



Good morning ladies and gentlemen. It's hard to believe that over 3 months has passed since the last FOI workshop, but I hope that the workshop has been of help to you in making your preparations for the 11 November deadline.

We've certainly been busy, and in a moment I'll give you an update on the key workstreams we've put into place over the summer.

As we mentioned last time, we have taken your comments and suggestions on board when putting together today's agenda to make it as relevant as possible for you, the people charged with making FOI work for your organisations. We'll therefore look at the publication scheme duty, but most of the focus will be on the duty to respond to requests for information, with practical tips, including how to deal with difficult requests; and a focus on commercial and personal information.

We hope that all of this will help you in your final preparations so that come 11 November you are ready to hit the ground running, confident in your own internal processes, confident in how to respond, and confident in where to find help and guidance.

# Registered Social Landlords Designation Order



**FREEDOM OF INFORMATION**  
The Freedom of Information (Scotland) Act 2002 (Designation  
of Persons as Scottish Public Authorities) Order 2019

Made - - - - - 2019  
Coming into force - - - - - 11th November 2019

The Scottish Ministers make the following Order in exercise of the powers conferred by section 5(1) of the Freedom of Information (Scotland) Act 2002 and all other powers enabling them to do so.

In accordance with section 75(2)(b) of that Act a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

In accordance with section 5(5) of that Act the Scottish Ministers have consulted every person to whom the Order relates or persons appearing to them to represent such persons and such other persons as they consider appropriate.

**Citation, commencement and interpretation**

1.—(1) This Order may be cited as the Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2019 and comes into force on 11 November 2019.  
(2) In this Order, “the 2010 Act” means the Housing (Scotland) Act 2010.

But before we begin to look at those more in depth areas, let's have a quick reminder of the basics – the terms of the Order and the 3 core FOI duties.

So, to recap, the Order which comes into force on 11 November will apply FOISA to RSLs and subsidiaries in relation to specified functions.



The Order sets out:

Who is covered – as in which organisations are designated/brought under FOI by the draft Order

What is covered – telling us what information held by those organisations is (and isn't) covered by FOI law (certain functions)

From when – the order also gives us an implementation date to work towards – 11 November

And we'll look at these in turn.



So, what do we mean by RSLs and subsidiaries?

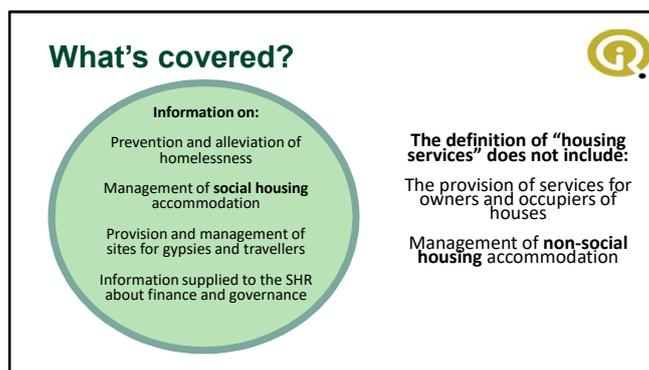
Organisations that are listed on the register kept by the Scottish Housing Regulator will be automatically be covered by the legislation. (This will include subsidiaries that are registered).

For subsidiaries that are not listed on the register, the terms of the order mean that coverage is dependent on a range of factors, including:

- **the corporate structure of the subsidiary and its parent RSL**  
(i.e. are they registered with the Financial Conduct Authority as registered societies, or are they companies or bodies corporate?)
- **And the relationship between them**  
(e.g. does the RLS have voting rights, does it control composition of the board of directors?)

We've published detailed guidance on these definitions on our website.

Following on from the last workshop, thank you for your help in identifying your subsidiaries which fall within the definition.



As we discussed last time, while these organisations (RSLs and subsidiaries) are covered, the terms of the order mean that not all information held by these organisations will fall within the scope of FOI law.

The Order sets out that FOI will apply in relation to any activities in relation to housing services, as defined in section 165 of the 2010 Housing (Scotland) Act.

There are, however two parts of the normal definition of housing services which are not included in the Order's definition.

