



Isle of Man
Government

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Council of Ministers

Freedom of Information Act 2015

Code of Practice

A Code of Practice issued by the Council of Ministers under
Section 60 of the Freedom of Information Act 2015

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Freedom of Information Act 2015

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Introduction by the Chief Minister

The implementation of the Freedom of Information Act delivers on this Government's pledge to significantly strengthen the operation of open government in the Isle of Man.

The Act gives residents the legal right to access information held by Public Authorities, balanced by protection for legitimate confidentiality where this is in the public interest.

The Act comes into effect from 1 February 2016, initially only in respect of the Cabinet Office and the Department of Environment, Food and Agriculture. The regime will be extended in stages over the following two years to other Departments and all Public Authorities, including local authorities, so that the Act is due to be fully in force by 1 February 2018.

To manage its impact on public resources, the Act does not apply retrospectively beyond the start of the current Government administration in October 2011, can only be used by Isle of Man residents, and as indicated above its implementation is being phased.

At the same time the public should be aware that the non-statutory Code of Practice on Access to Government Information, which has been in place since 1996, is being retained alongside the new statutory regime and is not subject to the above restrictions. [The Code of Practice on Access to Government Information is entirely separate from, and should not be confused with, the current document, the Freedom of Information Act Code of Practice].

The Freedom of Information Act is an extensive and detailed piece of legislation, imposing legal duties on the named Public Authorities as well as giving new rights in law to Island residents.

To provide guidance in the execution of those duties, the Council of Ministers is required to issue a Code of Practice to be followed by Public Authorities in the exercise of their functions under the Act.

The Freedom of Information Act Code of Practice has been produced in consultation with the Information Commissioner, who provides independent oversight of the operation of the legislation. This is an important document and I hope that it proves helpful to Public Authorities in the fulfilment of their responsibilities under the Act and to the wider public in their understanding of how the legislation will be applied.

Hon Allan Bell MHK
Chief Minister

Interpretation

Where terms are defined, other parts of speech and grammatical forms of the term have corresponding meanings. Words in the singular include the plural and words in the plural include the singular.

"absolutely exempt information" has the meaning given by section 11(3) of the Act.

"the Act" means the Freedom of Information Act 2015.

"an Applicant" means a person who makes a request for information.

"Appropriate Limit" means the same as in the regulations issued under section 68 of the Act.

"Authority" means a Public Authority listed in Schedule 1 of the Act.

"a Department" means one of the Departments of the Isle of Man Government.

"exemptions" means either absolutely exempt information or qualified exempt information.

"extended processing period" has the same meaning as in section 13 of the Act.

"the form" means the form designated in section 9 of the Act for the purposes of making requests for information.

"information" means information that has been created on or after 11 October 2011 and recorded in any form.

"Information Commissioner" means the Isle of Man Information Commissioner.

"practical refusal reason" has the same meaning given by section 11(3) of the Act.

"publication scheme" means a publication scheme adopted and maintained in accordance with section 59 of the Act.

"qualified exempt information" has the meaning given by section 11(3) of the Act.

"qualified exemption" has the meaning given by section 11(3) of the Act and Part 4 of the Act.

"Regulations" means the Freedom of Information (Appropriate Limit and Fees) Regulations 2015 should they be issued pursuant to section 68 of the Act.

"a request" means a request for information made under section 9 of the Act.

"a refusal notice" means a notice given under section 18 of the Act.

"standard processing period" has the same meaning given by section 12(2) of the Act.

“third parties” means a person or body whose interests may be affected by the disclosure of the information that is requested. They may, for example, have provided the information, or be the subject of it.

1. Determination of when information is held by a Public Authority for the purposes of the definition of "held" in section 5 (Interpretation)

1.1 Introduction

- (a) Information will be held by an Authority if it is held at the time that a request is received for it:
 - (i) By an Authority, otherwise than solely on behalf of another person; or
 - (ii) By another person for or on behalf of an Authority.
- (b) In order to comply with the Act, an Authority needs to know what information it holds and on what basis. This means also being aware of what information it holds solely on behalf of another person and what information is held on behalf of an Authority by a third party, in which case it should have arrangements in place to allow it to retrieve the information in the event of a request being made for it.
- (c) If an Authority does not hold the information requested by the Applicant then subject to the duty to advise and assist, it must issue the Applicant with a refusal notice.

1.2 What does "held" mean?

- (a) The definition of "held" is set out in section 8(2) of the Act.
- (b) An Authority does not have to control the information or own the information. The test is whether anyone would say, on the facts of a particular case, that an Authority holds it.
- (c) Information held by an Authority includes:

Information created by an Authority	Information held by a third party on behalf of an Authority
Information created by a third party and obtained by an Authority	Information that an Authority holds partly on behalf of itself and partly on behalf of a third party

- (d) When determining if an Authority holds the information requested, avoid the use of any formulaic checklist and look at the facts on a holistic basis taking into account any guidance, all the circumstances of each individual case and any other relevant factors. It may assist to consider the following examples:

If an Authority's resources are being used	If an Authority decides what information is retained, altered or deleted
If an Authority provides clerical and administrative support	If an Authority deals with enquiries and requests
If information is included within an Authority's budget	

- (e) An Authority will not hold information for the purposes of the Act if:

It holds that information solely on behalf of a third party	Where that information has not been created, sought, used or consciously retained by an Authority
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- (f) Examples that indicate that an Authority may hold information solely on behalf of a third party (and therefore the information is not subject to the Act) are where:

An Authority has no access to, use for, or interest in the information	Access to the information is controlled by a third party
An Authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information	An Authority is merely providing storage facilities, whether physical or electronic

1.3 Information held at the time of the request

- (a) When answering a request, an Authority does not have to consider information that it first held or recorded after the date on which the request was received, even though the information answers the terms of the request, but it may choose to do so. If an Authority decides not to respond it must issue a refusal notice.
- (b) An Authority can legitimately amend or delete information that answers the terms of a request between the date on which the request for information is received and the determination of that request as long as this is in accordance with its retention/deletion policies. Where such amendment or deletion has taken place an Authority does not have to answer the request for information (and in such cases it must issue a refusal notice), but it may choose to answer as far as the deleted or pre-amendment information is concerned.

