



# A Citizens' Guide to FOI

How to use the Freedom of Information and the Environmental Information Regulations

# Contents

	Page
Introduction	3
Part 1: FOI – the background	4
Part 2: Your rights	6
Part 3: The public sector’s obligations	8
Part 4: Exemptions	11
Part 5: The Data Protection Act	12
Part 6: Environmental information	13
Part 7: How much does it cost?	14
Part 8: Scotland	18

## Introduction

The UK Freedom of Information Act (FOIA) and its sister legislation, the Environmental Information Regulations, have had a profound effect on the public and private sectors alike, and provides companies, campaigners, journalists and citizens with a powerful tool.

Since 2005 everyone has, for the first time, a legal right of access to information held by over 100,000 public bodies. The Act is retrospective, so applies to historical documentation as well as that generated since it was enacted.

This booklet is designed to help you to understand the legislation and use it to its full potential.

## Part 1

# FOI – some basics

The Freedom of Information Act applies to all so-called 'public authorities', which means almost the entire public sector, from Government departments down to primary schools and GP practices. The Act covers England, Wales and Northern Ireland, plus UK Government departments operating in Scotland. Bodies under the control of the Scottish Executive are covered by separate but similar legislation, and environmental information is covered by the Environmental Information Regulations (EIRs).

The legislation gives the public a legal right of access to official information and makes the destruction or alteration of records to prevent disclosure a criminal offence.

## The Information Commissioner

The post of Information Commissioner was created under the FOIA. He is responsible for the Act's enforcement and handles appeals on behalf of those whose requests for information have been refused. The Commissioner has similar responsibilities for the Data Protection Act (DPA) and the Environmental Information Regulations.

The FOIA and the DPA are closely interrelated and define our twin rights of access to information and protection of personal data. The boundary between these two rights is mostly rigidly drawn, but some areas are open to legal interpretation and have been tested in the courts.

The FOIA significantly extended the DPA, allowing you to access a wider range of personal data held on you by public authorities. Under the FOIA the Lord Chancellor has issued two codes of practice one of which relates to the disclosure of information and the other to the management of records.

If the Commissioner believes an authority has breached the Act, or one of the Lord Chancellor's codes, he can issue so-called practice recommendations, which set out the corrective measures the authority should take. If you believe your information request has been dealt with incorrectly by an authority, you can apply to the Commissioner for a decision. In response he can issue three types of notice against the authority:

- **Decision notices.** If the Commissioner finds in favour of the applicant he can issue a decision notice, setting out the necessary steps for compliance with the Act, plus a deadline.
- **Information notices.** If the Commissioner needs more information about the disputed request he can issue one of these notices to demand the necessary details.
- **Enforcement notices.** If the authority does not comply with the decision notice the Commissioner can issue an enforcement notice, which again must specify the action required and a deadline.

If the authority fails to comply with any of the notices, the Commissioner can write to the High Court, which can then declare the authority in contempt of court. Either party can appeal against decision notices, but only the authority can appeal against information or enforcement notices. The appeals are considered by the First Tier Tribunal (Information Rights) formerly known as the Information Tribunal. Subject to appeal to the courts on a point of law, or to judicial review, the tribunal's decision is final.

## Third party information

Much information held by public authorities was originally submitted by third parties such as private contractors, or special interest groups. This information is covered by the FOIA and can therefore be released, as long as there is no breach of legal confidence, the Data Protection Act, or any other law. There is no legal obligation on authorities to consult with third parties before releasing such information. However, the Lord Chancellor's Code of Practice recommends consultation if the authority is unsure whether the information should be released. Third parties have no right of veto over its release and automatic right of appeal to the Information Commissioner or Tribunal against a decision to release.

## Ministerial veto

Decisions of either the Commissioner or the Tribunal may be overridden by a cabinet minister, but only if: (i) the issue is whether the disclosure should take place in the public interest; and (ii) the information is held by central government or an authority specified by order. The veto is supposed only to be used in exceptional circumstances and the Information Commissioner has made it clear that all such decisions will be reported to Parliament for its scrutiny.

## Part 2

# Your rights

The Freedom of Information Act hands you the power to uncover how your institutions are run. Our secretive 'need-to-know' culture, though not completely dead and buried, has been replaced by a legal 'Right to Know'. To use the Act effectively you need to understand how this right works in practice.

## The fundamentals

The Right to Know allows you to do two things:

- To ask any public organisation covered by the Act what information it has on any subject you specify.
- If the organisation has the information, to be given copies.

Providing the information is not legally exempt from disclosure the organisation must tell you what it has and give it you within 20 working days. In most cases, even if it withholds the information, it at least has to tell you what it has.