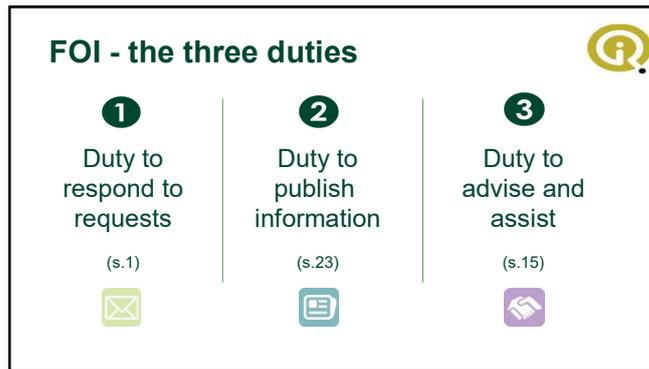
- Information held in relation to the provision of services for owners and occupiers of houses – e.g. factoring services
- Information held in relation to the management of non-social housing – e.g. on private or mid-market rental accommodation.

**Rights WILL, therefore, apply to information held in relation to any activity in relation to the following housing services:**

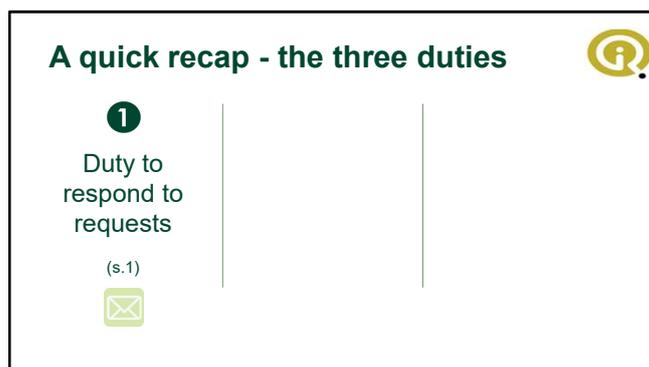
- The prevention and alleviation of homelessness
- Management of **social housing** accommodation (as you would expect, this is very wide)
- Provision and management of sites for gypsies and travellers

In addition, the Order makes clear that information supplied to the SHR about finance and governance will also fall within scope (information which is currently requestable from the

Regulator, of course).



Now let's have a quick reminder of what FOI designation actually means for an organisation on practice – the 3 core FOI duties.



The first is the duty to respond to information requests.

The duty applies to all written requests for information that an organisation receives.

If you receive a request for information under FOI you have a legal duty to respond *promptly*, and in any event within 20 working days in most cases, providing the information or setting out why, according to FOI law, it can't be provided.

This is a key area to be aware of in the management of your FOI. Overly complex systems, or systems which require decisions to be taken at the highest level can result in failures to respond, and failing to respond to a request within the timescales can turn what might have been a simple and quick issue to resolve, into a protracted and time consuming one, as reviews and appeals are made, with has knock-on reputational issues for your authority. Approximately one fifth of our appeal caseload each year relates to failures to respond.

Focus on getting this right.

### **FOI law applies to recorded information**

FOI law applies only to recorded information that the authority holds. Authorities aren't required to create new information to respond to requests.

### **Requests can only be refused if FOI law allows it**

Authorities can only refuse requests if the law allows them to: for example, if an FOI exemption or an EIR exception applies. If an exemption or exception applies to only some of the requested information, the remaining information must be disclosed.

If it would cost an authority more than £600 to respond to an FOI request it can refuse to respond. Regulations set out what can and can't be charged for. Under the EIRs, there's no upper cost limit, but requests can be refused if they're 'manifestly unreasonable'. In both cases, authorities must remember their duty to advise and assist.

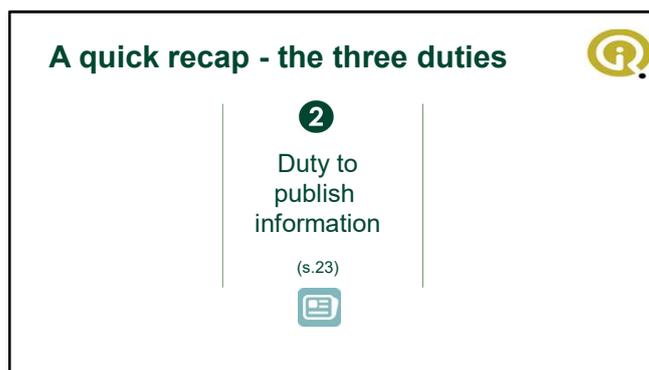
Requests can also be refused if an exemption applies. There are 17 categories of exemption in the FOI Act, which contain protections for information ranging from personal data to communications with the Royal Family. While a small number of these exemptions are

“absolute” meaning that information can automatically be withheld if it falls into the particular category, most are subject to a public interest test.