1.4 Reasonable search

- (a) What will amount to an Authority taking reasonable steps to find the information that an Applicant has requested will be determined on a case by case basis depending on the facts. It may include considerations such as:

Whether an Authority knows what it is looking for and where it is logical to search to identify if the information exists and having conducted such a search no information has been located	Whether the requested information does not relate to matters that an Authority is responsible for
Whether there has ever been a business need for an Authority to record such information	Whether it is not common practice for an Authority to record information of the type requested
Whether such information is included within any of an Authority's records management policies	

2. Determination of matters to which a Public Authority may have regard to in determining whether a request for information is vexatious, malicious, frivolous, misconceived or lacking in substance

2.1 Introduction

- (a) Rights to privacy, effective government and value for the taxpayer are integral to the Act and practical refusal reasons exist to protect the resources of an Authority in its everyday business and from disproportionate use of the Act. An Authority may refuse to give an Applicant the information requested if the request is vexatious, malicious, frivolous, misconceived or lacking in substance.
- (b) Before it can refuse to provide the information requested an Authority must:
 - (i) Ascertain whether a practical refusal reason exists because a request for information is vexatious, malicious, frivolous, misconceived or lacking in substance; and
 - (ii) Attempt to remove the practical refusal reason by the provision of advice and assistance to the Applicant.
- (c) If the practical refusal reason cannot be removed then an Authority can refuse to provide the information requested based on its own assessment of all of the relevant circumstances of the case.
- (d) Whilst the terms vexatious, malicious, frivolous, misconceived or lacking in substance denote separate characteristics, they may also overlap with one another. For example, something that is frivolous may also be vexatious or lacking in substance or both.

2.2 Considering the request

- (a) Consideration of a request must be on the basis of each set of individual facts. A single, abusive offensive request or a torrent of individually benign requests which causes disruption can both engage this practical refusal reason.
- (b) Any refusal can only be applied to the request and not the individual who submitted it. However, any apparent motive within the request may be relevant in considering whether the request is vexatious, malicious, frivolous, misconceived or lacking in substance or in determining if an Authority's response has been reasonable.
- (c) When considering a request, in exceptional circumstances, an Authority can look behind the request and consider it in light of its context and history. A request which appears completely benign on the surface but forms part of a wider trend when looked at in context can meet the criteria to be refused under this provision. What amounts to exceptional circumstances shall be determined by an Authority on a case by case basis.
- (d) If an Authority is concerned about possible prejudice arising from disclosure, then it should consider whether any of the exemptions listed in the Act apply.

2.3 Definition of vexatious, malicious, frivolous, misconceived or lacking in substance

- (a) There is no legal definition however a request will meet the criteria if it amounts to a manifestly unjustified, inappropriate or improper use of a formal procedure.
- (b) When considering whether a request is vexatious, malicious, frivolous, misconceived or lacking in substance, a request should be looked at as a whole and any use of a formulaic checklist should be avoided. A useful starting point is to ask the following questions:
 - (i) Will compliance with the request create a significant burden on an Authority in terms of expense and distraction?
 - (ii) Is the request designed to cause distress, disruption or irritation without any proper or justified cause?
 - (iii) Has the request the effect of harassing an Authority or its staff?
 - (iv) Can the request be characterised as obsessive or manifestly unreasonable?
 - (v) Does the request appear to have any serious purpose and/or value?

2.4 Indicators of when a request might be vexatious, malicious, frivolous, misconceived or lacking in substance

- (a) The fact that a number of indicators apply in a particular case will not necessarily mean that an Authority may refuse the request. An Authority should take a holistic approach and consider all indicators in addition to any other factors in reaching a judgment as to whether the request amounts to being a disproportionate, manifestly unjustified, inappropriate or improper use of the Act. The fact that a request has one or more of the indicators does not necessarily mean that it meets the criteria and the strength of the indicators will vary in importance depending on the particular circumstances of the case. Some factors will be easier to evidence and support than others.
- (b) Indicators that a request might be vexatious:

Abusive or aggressive language	The tone or language of the Applicant's correspondence goes beyond the level of criticism that an Authority or its employees should reasonably expect to receive.
Burden on an Authority	The effort required to meet the request will be disproportionate in terms of the strain on time and resources, that an Authority cannot reasonably be expected to comply, no matter how legitimate the subject matter or valid the intentions of the Applicant.
Deliberate intention to cause annoyance	The Applicant has explicitly stated that it is their intention to cause disruption to an Authority, or is a member of a campaign group whose stated aim is to disrupt an Authority.
Disproportionate effort	The matter being pursued by the Applicant is relatively trivial and an Authority would have to expend a disproportionate amount of resources in order to meet their request.

Frequent or overlapping requests	The Applicant submits frequent correspondence about the same issue or sends in new requests before an Authority has had an opportunity to address their earlier enquiries.
Futile requests	The issue at hand individually affects the Applicant and has already been conclusively resolved by an Authority or subjected to some form of independent investigation.
Intransigence	The Applicant takes an unreasonably entrenched position, rejecting attempts to assist and advise and shows no willingness to engage with an Authority.
Motive	This might be an important factor in determining vexatiousness. A request may start as reasonable but lead to further requests which become increasingly distant from the Applicant's starting point.
No obvious intent to obtain information	The Applicant is abusing their rights of access to information by using the Act as a means to vent their anger at a particular decision, or to harass and annoy an Authority, for example, by requesting information which an Authority knows them to possess already.
Obsessive conduct	Conduct that harasses or distresses staff or uses intemperate language, or which makes unsubstantiated allegations or contains abuse.
Personal grudges	The Applicant is targeting correspondence towards a particular employee or office holder against whom they have some personal hostility.
Scattergun approach	The request appears to be part of a completely random approach, lacks any clear focus, or seems to have been solely designed for the purpose of "fishing" for information without any idea of what might be revealed.
Unfounded accusations within a request	The request includes completely unsubstantiated accusations against an Authority or specific employees.
Unreasonable persistence	The Applicant is attempting to reopen an issue which has already been comprehensively addressed by an Authority or otherwise subjected to some form of independent scrutiny.

c) Indicators that a request might be misconceived:

This covers the situation where an Applicant does not understand or may have "the wrong end of the stick". The Applicant does not need to be seen as malicious in any sense nor the request vexatious. The Applicant may simply fail to understand that their request cannot be fulfilled and following the provision of advice and assistance an Authority is unable to help any further.