## Extra rights

Your request has to be in written form, but email will do. You don't have to give your real name, only a contact address. Neither must you explain why you want the information and they have no right to ask you. These rights apply to everyone, not just UK citizens.

The FOIA also strengthens your rights under the Data Protection Act, allowing you access to both electronic and manual personal data.

## What if your request is refused?

If your request is refused, you can complain to the organisation involved, which must then carry out an internal review. If the complaint is rejected, you can appeal to the Information Commissioner, who, if he finds in your favour, has legal power to force disclosure. If the Commissioner finds against you, you can appeal to the independent Information Tribunal.

## Part 3

# The public sector's obligations

The Freedom of Information Act covers almost all public authorities, which are estimated to number around 100,000 (there are a few exceptions – see Part 4: Exemptions) and include:

- Central government departments, eg; the Home Office and the Ministry of Defence.
- NHS organisations, from health authorities to hospital trusts, GP surgeries, pharmacies, dentists and opticians.
- Schools, colleges and universities.
- Regulatory bodies, such as Ofcom and the Charities Commission.
- Local authorities, from parish councils upwards.
- Non-departmental bodies, which includes everything from the Environment Agency to the British Potato Council.

These public authorities have two main obligations, which are explained in more detail below:

- To maintain publication schemes for the proactive release of information.
- To respond to information requests from the public.

## Publication schemes

Publication schemes are systems for the proactive release of information. The type of information normally released via publication schemes would include such things as:

- Details of service and financial performance targets and related performance data.
- Board meeting agendas and minutes.
- Organisational information, including a who's who of senior staff, their responsibilities and contact details, and staff rules and internal guidance.
- Financial information, such as sources of income, fund-raising and how money allocated between different functions and departments.
- Information on the authority's decision-making process. This might include, internal reports and inquiries and the decisions emanating from them.



Almost all the public authorities covered by the Act now have active publication schemes, which are generally accessible via their websites. The schemes must be approved by the Information Commissioner, with the approval time limited to four years. In the spirit of the Act they should be regularly reviewed and updated.

## Information requests

On receiving your information request, public authorities must acknowledge and log it. They must then answer the request within 20 working days, unless they are unsure whether the information should be exempt, in which case they are allowed more time for consultation. They have no right to ask the reason for your request.

Although authorities can refuse vexatious requests and those that would be disproportionately expensive to meet, the Act requires them to help you as far as is reasonable. The word 'reasonable' is open to interpretation, but the Lord Chancellor's Code of Practice provides helpful guidance. If it's not clear what information you're seeking, the authority must ask you to clarify and if your request is too broad it should suggest you submit a narrower request. The authority can help you by, for example, setting out some of the available options, or, if such things are available, giving you access to information indexes and catalogues. If there is a cost barrier to meeting a request the authority could outline the information it could supply within the cost ceiling. If you don't respond to the authority's efforts, the authority is not obliged to take further action.

Hopefully most information requests will be more straightforward. In replying to standard requests the authority must set out:

- What information it holds on the subject you have specified, providing this information is not itself exempt.
- The information it is releasing.
- The information that is exempt from disclosure and therefore not being released, again providing this information is not exempt.
- Details of the relevant exemptions.

Wherever possible the information must be provided in the manner you request, for example photocopies, or computer files.

## Complaints procedure

Public authorities must have an internal review procedure in place in case you wish to complain against a decision to withhold information. Once it receives your complaint, the authority should send you confirmation and tell you when you can expect a response.

Internal reviews can be conducted by person – ideally an appropriately trained senior figure – who was not involved in the original decision to withhold. They should be fair and impartial, with the reviewer considering the information released against that requested, plus all the documents associated with the original application. He should also discuss the case with the staff who handled the original application and, on completion, with the organisation's FOI specialist, in case the conclusions warrant changes to internal processes.

The authority should inform you of the outcome and ensure all actions are recorded in case of further investigations by the Information Commissioner. As for timescale, they should deal with simpler complaints within two to three weeks and more complex ones – in particular those involving public interest test exemptions within six weeks. They should notify you if these deadlines are likely to slip.

If the original decision is reversed, you must be informed and supplied with the relevant information. If the decision is upheld, you must be told of your rights of appeal to the Information Commissioner's Office and be supplied with the relevant contact details.

## Records management

The public right of access to information can only be realised if public authorities organise all their data effectively. This principle applies equally to paper and electronic records. Under section 46 of the Act, the Lord Chancellor has produced a code of practice on the management of records. Failure to comply with the Code may be a breach of other legislation, including the Public Records Act, the Data Protection Act, the Local Government Act and the Human Rights Act.