This means that, even if an exemption applies, information can only be withheld if the balance of the public interest favours non-disclosure.

There’s plenty of information on our website on the exemption (and the EIR exceptions), talking you through the tests to be applied in relation to each.

As I said earlier, most of today will be focusing on how to meet this duty.



**The second duty is the duty to publish information.**

FOI requires organisations to proactively publish information into the public domain.

This duty is referred to as the 'publication scheme' duty, and is contained in section 23 of the FOI Act.

Under this section, organisations should be publishing information about the services they provide and the decisions that they take, to help the public better understand the costs and the standards of services, the reasons for decisions, and the facts/analysis on which decisions of importance to the public have been made.

By putting as much information as you can in the public domain, and publishing information whenever a public interest in that information is identified, you'll be providing people with a route through which they can access that information themselves, meaning they won't have to ask you for it.

A clear, helpful and user-friendly route to information also marks you out as an open and transparent organisation, and helps build trust with service users and the wider public.

I'll be saying a bit more about this duty in a moment.

**A quick recap - the three duties** 

**3**  
Duty to  
advise and  
assist  
(s.15)  

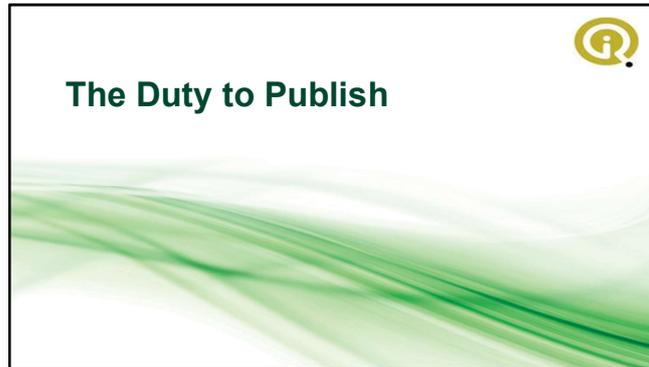

And this leads us on to our third duty. The **Duty to advise and assist**

Section 15 of the FOI Act places a legal duty on organisations to advise and assist requesters.

At it's best, FOI can help you build a positive relationship with your service users and stakeholders.

And, as with the publication scheme duty, taking your duty to advise and assist seriously can reduce the impact of FOI request, as well as building trust in your organisations.

So, a very quick canter through the key duties.



Finally, before the day moves to focus on requests for information, I want to spend a few minutes looking at the duty to publish. This is going to be an increasingly important aspect of FOI law, albeit it does not get the same headlines as responses to RFIs. Proactive publication is the route by which most people access information from Scottish Public Authorities. Preliminary findings from Dundee University's EIR research confirms that people will generally look for information online first – it is now part of everyday life.

Our challenge is to ensure that we push out information to meet that demand. By doing so we are also marking ourselves out as open and transparent authorities, and are likely to also reduce the need for people to ask us for information.

We currently achieve this through the publication scheme duty.

## The duty to publish

Duty to Publish Information 

**Section 23:**

-  Adopt and maintain a publication scheme approved by the Commissioner
-  Publish information in accordance with the scheme

You'll be aware of course, that organisations have a duty to publish information under FOI law. The FOI publication scheme duty requires organisations to:

- Adopt and maintain a publication scheme approved by the Commissioner
- Publish information in accordance with the scheme.

We've made adopting a scheme as easy as possible: organisations can adopt our Model Publication Scheme.

By adopting the Model Publication Scheme you commit to publish information in accordance with a series of high-level principles, e.g., on the formats in which you publish information, the costs you might charge for access to published information, and the classes, or types, of information that you'll publish (if you hold it).

You do this, of course, by preparing a Guide to Information – essentially a route through which your stakeholders and service users can access your information.