Belief that the Applicant has a right to the information because they may have already had it in the past	The subject matter involves information that an Applicant may have had in his possession previously but for some reason no longer has it and believes that they have an entitlement to it by virtue of the Act.
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Repeated requests based in a fundamental misunderstanding	Requests which do not fall within section 11(3)(e)(i) of the Act but exist pursuant to a fundamental misunderstanding of the role of an Authority and the information that it holds. Following the provision of advice and assistance, the Applicant continues to pursue an Authority for information, failing to understand that the request cannot be fulfilled.
Unwillingness to accept result	The Applicant believes that more information exists beyond that which was requested and refuses to accept that either an Authority does not hold the information or an Authority does not hold any further information beyond that which has already been provided.

d) Indicators that a request might be lacking in substance:

Inadequate information	Despite advice and assistance the Applicant continues to fail to adequately describe in sufficient detail the information they want.
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e) Indicators that a request might be malicious:

Abusiveness	The request or any subsequent correspondence contains abuse towards officers or a particular individual.
Blackmail	An Applicant includes within the request or subsequent correspondence any suggestion for an Authority or an employee of an Authority or any other person to do something "or else", that to a reasonable individual could be interpreted as an unwarranted threat.
Harassment	The Applicant acts against an Authority either singularly or in concert with others, in pursuit of a mischievous objective.
Unjustified persistence	The Applicant mounts an intensive campaign of overzealous scrutiny creating a detrimental effect on an Authority and intolerable working conditions.

f) Indicators that a request might be frivolous:

A request may amount to being frivolous if it is of little or no weight, value or importance. Care should be taken when considering this as what may seem to be of little or no weight, when viewed in context may actually be of importance and value to an Applicant.

Trivial	The subject matter is inane or of very little importance or value.
Lack of purpose	The request appears to lack any serious purpose.
Not worthy of serious attention	The request is made for the sole purpose of amusement or nuisance value.
Other purpose	The request is made for a purpose other than seeking access to information.

3. Determination of the public interest when considering requests for information concerning qualified exempt information

3.1 Introduction

- (a) The public interest is not defined within the Act but must be something that is of serious concern and benefit to the public at large and not merely something of individual interest.
- (b) Where an Authority decides that a qualified exemption has been engaged it must undertake a balancing exercise to consider the public interest in disclosing the information and the public interest in maintaining the exemption.
- (c) Where the public interest in maintaining the exemption outweighs the public interest in disclosing the information, then the information can be withheld. If the public interest in disclosing the information is equal to or greater than the public interest in maintaining the exemption, then the information must be disclosed.
- (d) Once an Authority believes that a qualified exemption is engaged it should:
 - (i) Identify the arguments in favour of maintaining the exemption against the public interest in disclosure of the information requested;
 - (ii) Attach a weighting to those identified arguments; and
 - (iii) Balance them against one another.
- (e) One of the factors which permit an Authority an extended processing period beyond the 20 working days standard processing period is when an Authority is consulting with a person about whether access to the information would be in the public interest.

3.2 Identifying arguments in favour of disclosure

- (a) Factors in favour of disclosure can be generalised across the exemptions and should be construed broadly.
- (b) What is in the public interest is a flexible concept, dependent on the facts of each case, for example:
 - (i) Promoting public understanding and providing a "full picture";
 - (ii) Promoting transparency and accountability;
 - (iii) Safeguarding the democratic process;
 - (iv) Promoting good decision making by public bodies, ensuring standards of integrity are upheld and that there is justice and fair treatment for all;
 - (v) Securing the best use of public resources;
 - (vi) Ensuring fair commercial competition in a mixed economy; and
 - (vii) Shedding light on a suspicion of wrongdoing on the part of an Authority.

3.3 Identifying arguments in favour of maintaining an exemption

- (a) Public interest arguments in favour of maintaining an exemption must relate specifically to that exemption and be construed narrowly, focusing on the public interests expressed explicitly or implicitly in the particular exemption provision at issue.
- (b) The onus is on an Authority to prove that there is a pressing need for non-disclosure of the information and that to override the right to access the information is a necessary and proportionate way of meeting that need.
- (c) As disclosures of information are effectively to the world at large and not merely to the individual Applicant, an Applicant's private interest and what may serve those private interests does not necessarily serve a wider public interest.
- (d) In assessing the public interest in disclosing information it is permissible to take into account a use that would be made of the information even though that use would involve an unlawful act. If the cumulative effect of similar requests gives rise to a well-founded fear of misuse of the information that may be a legitimate factor to be taken into account in maintaining an exemption.
- (e) An Authority should not take into account factors such as:
 - (i) The information could be misunderstood or considered too technical or complex. If an Authority fears that the public might be confused by the information disclosed it should consider volunteering information that will redress any imbalance. However, where only part of some information will be disclosed, because the remainder is absolutely exempt – if the part that stands to be disclosed would result in speculation which "could cause problems" then that will be a public interest factor against disclosure;
 - (ii) There are other methods of scrutiny available. However, where other means of scrutiny have been used apart from the Act, this may weaken the public interest in disclosure. Ask the questions:
 - How far do the other means of scrutiny go to meet the specific public interest in transparency in any particular case?
 - What information is available to the public by these other means?
 - (iii) Possible embarrassment of an Authority or other officials or the seniority of the persons involved in the subject matter; or
 - (iv) Possible loss of confidence in an Authority.