Authorities routinely pass on information to other bodies, or individuals, for a variety of administrative reasons. In such cases they must keep a proper record of the transfer. Under the Code of Practice, if an authority holds some of the information you have requested, but believes another authority has other parts, it must inform you what it holds.

## Part 4

# Exemptions

Although the Freedom of Information Act allows you right of access to most information held by public authorities, some information remains protected. There are two types of exemption, absolute and qualified. Some of these, almost all qualified ones (see below), require a judgement to be made on whether release of the information will prejudice the interests specified in the particular exemption. This is known as the 'prejudice test' and sometimes as the 'harm test.'

The word 'prejudice' in the FOIA has been controversial, drawing criticism from open government campaigners. The Government's original white paper on freedom of information used the term 'substantial harm', which would have made it more difficult to refuse disclosure, but this was diluted to 'prejudice' by the then Home Secretary Jack Straw. The Scottish Freedom of Information Act, however, uses the term 'substantially prejudice.'

Some of the exemptions overlap, for example, information might be exempt because it affects the country's defence – see section 26 of the Act – and, by extension, national security – see section 24.

Sometimes only part of the information contained in a document will be exempt. In those circumstances an authority can release the document with the exempt sections blanked out.

**For a full guide to the exemptions, see our separate [booklet](#).**

## Part 5

# The Data Protection Act

The Data Protection Act 1998 (DPA) is the sister act to the Freedom of Information Act, and the Information Commissioner – formerly the Data Protection Commissioner - is responsible for enforcing both.

Whereas the FOIA and the Environmental Information Regulations (EIRs) allow you access to a vast range of information on public issues, the DPA gives you a right of access to personal data and protects it from others. As a general rule, any information you can access about yourself under the DPA cannot be released to others under the FOIA and the EIRs. However, some personal information might be disclosed to third parties if it is deemed not to breach the data protection principles set out in the DPA.

The DPA applies to both public and private sector bodies and you can apply to any organisation or company for personal data they hold on you. This is known as a subject access request. The authority has 40 calendar days to respond, compared with 20 working days for FOIA requests.

Prior to the FOIA, the DPA allowed you access to electronic data and formally structured manual files such as medical and financial records. However, the FOIA amended the DPA, extending your right of access to 'unstructured' personal data held manually by public authorities.

This new right, which began on January 1st 2005, might have obliged authorities to hand over every piece of paper concerning the subject, were it not for a 2003 Court of Appeal judgment, in the case of *Durant vs the Financial Services Authority*. The judgment significantly narrowed the definition of 'personal data', effectively excluding any document which does not have the subject as its main focus and which could not impact on his or her privacy. The judgment also ruled that the right of access to manual files applies only to those that are both formally structured and organised for the simple retrieval of personal data.

## Part 6

# Environmental information

Environmental information falls under the Environmental Information Regulations (EIRs), rather than the FOIA. The Regulations does not specify exactly what information is classed as environmental, but among the types covered are:

- 'Raw' data on subjects such as air and water quality levels, industrial discharge rates, soil quality and biodiversity.
- Regulatory measures affecting the environment, including policies, plans, programmes and agreements.
- Reports on the implementation of environmental legislation.
- Economic analyses, including cost benefit analyses on regulatory measures.
- Health & safety information, on subjects such as food and land contamination and quality of life.

The Regulations cover the same range of public authorities as the FOIA and enforcement procedures are also the same, with public authorities expected to abide by the Code of Practice issued under the FOIA's section 45. They are also required to proactively release environmental information under their publication schemes.

There is no geographical restriction on the information, as long as it is held by one of the public authorities covered by the EIRs, it can relate to anywhere in the world. It may therefore include information about UK embassies and foreign aid programmes. Neither are there any historical restrictions, since, like the FOIA, the regulations are fully retrospective.

Unlike the FOIA, information requests may be made orally, as well as in writing.

## Exemptions

The EIRs' exemptions – which are known as exceptions – are narrower than the FOIA; there are fewer of them, and, crucially they are all qualified, or 'public interest', exemptions, rather than absolute. **For a full guide to the exemptions, see our separate [booklet](#).**

## Part 7

# How much does it cost?

Freedom of information is only meaningful if it's affordable. You might have the legal right to information, but, if it costs you too much, it may as well remain secret. When, in 2003, the Irish Government increased charges for answering requests under the country's FOI Act, usage fell dramatically. So, what can you expect to pay for information in the UK? And how are those costs calculated?

## Discretionary cost limits

The FOIA allows public authorities to charge you for information, but it doesn't say how much. Fees regulations issued under the Act set some limits, but these give public authorities plenty of room for manoeuvre, so there could be wide variations in what, if anything, you end up paying. Public authorities may refuse your information requests if the cost of meeting them, in terms of staff time, exceed what the Act terms an 'appropriate limit'. The fees regulations set this limit at £600 for central government departments and £450 for all other public authorities.

