do all of this within 20 working days. If in doubt, contact the Corporate Information Officer.

Does the Library hold the information?

Only recorded information, that is information that the Library already holds, is covered by the legislation. You may need to search for this information, but you will not need to create new information. If the Library does not hold the information, write to the applicant explaining this (there are limited instances where you do not have to confirm or deny whether the Library holds the information, if by doing so you invalidated the nature of an exemption – for example, you may not want to confirm or

deny that you held information relating to a sensitive security matter – but you could say that this information is exempt from the Act). You should *not* suggest that the applicant try another public authority, unless you are certain that they hold the information. Nor should you transfer the request to another Scottish public authority.

Under which information regime does the request fall?

If the applicant is requesting personal information about himself or herself, the request is (most probably) a data protection request. These requests must be handled as Subject Access Requests under the Data Protection Act, not FOISA.

If the request is about someone *other* than the applicant (unless the applicant is acting on behalf of the data subject), it should be dealt with under FOISA. Note, however, there is an exemption if disclosure of the third party's personal data would breach any of the Data Protection principles, and it is quite likely that this information would be withheld.

If the applicant is asking for any other non-personal information, it is either a freedom of information or an environmental information request. Although many of the procedures for dealing with freedom of information and environmental information requests are the same, you still need to know which regime the information request falls under, because the two regimes have different exemptions and charging structures. See page [tuytut](#) for further information about environmental information requests.

Some information requests may include several questions that need to be handled differently. For example, if someone writes in asking to see all the information you hold on them, any details of asbestos risk in the buildings where they worked in the Library, and your human resources policies, you will need to handle the first question under the Data Protection Act, the second question under the Scottish Environmental Information Regulations, and the third under FOISA.

Right of review

Applicants who are dissatisfied with the Library's handling of their information request in any way have the right to request the Library to conduct a review. This could be because the Library was late in replying, because some or all of the information

requested was withheld, or because the applicant feels the fee requested was too high or they did not receive the help and assistance from the Library they feel they should have.

Any expression of dissatisfaction should be treated as a request for review. The applicant does not have to specifically request a review. If you receive a request for review, contact the Corporate Information Officer. Please do so promptly as the timescale for dealing with review requests is tight.

THE NLS PUBLICATION SCHEME

Section 23 of FOISA places a duty on Scottish public authorities to adopt and maintain a Publication Scheme. This amounts to a declaration of all of the information that the Library makes readily available to the public, and it must specify:

- the classes of information the authority publishes or intends to publish;
- the manner in which this information will be published, and;
- whether the information is available free or on payment of a charge.

The Information Commissioner approved the National Library of Scotland's Publication Scheme on 30 November 2004.

The Publication Scheme consists of the explanation of the FOISA process and citizens' rights, and the actual list of documents and publications available. The Publication Scheme is available in printed form, but also is available on the NLS website. The website contains hyperlinks to most of the documents. The Publication Scheme also has an online information request form. It is therefore a very useful tool to use if you are unsure of how to best cope with verbal requests for information. By directing the person to the publication scheme and explaining what it is, there is the possibility that they will find the information they are seeking on it, but more importantly there is the safety that they will be advised of the FOISA process and guided towards making a proper request.

Below is a summary of what is on the Scheme (divided into the three classes):

Corporate	Collections	Public Services
Governance	Collections	Bibliographic services
Structure	Catalogues	Services to the general public and visitors to the Library
Planning		User services
Annual report		
Human Resources		

If you are faced with a **verbal** request for (non-environmental) information, and are unsure of how to answer it, the Publication Scheme would be a very useful tool to use. Consider saying something like:

“The answer to that question may be in one of the documents that the Library has made available on its Publication Scheme. If the information is unavailable, the Scheme explains how to make a request for that information”

RECORDS MANAGEMENT ADVICE

The right to request access to information is only as good as the Library's ability to access the information in order to answer the requests. FOISA has made the case for better records management quite clear, particularly Section 61 of the Act, which is a Code of Practice on Records Management. The National Archives of Scotland 'Model Action Plan lists the benefits of better records management as helping to:

- increase efficiency and effectiveness, delivering savings in admin. costs
- improve and develop service delivery
- achieve business objectives and targets
- ensure compliance with duties under FOISA and other legislation such as the Data Protection Act
- provide a sound basis for the transition to e-government

Without good records management, FOISA is almost unworkable. For example, if the Library received a request for information about BOSLIT, it is likely that the current BOS staff would be able to provide the majority of the information. But would the Library know whether that amounted to all that there was on the subject? There may be Word documents and emails about BOSLIT on other computers in the Library, not to mention paper memos in folders and drawers.

Developing a better records management culture will help the Library to know what it knows. Apart from the legal obligation under FOISA to do this, such a development would benefit all staff at the Library, who would be able to share knowledge to better inform policies and operations. Indeed, staff are already well accustomed to joint working groups and sharing knowledge. But such is the scale of corporate information, especially since the advent of electronic communication and word-processing, that systems need to be investigated that would allow this explosion of recorded information to be managed.

Developing a better records management culture will be a long-term project, and separate guidance will be issued. However, it might be useful for staff to think about the following aspects of records management:

- Retention schedules – some records / information documents need to be kept for legal reasons. Other information documents are kept because they are useful to our operations. But other things do not need to be kept forever, and

we must develop sensible retention schedules across the Library, including paper based records and email.

- Knowledge sharing – think about what information you personally hold, and how this could be made available to other staff that could benefit from it.
- Developing knowledge – think about information that should be recorded but currently is not, or information that is recorded but is not made full use of. Think about the types of information documents you use, how you use them now, and how you would like to use and access them in the future.

An information audit is perhaps the best way to find out what kind of records management the Library needs to develop. Until this takes place, and with regard to FOISA, it is important that staff understand that destroying information records to prevent disclosing information that has been requested is a personal criminal offence. However, normal housekeeping duties should continue, such as deleting emails that are irrelevant or have served their purpose, or throwing out an old document that has been superseded.

Also, anything relating to a request for information should be recorded, and dates of receipt and response clearly marked. Copies of any requests for information and the responses can be sent to the Corporate Information Officer for filing.

SUMMARY

FOISA begins with the statement "A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority". This is the starting premise, and although there are exemptions, the public interest in knowing about how public institutions operate and spend will often have the power to overturn those exemptions.

FOISA is not designed to overrule other legislation, such as the Data Protection Act or Representation of the People Act, and cannot override legal prohibitions on disclosing information.

FOISA encourages greater transparency in the affairs of public institutions, and the Publication Scheme should be used as a method of declaring information.

The ability to comply with FOISA depends to a degree on the state of records management in an institution. Because of this, and also because of the benefits to the operations of the Library, and information audit will be undertaken, which will establish a framework for the development of better records and knowledge management systems.

The National Library of Scotland has for many years provided access to the information that it holds, and its staff are proficient in this. FOISA should be seen as an opportunity to extend these skills and this access into its corporate information, so that the Library can demonstrate its commitment to excellent service and value for public money.

In compiling this document, thanks should go to the Information Steering Group (now Information Management Group), and for her assistance in producing the web-based Publication Scheme, thanks should be extended to Alison Buckley.

Further guidance regarding FOISA is available from:

<http://www.itspublicknowledge.info/>

<http://www.scotland.gov.uk/library5/government/foisa-00.asp>

<http://www.slainte.org.uk/files/pdf/cilips/foisa04.pdf>

A = Primary filtering
 B = Secondary filtering
 C = FOISA process