3.4 Attaching a weight to the identified arguments

- (a) Once an Authority has identified the arguments for maintaining the exemption and for disclosure of the information, it must assess the relative weight of these arguments to decide where the balance of the public interest lies. This can be affected by the likelihood and severity of any prejudice, the age of the information, how far the requested information will help public understanding and where similar information is already in the public domain.

- (b) This should be approached as objectively as possible and both an Authority and the Information Commissioner must take into account all considerations that are relevant to the public interest balancing exercise and not take into account any that are irrelevant to the exercise.
- (c) Factors that add weight to the arguments on either side and help decide where the balance of public interest lies include:
- (i) Likelihood of prejudice – decide whether disclosure would or would likely cause the prejudice described in the exemption.
 - “Would” means more probable than not – i.e. over 50%; and
 - “Would likely” means that there must be a real and significant chance of the prejudice occurring even though the probability may be less than 50%.

“Would” is a higher standard than “would be likely” so if an Authority can establish that prejudice “would” happen the argument carries greater weight;
 - (ii) Severity of the impact of the prejudice. If the prejudice will have a particularly severe impact on individuals or an Authority or other public interests then this will carry considerable weight in the public interest test (relevant for example if there is any risk of physical or mental harm to an individual). Severity and likelihood together indicate the impact of the prejudice and this in turn affects the weight attached to the arguments for the exemption;
 - (iii) Age of the information. Although not necessarily true in every case, weight generally diminishes over time as the issue it relates to becomes less topical or sensitive and the likelihood or severity of the prejudice diminishes;
 - (iv) How far would disclosing the specified information further the public interests identified? The information may be relevant to a subject of public interest but does not add to it. In such cases the public interest in maintaining the exemption may outweigh that in disclosure. However, if disclosure may help inform a debate the public interest in disclosure is strengthened. The weight of the argument for disclosure will depend on the content of the information and the nature of the public interest identified;
 - (v) Consider whether similar information is already in the public domain and what effect this has on the public interest test. If similar information is already available and the requested information would not significantly add to it, the public interest arguments about furthering debate and increasing accountability may carry little weight. If the requested information contains new material that would help inform public debate then the weight of the specific public interest argument is not reduced. Moreover there is always some weight in the general argument for transparency and having the “full picture”;
 - (vi) There is a public interest in the disclosure of information where it would correct misinformation that is in the public domain, particularly where the origin of the misinformation is an Authority to whom the request has been made; or
 - (vii) If it is anticipated that prejudice has already resulted from an earlier disclosure it will be difficult to attribute any material prejudice to a later disclosure of the

same or like information but earlier disclosure does not mean prejudice has already occurred.

3.5 Timing

- (a) An Authority may consider the circumstances at the date of the request or when it actually deals with the request, taking into account the extended processing period afforded to an Authority when considering whether the information requested is qualified exempt information. Similarly, when dealing with a complaint that information has been wrongly withheld, the Information Commissioner will consider the situation at the time of the request or within the time for compliance.
- (b) An Authority or the Information Commissioner may properly take into account circumstances or matters that come to light after the date of the request where those subsequent circumstances or matters shed light on the public interest at the time that it falls to be decided. If the Applicant is disadvantaged by this approach it can be circumvented by lodging a fresh request in identical terms. Any change in those circumstances may influence the outcome of the balancing exercise.

3.6 Aggregation

If arguing to maintain two or more exemptions an Authority may aggregate the public interest arguments in favour of maintaining the exemptions when weighing them against the public interest arguments in favour of disclosing the information.

3.7 The balancing exercise

An Authority must then carry out a balancing exercise to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits that disclosure would (or would be likely to or may) confer or promote. It requires an appropriately detailed identification, explanation and examination of the harm or prejudice and the benefit of the proposed disclosure.

3.8 Other considerations

The mosaic or cumulative effect means that although disclosure of particular information, when considered in isolation may fail to satisfy the prejudice requirement, consideration of the prejudice caused by the disclosure of that information together with that caused by the disclosure of other similarly non prejudicial information may yield a different result.

3.9 Notifying the Applicant

Where an Authority decides that the public interest lies in maintaining an exemption it must issue the Applicant with a refusal notice stating why an Authority believes that in all the circumstances of the case the public interest in maintaining the exemption outweighs that in disclosure of the information, setting out the competing public interest arguments and explaining its conclusion.

4. Provision of advice and assistance by public authorities to persons who propose to make, or have made, requests for information

4.1 Introduction

- (a) The aim of providing advice and assistance is to give the Applicant an opportunity to discuss their request for information and help the Applicant to describe the information being sought reasonable clearly, so that an Authority can identify and locate it.
- (b) An Authority must provide advice and assistance as soon as possible and at all stages of a request including before a request is made, making and responding to a request (including the type of information that can be accessed), how to formulate a clear and focussed request, other sources of information and the progress of a submitted request. An Authority must be flexible and liaise with an Applicant to provide advice and assistance appropriate to the facts of the case and circumstances. Examples include:
 - (i) Contacting the Applicant to discuss the information that the Applicant is requesting and whether this is available without making a request, such as through routine business as usual enquiries or because the information is already available and the Applicant needs to know where to find it;
 - (ii) Advising the Applicant of the different kinds of information which might meet the terms of the request;
 - (iii) Providing access to detailed catalogues and indexes where these are available to help the Applicant ascertain the nature and extent of the information held by an Authority; or
 - (iv) Providing a general response to the request which sets out options for further information, which could be provided on request.
- (c) There is no requirement for an Applicant to explain why they need the information requested and only in limited circumstances can an Authority take into account an Applicant's identity or motives for requesting the information.
- (d) Employees of an Authority should bear in mind that not everyone will be aware of the Act, or Regulations made under it, and they will need where appropriate to draw these to the attention of potential Applicants who appear unaware of them.
- (e) Any employee of an Authority may provide advice and assistance. It is good practice for a record of the advice or assistance to be kept by an Authority, in case it is later queried.
- (f) Applicants should not be expected to know any technical language or file identifiers such as file numbers.