If the appropriate limit is breached, the authority doesn't have to reject your request, but it can charge you the full amount, rather than the excess. So, if it costs a central government department £650, they can charge you £650, rather than £50. However, if it wishes, the authority can waive the fees altogether. Unfortunately you have no say in the matter, but, if your request does breach the limit, the authority must tell you what information would be available within it.

## How are costs calculated?

Staff costs are fixed at £25 per person per hour, but in most cases the authority's calculations will be based on estimates. Staff time costs only apply to:

- determining what information the public authority holds
- locating the information
- retrieving it
- if necessary, editing or redacting it.

They do not apply to time spent:

- checking whether the exemptions apply
- advising and assisting you
- copying the information
- putting it your preferred format, for example, converting it to a computer file
- delivering it to you, for example by post or email.

## Other charges

If answering your request costs less than the appropriate limit, you may still be charged, but only for copying the information, preparing it in your preferred format and postage. The authority may only include the actual, rather than staff, costs, and these must be 'reasonable'. Although 'reasonable' is not defined, the Department for Constitutional Affairs guidelines say that printing and photocopying should not normally be charged at more than 10 pence per sheet. Authorities that do charge must provide you with a written notice of the fees and can request payment in advance. If you don't pay within three months, the authority can drop the request.

## The Environmental Information Regulations

The EIRs allow authorities to charge you a 'reasonable amount' for information, but don't mention an 'appropriate limit'. Although there are no fees regulations for the EIRs, Defra guidance suggests authorities apply the FOIA fees regulations. So, although authorities can, in theory, charge you all their costs, it would be difficult for them to argue that the charges were 'reasonable' if their costs were below the FOIA's appropriate limits.

## Part 8

# Scotland

The Freedom of Information (Scotland) Act 2002 is similar, though not identical, to the UK Act. Passed by the Scottish Parliament, it applies to over 10,000 public authorities under the control of the Scottish Executive, but not to UK government departments operating in Scotland. As with the UK Act, there are two codes of practice, one relating to the disclosure of information the other to records management.

## Differences to the UK Act

There are a number of differences between the Scottish and UK acts, some subtle and some substantial. The most important ones are:

- **The Data Protection Act.** The Scottish Information Commissioner is not responsible for implementation of the Data Protection Act, which remains the responsibility of the UK Information Commissioner.
- **Qualified exemptions.** In Scotland the public interest test applies if disclosure could 'substantially prejudice' the interests specified in the Act. The UK act uses the term 'prejudice', which makes it easier for public authorities to justify non-disclosure.
- **Exemption for parliamentary privilege.** The UK act provides an absolute exemption on the release of information covered by parliamentary privilege. Since the Scottish Parliament has no such concept, no equivalent exemption applies in Scotland.
- **Right of appeal.** Under the Scottish Act there is no Information Tribunal, so the Scottish Information Commissioner is the final arbiter. Applicants and public authorities can appeal against decisions of the Commissioner on points of law to the Court of Session. This is the equivalent to an appeal to the High Court under the UK Act.
- **Ministerial veto.** The UK Act allows any minister to veto a decision of the Information Commissioner to disclose information on the grounds of public interest. The Scottish act gives less room for manoeuvre, with only the First Minister able to exercise a veto. The veto only applies to a narrow band of exemptions and only then if the information is deemed to be of 'exceptional sensitivity.'
- **Time limit on public interest questions.** If a public authority has to decide whether the public interest test should apply, the UK Act allows the authority more time to respond to a request for information than the normal 20 working days. The Scottish Act is stricter, insisting on the 20 working day limit (30 days if the information requested has been transferred to the Keeper of Records). However, the Scottish Act recognises that the time limits could be extended if further details are required to locate information.



- **Cost.** In Scotland there is an upper cost limit to the authority of £600, based on a rate of £15 per hour. Requests costing the authority under £100 to fulfil will be free to the applicant, while requests costing between £100 and £600 should be charged at 10 per cent of the cost, meaning a maximum charge of £50.

## Environmental Information (Scotland) Regulations

Scotland has its own Environmental Information Regulations, which, like the UK EIRs and the FOIA, came into force on January 1st 2005. The Scottish EIRs cover all Scottish public authorities, plus the relevant private companies, and have a similar scope and range of exemptions as the UK regulations. Authorities may charge 'a reasonable amount' when responding to information requests, but, in contrast to the UK FOIA, there is no upper cost limit to the authority and charges are not fixed at 10 per cent of costs. So, in theory, you could bear the full costs incurred by the authority to which you apply.

To find out more...

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