4.2 Procedures for the provision of advice and assistance

An Authority shall advise Applicants and potential Applicants of its procedure for dealing with requests for information and where appropriate direct them to the relevant pages on the Isle of Man Government website regarding Freedom of Information.

4.3 Provision of assistance in making a request

- (a) Where an Applicant is unable to frame their request in writing, on the form, an Authority should ensure that appropriate assistance is given to enable that person to make a request that describes the information that they want clearly, giving particular consideration to those with a disability or with communication difficulties.
- (b) In exceptional circumstances an Authority should consider offering to complete the form over the telephone and then send it to the Applicant for confirmation and return. The standard processing period for reply would begin when the confirmed application was received by an Authority.

4.4 Clarifying the request

- (a) If an Authority requires more information from the Applicant to identify and locate the information being sought, an Authority should ask the Applicant to clarify their request by issuing a notice to the Applicant as soon as possible explaining that:
 - (i) The Applicant has 28 days to provide such clarification otherwise an Authority may refuse to provide the information; and
 - (ii) That any time between an Authority issuing a notice and the time taken by the Applicant to provide the clarification will be disregarded in determining when the standard processing period of 20 working days ends.
- (b) Care should be taken not to give the Applicant the impression that he or she is obliged to disclose the nature of his or her interest as a pre-condition to exercising the rights of access, or that he or she will be treated differently if he or she does or does not.

4.5 Limits to advice and assistance

- (a) If, following the provision of advice and assistance, the Applicant still fails to describe the information requested in a way which would enable an Authority to identify and locate the information or if an Authority has not been able to remove a practical refusal reason, an Authority is not required to proceed with the request. An Authority must issue a refusal notice explaining to the Applicant why it cannot take the request any further and provide details of its complaints procedure and the Applicant's rights under Part 5 of the Act.
- (b) An Authority should disclose any information relating to the application which has been successfully identified and found and for which it does not propose to claim an exemption or a practical refusal reason.

5. Provision of reasonable notice about the progress of an Applicant's request for information

5.1 Introduction

An Authority should provide reasonable notice about the progress of an Applicant's request for information at various times. The deadlines under the Act are absolute and failure to comply is a breach of the legislation that can be enforced by the Information Commissioner.

5.2 General progress during the standard processing period

- (a) An Applicant should receive an acknowledgement of receipt of the request from an Authority, explaining when a response will be received.
- (b) If an Authority is likely to be delayed in responding to a request, an explanation should be provided to the Applicant together with an estimated response date.

5.3 Extended processing period for responding to requests involving qualified exempt information

- (a) This section applies if, in responding to a request for information during the standard processing period, an Authority has identified that a qualified exemption is likely to apply and as a result requires additional time to consider; whether any prejudice or harm specified in the identified qualified exemption would result from disclosure of the information requested and where the balance of the public interest lies.
- (b) An Authority must notify the Applicant during the standard processing period of 20 working days that a qualified exemption is likely to apply to the information and that an Authority requires additional time to consider it, in accordance with sub-paragraph 5.3(a).
- (c) An Authority must continue to give the Applicant reasonable notice about the progress of the request for information beyond the initial 20 working days whilst it is still dealing with the request.
- (d) There is no statutory time limit on the extended time that an Authority may take when considering whether the request includes qualified exempt information and what is reasonable shall be determined on a case by case basis having regard to:
 - (i) How long it will take to consult with any person who may be affected by the disclosure of information and/or whether access to the information would be in the public interest; and/or
 - (ii) Whether responding to a request will substantially or unreasonably interfere with the day to day operations of an Authority.

6. Transfer of requests for information by one Authority to another that holds or may hold the information requested (including how the periods of time within which requirements under the Act must be fulfilled are modified for that purpose)

6.1 Introduction

If an Authority is unable to comply with a request (or to comply with it in full) because it does not hold the information requested it must issue a refusal notice. It can then go on to consider, in exceptional circumstances, whether it would be appropriate to transfer the request to another Authority. What amounts to exceptional circumstances will be determined by an Authority on a case by case basis.

6.2 Information held by another Authority

- (a) In most cases, best practice will be served by an Authority:
 - (i) Contacting the Applicant and informing him or her that the information requested may be held by another Authority and suggesting that the Applicant re-applies to the other Authority; and
 - (ii) Providing the Applicant with contact details for the other Authority.

6.3 Transferring requests between Authorities

- (a) In exceptional circumstances an Authority may consider it to be more appropriate to transfer the request to another Authority in respect of the information which it does not hold. In such cases, an Authority must:
 - (i) Issue a refusal notice to the Applicant in respect of the information that it does not hold; and
 - (ii) Confirm with the other Authority that it holds the information, and that the Applicant has a right to obtain access to it under the Act.
- (b) If the other Authority confirms that it does hold the information, an Authority should proceed to consider transferring the request.
- (c) An Authority will only be able to consider transferring a request if the other Authority is also subject to the Act.
- (d) A request (or part of a request) should not be transferred without the Applicant's consent.
- (e) Where a request or part of a request is transferred from the first Authority to the second Authority, the second Authority should comply with its obligations in the same way as it would in the case of a request received directly from an Applicant. The time for complying with such a request should be calculated by regarding the date of transfer as the date of receipt of the request.
- (f) All transfers of requests should take place as soon as is practicable and the Applicant must be informed as soon as possible once this has been done.

- (g) Where an Authority is unable either to advise the Applicant which Authority holds, or may hold, the requested information or to facilitate the transfer of the request to another Authority (or considers it inappropriate to do so) it should consider what advice, if any, it can provide to the Applicant to enable him or her to pursue his or her request.

7. Consultation with persons to whom information requested relates or with persons whose interests are likely to be affected by the disclosure of such information

7.1 Introduction

- (a) There are many circumstances in which:
 - (i) Requests for information may relate to third parties other than the Applicant and an Authority; or
 - (ii) Disclosure of information is likely to affect the interests of third parties other than the Applicant or an Authority.
- (b) An Authority should ensure that third parties that supply them with information are aware of an Authority's duty to comply with the Act and that information will have to be disclosed unless an exemption or a practical refusal reason applies.
- (c) Most Authorities will have existing contracts that pre-date the coming into force of the Act and may contain wide reaching confidentiality provisions that are unsupportable under the Act. See sub-paragraph 8.5 for further information.
- (d) The Act does not require an Authority to consult with a third party when considering how to respond to requests for information, however, based on the particular circumstances of the case, it may be good practice to seek the views of third parties on the possible sensitivities of the information requested, such as potentially confidential information or personal data or because disclosure would significantly affect them. Consultation can inform, but not determine, an Authority's application of exemptions and (where appropriate) the public interest test.
- (e) When consulting with third parties an Authority should focus on the information requested and make clear to the third party that their consent is not being sought and they do not have a veto on the release. A refusal by a third party to consent to disclosure does not, in itself, mean that information should be withheld.
- (f) If an Authority has determined that a qualified exemption is engaged and is consulting with a third person to determine where the balance of the public interest test lies, an Authority is permitted such time as is reasonable in the circumstances to allow such a consultation to take place. In all other circumstances meeting a statutory deadline for responding to a request takes precedence over any consultation with third parties and a third party can only be allowed a short time to respond. If an Authority does not identify the need to consult with a third party until near the end of any statutory deadline it should consider notifying the third party at the same time as it responds to the Applicant.

7.2 Identity of the Applicant

The identity of the Applicant will not usually be relevant to the consideration of the request and must not be revealed when consulting third parties unless permission is sought and granted or it is necessary for the third party to properly respond.

7.3 When consultation should apply

It is difficult to be definitive about the circumstances in which consultation would be appropriate. In some cases it will be necessary to consult, directly and individually, with third parties for the following reasons:

- (i) Their views may help an Authority determine, in the handling of a request, whether an exemption applies to the information requested; or
- (ii) To reach a view on whether an Authority holds the information; or
- (iii) To help an Authority determine where the public interest lies.

7.4 When consultation may not apply

Consultation will be unnecessary/may not be appropriate where:

- (i) The Authority does not intend to disclose the information. For example, because it considers, based on reasonable evidence, an exemption or practical refusal reason applies; or
- (ii) The Authority already has evidence from the third party that disclosure would, or would not, prejudice their interests; or
- (iii) The views of the third party can bear no influence on an Authority's decision. For example where there is other legislation either preventing or requiring disclosure; or
- (iv) In an Authority's view there is no basis for withholding the information; or
- (v) The cost of consulting with third parties would be disproportionate. For example because the number of third parties involved; or
- (vi) Where there has been earlier consultation on the status and sensitivity of the information and nothing, including the views of the third party, has changed.

7.5 Government Departments, Boards and Offices

No decision to release information which has been supplied by one Authority to another should be taken without first notifying, and where appropriate consulting, the Authority from which the information originated.

7.6 Third party representatives

Where information to be disclosed relates to a number of third parties, or the interest of a number of third parties may be affected by a disclosure, and those parties have a representative organisation which can express views on behalf of those parties, an Authority may consider whether it would be sufficient to notify or consult with that representative organisation. If there is no representative organisation, an Authority may consider that it would be sufficient to notify or consult with a representative sample of the third parties in question.

7.7 Where a response is not received

The fact that a third party has not responded to consultation does not relieve an Authority of its duty to make information available, or its duty to reply within any relevant statutory timescales.

7.8 Notifying third parties about the release of information

When an Authority has made a decision to release information, whether or not consultation has taken place, an Authority may consider notifying any third parties who have a material interest that information relevant to them has been released in response to a request. Notification is at the discretion of the Authority and would depend on the individual circumstances of the information and what is judged to be a material interest.

8. Inclusion in contracts entered into by an Authority of terms relating to the disclosure of information

8.1 Introduction

- (a) An Authority should bear in mind obligations under the Act when preparing to enter into contracts which may contain terms relating to the disclosure of information by them. It is important that contractors have an understanding that requests may be made for information and that where a request is received, information will be disclosed unless it is covered by an exemption.
- (b) It is important that contractors and an Authority understands what information may be available and that time and changing circumstances can strengthen or weaken public interest arguments in favour of disclosure where a qualified exemption is engaged. Similarly, the nature of information may change over time and information that was once considered confidential or sensitive may lose its quality of confidence or sensitivity for example, if that information subsequently becomes public knowledge.
- (c) It is not possible to provide definitive statements about whether specified types of contractual and procurement related information should be made available. Each Authority must make its own decision in light of the facts and circumstances of the particular case.
- (d) When entering into contracts with non-Public Authority contractors, an Authority may be asked to accept confidentiality clauses, for example to the effect that information relating to the terms of the contract, its value and performance will not be disclosed. An Authority should carefully consider the compatibility of such terms with its obligations under the Act. It is important that both the Authority and the contractor are aware of the limits placed by the Act of the enforceability of such confidentiality clauses.

8.2 Guiding principles

In making available contractual and procurement-related information, whether proactively or in response to an information request, the following guiding principles should be considered:

- (i) Principle 1: Transparency in the use of public funds

The public must be reassured that Authorities are spending taxpayers money wisely. The type of contractual and/or procurement information produced may vary depending on the situation, but where held the public should be able to access:

- How much money is being spent;
- With whom that money is being spent;
- The nature of the services, goods or works that money is buying;
- What redress is available if those services, goods or works are below an agreed standard; and

- Any cost benefit analysis that has been undertaken.
- (ii) Principle 2: Demonstrable diligence in managing contractors to ensure best value for money

Information should also be made available which makes clear the extent to which an Authority is actively managing its contractors. For example, where it is appropriate to the individual contract, the public should be able to see whether:

- Project management and procurement best practice principles are being applied;
- Suitable checks and balances are in place to ensure proper monitoring of project performance;
- Those checks and balances are being actioned effectively; and
- Intervention on the part of an Authority is happening where necessary.

- (iii) Principle 3: Respecting commercial interests

The Act and this Code are not intended to undermine an Authority's commercial relationships with the private sector. To protect the legitimate concerns of the private sector, an Authority should consider appropriate use of the section 26 exemption (Information provided in confidence) and the section 30 exemption (Economy and Commercial Interests) when considering disclosure of contractual and procurement related information. Otherwise there could be a risk that:

- Companies would be discouraged from dealing with the public sector, fearing disclosure of information that may damage them commercially; or
- Companies would withhold information where possible, making the choice of the best contractor more uncertain as it would be based on limited and censored data.

8.3 Best Practice

- (a) When beginning a new exercise involving contracts an Authority should ensure that bidders/suppliers understand the extent to which information provided by them may be disclosed by an Authority (either proactively or in response to an information request).
- (b) Inclusion of disclosure provisions in procurement documentation
- (i) Bidders should be made aware in the Pre-Qualification Questionnaire and Invitation to Tender documentation 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).
- (ii) Withholding information under certain exemptions requires that prejudice is demonstrated and an Authority must be able to show that real, actual,

substantial harm would or would likely be caused by disclosure and that there is a causal link between the disclosure and the prejudice claimed.

- (iii) Contractors should be aware that an Authority will not implicitly accept confidentiality terms and that any confidentiality markings, whilst being noted, may have little weight if the information is requested, for example if it is apparent that the information is not sensitive.
 - (iv) An Authority should recognise bidders/suppliers legitimate commercial concerns. A bidder/supplier should be asked to identify information it provides to the Authority that it believes to be genuinely sensitive, and to explain why and how long it is likely to remain so. The Authority should make clear to the bidder that it cannot be bound by their views but that they will help inform the Authority in determining what information it can and cannot make available on request.
 - (v) An Authority should consult with the bidder/supplier if it receives a request for any information highlighted as being sensitive within the identified sensitivity period. The sensitivity of information will vary depending on the timing of the request. For example, information may be sensitive during the tender exercise but may cease to be sensitive once the contract has been awarded.
 - (vi) The bidder/supplier should also be consulted if there is any doubt about the information's confidentiality/sensitivity, regardless of the specified period. If the Authority considers that information is exempt from release because its release may prejudice the bidder's commercial interests, it must obtain evidence from the bidder to support this view. The final decision on the release or withholding of information rests with an Authority. This approach may not be appropriate for all tenders and contracts, for example it may be disproportionate or the volume of tenders/contracts may make it impractical. If so, the criteria applied to contract review which is detailed further under sub-paragraph 8.5 "Reviewing older contracts" should be considered.
- (c) Inclusion of disclosure provisions in contracts.
- (i) The terms and conditions of a contract should contain disclosure provisions regarding information provided during any competition phase but may also be expanded to include the disclosing of information by the contractor. Although not strictly a consideration under the Code – as it applies to Authorities – it is sensible to tackle all these issues under a single "disclosure of information" (or similar) provision. Such provisions will be particularly relevant where the contractor is designated by an Authority for the purposes of the particular contract by an Order made under an Act.
 - (ii) It is recommended that a provision is included in a contract to the effect that an Authority will aim to consult with the contractor on any request for information which has been identified as being sensitive. Where exemptions are being applied on the basis that release of information would harm a third party, an Authority must have evidence from the third party that this is the case.
 - (iii) As regards information identified by either party as sensitive, Authorities may consider including that information in an annex which also sets out the reasons for sensitivity and the period of sensitivity. This will facilitate disclosure of the

remainder of the contract should a request for information be received or if it is being published proactively.

8.4 Consultation with bidders/suppliers on disclosure requests

- (a) As already indicated, consideration should be given to making express provision as to when consultation with bidders/suppliers will be appropriate where requests for information involve information provided by them.
- (b) Where bidders/suppliers have been given the opportunity to identify sensitive material and have done so (and any declared period of sensitivity has not expired), then consultation is unnecessary if the request relates to that information. However, if they have not been given the opportunity, then consultation may be necessary.
- (c) Information in respect of older contracts will have been provided prior to any understandings on information sensitivity being agreed. Therefore requests for older material that could have some commercial sensitivity should involve consultation with bidders/suppliers.
- (d) Even when a bidder/supplier has indicated that information should be withheld and exemptions are engaged, the public interest test needs to be considered in each case in light of the facts and circumstances prevailing at the time of the request and will not necessarily weigh in favour of withholding the information.

8.5 Reviewing older contracts

- (a) Most Authorities will have existing contracts that pre-date the coming into force of the Act and may contain wide reaching confidentiality provisions that are unsupportable under the Act. Information covered by a confidentiality provision will only be exempt if the information is a trade secret or commercially sensitive or disclosure would be an actionable breach of confidence. In these cases, as far as reasonably practicable, an Authority should consult with the relevant suppliers to:
 - (i) Advise them that information covered by the contract may need to be disclosed under the Act, irrespective of any confidentiality provision; and
 - (ii) Agree procedures for consultation in the event that an information request is received.
- (b) It may be impractical or disproportionate to review every extant contract. Authorities may however wish to consider proactive publication and focus on contracts that are:
 - Large value
 - Critical to an Authority's functions
 - Controversial
 - Longer term and still have a number of years to run
 - Otherwise likely to attract information requests

8.6 Proactive publication in contracts and procurement

- (a) It is good practice for an Authority to consider proactively publishing information relating to the procurement process and contracts rather than wait until information requests are submitted to them.
- (b) Clearly not all contracts will be of interest to the public and an Authority may wish to focus on publishing contracts in which there is a particular public interest for example those which they consider to be of high value or long term or otherwise high profile.

9. Provision by Public Authorities of procedures for dealing with complaints about the handling of requests for information

9.1 Introduction

- (a) The aim of a review is to allow an Authority to take a fresh look at its response to an information request, to confirm the decision, with or without modifications or if appropriate to substitute a different decision. The review procedure should be fair and impartial and allow decision makers to look at the request afresh. This does not include responses to "business as usual" requests where all of the information requested by the Applicant is routinely provided and an Authority has no grounds for suspecting there is any possibility that the Applicant will be in any way dissatisfied with the response.
- (b) The Information Commissioner will not make a decision pursuant to section 42 of the Act until such time as the Applicant has exhausted an Authority's complaints procedure.

9.2 Procedure

- (a) Where an Authority responds to an Applicant and either provides the information requested, refuses to disclose information in whole or in part, or does not hold the information requested, it must, when responding to Applicants, notify them of the following:
 - (i) Their right to request a review and their subsequent right to appeal to the Information Commissioner; and
 - (ii) Where any request for review should be directed in order to avoid any delay in responding.
- (b) If the Applicant does not receive a response or is dissatisfied with the response (for example because they have not received all of the information asked for or they have received all of the information asked for but are unhappy with the way in which an Authority has dealt with the request), they may ask an Authority to review its decision. An application for review will not be valid whilst an Authority is still dealing with the request for information during the standard processing period or any relevant extended processing period.
- (c) A request for review must be submitted on the required form, available electronically and in hard copy. It is important that all staff can recognise a request for review and ensure that it receives an appropriate response. If an Applicant writes to an Authority expressing dissatisfaction with the way in which the Authority has dealt with their request the Authority should provide advice and assistance to ensure that the Applicant's complaint is submitted in the required manner.
- (d) An Applicant needs to specify why they are dissatisfied with the original response for the review request to be valid (for example, the application of exemptions/practical refusal reasons, or the handling of the request) and if this is not clear the Authority has a duty to advise and assist the Applicant in making a valid review request.
- (e) An Applicant should make a request for review as soon as practicable in the circumstances.

- (f) An Authority should put in place appropriate and accessible procedures for handling reviews. The review procedure should be fair and impartial and it should enable different decisions to be taken if appropriate. Where practicable the review should be handled by staff who were not involved in the original decision (subject to the below) to enable the matter to be considered afresh.
- (g) The reviewer should record the process undertaken when considering the review request, and produce a review report in order that the Authority can learn from any good or bad practices identified. Where the review report highlights procedural errors, the Authority should promptly take steps to prevent such errors reoccurring.

9.3 When an Applicant complains that a response to their initial request has not been provided

- (a) An Applicant may submit a complaint to an Authority if they have not received a response to their request within the standard processing period, or where an extended processing period is relevant where an unreasonable amount of time is deemed to have passed without the Applicant receiving any response from the Authority. The Authority should inform the Applicant of the outcome of the review in writing and in its response:
 - (i) If dealing with any procedural failure, contain an apology to the Applicant and take necessary steps to prevent a similar occurrence in the future; and
 - (ii) Must make a decision on the initial information request itself, i.e. either provide the information requested or with-hold it if appropriate, explaining which exemptions apply; and
 - (iii) Should inform the Applicant of their right, if dissatisfied with the response, to make an application to the Information Commissioner.
- (b) An Authority may consider it appropriate for the original case handler to continue dealing with the request and issue the review response, rather than appointing a separate reviewer to start the case afresh.
- (c) If the Applicant has misunderstood the deadline and complained before either the standard processing period of 20 working days is complete or where relevant the extended processing period is complete, an Authority should either respond to the Applicant confirming the deadline, or, if the Authority's full response to the request is imminent and before the deadline, note in the full response that the request was completed within the statutory time limit. Following the guidance on acknowledging receipt of the initial request should ensure there is no confusion between the Applicant and Authority about the deadline for the request.

10. Information that Public Authorities are expected to make publicly available routinely

10.1 Introduction

- (a) The Council of Ministers may make an Order requiring an Authority to adopt and implement a publication scheme. If it has not done so, an Authority may decide itself to adopt and maintain a publication scheme relating to the publication of its information but it is not mandatory for it to do so.
- (b) The Act contains an exemption for information which is reasonably accessible other than by requesting it, which applies to information published by an Authority.
- (c) It is good practice for an Authority to regularly consider the types of information that will likely be of interest to the public and could be published proactively. Examples of such include:
 - (i) Information which is regularly the subject of information requests;
 - (ii) Information relating to forthcoming/recent decisions or announcements; and
 - (iii) Information about current issues which are attracting, or are likely to attract significant public interest or media coverage.
- (d) If an Authority adopts a publication scheme it should publish information about:
 - (i) Its functions, how it operates (including the decision-making processes) and its performance; and
 - (ii) Its finances, including funding allocation, procurement and the awarding of contracts.

10.2 Contents of a publication scheme

If an Authority adopts a publication scheme the Act states what it must specify and also what it must not do.

10.3 Publication schemes should be kept up to date

Authorities should ensure that the content of any publication scheme remains up to date, with new information being added as necessary. It is good practice to monitor the types of information which have been frequently requested and consider adding them to the scheme.

10.4 Advising third parties about publishing information

- (a) Where a third party is the subject of information which an Authority intends to publish, it is good practice to alert them to the publication. For example, where Authorities routinely publish information relating to procurement, the contractors bidding in a tendering exercise should be made aware at the time of bidding that the information they provide may be made public.

- (b) Websites should be accessible to all and simple to use. Information should be found readily on websites for example by enabling search functions and having an alphabetical directory as well as a site map. Information should not be "buried" on a site. Authorities should ensure that information is also accessible to people who cannot access the internet. This may be achieved by offering to print out information from the website on request.

10.5 Where published information can only be viewed in person

If information is reasonably accessible, whether free of charge or on payment of a fee, but it is only available to be viewed in person, it is good practice for an Authority to provide relevant contact details and other information necessary to enable the Applicant to make arrangements to view the information.

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