Your Guide to Information should be developed with your stakeholders in mind, which helping them to access the information you make available in accordance with the Model Publication Scheme.

For RSLs, the SFHA and GWSF have prepared a template Guide to Information, to help you meet the FOI duty to publish. I'm pleased to note that colleagues from the SFHA and GWSF will be discussing this later.

**Classes of information:** 

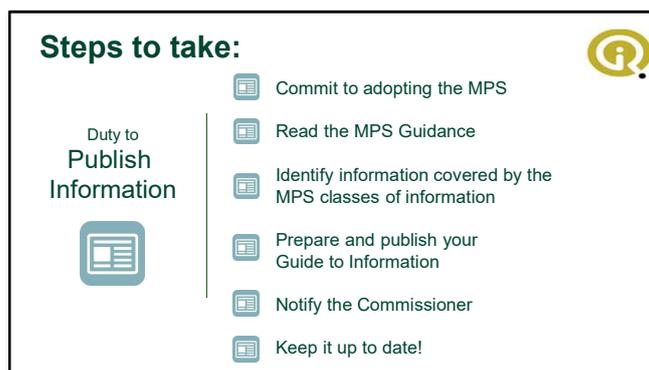
Class	Title
1	About the authority
2	How we deliver our functions and services
3	How we take decisions and what we have decided
4	What we spend and how we spend it
5	How we manage our human, physical and information resources
6	How we procure goods and services from external providers
7	How we are performing
8	Our commercial publications
9	Our open data

The MPS contains nine classes of information, and these should be reflected in the information you publish through your own guide to information.

Under some classes, you may hold a lot of information – e.g. those classes relating to who you are, what you do, how you make decisions and how you are performing. Our MPS Guidance sets out the types of information that should be published, if held, in some detail, but this will include information relating to e.g. your:

- Organisation structure
- Corporate policies and strategies
- Minutes, agendas and reports of board meetings
- Performance indicators and reports

Under some, you may hold little or no information (e.g. our commercial publications, our open data). In such cases, your guide just needs to contain a simple statement, setting out that you don't hold relevant information falling within this class.



1. Commit to adopting the MPS
2. Read the MPS Guidance – this is key – our MPS Guidance sets out the standard against which your own Guide to Information will be assessed for compliance with the s.23 duty. If you haven't familiarised yourself with this do it now, and treat the guidance as **the** essential reference document when preparing your Guide to Information. If your guide isn't consistent with the principles set out in the guidance, then it's likely that it **won't** be compliant with the publication scheme duty.
3. Identify information covered by the MPS classes of information
4. Prepare and publish your Guide to Information – this should be published online, on your own website, in a format that best meets the needs of your service users.
5. Notify the Commissioner – a downloadable MPS notification form is available on our website. We ask that you submit this to us between Monday 30 September and Friday 1 November. There's more information on this in the letter we sent to you at the end of last week.
6. Keep it up to date! Section 23 of the FOI Act also requires that organisations review their scheme from time to time – ensuring that it's up to date, checking for broken links, etc.

**Resources**

Support for new bodies  
Regulated social landlords and subsidiaries

[www.itspublicknowledge.info/rsls](http://www.itspublicknowledge.info/rsls)  
[www.itspublicknowledge.info/rslresources](http://www.itspublicknowledge.info/rslresources)

**Decisions Round-up**  
**FOI Scotland Forum**  
**@FOIScotland**

**Conferences & Events**

**Briefings and guidance**

FOISA Guidance  
Freedom of Information (Scotland) Act 2002

**Section 60 Code of Practice**

Our MPS Guidance is an essential resource for you as you prepare to meet your publication duty.

Some other resources that will be helpful to you as you work towards 11 November - most of which can be accessed via our website (see: [www.itspublicknowledge.info/rsls](http://www.itspublicknowledge.info/rsls)).

We're continuing to update our website with resources for RSLs, as well as answers to some of the questions that we are regularly receiving. You can access this RSL-specific information at [www.itspublicknowledge.info/rslresources](http://www.itspublicknowledge.info/rslresources).

Includes information on meeting the three duties developed for RSLs

Common Questions for RSLs and Subsidiaries

Animated introductions to key concepts

Links to guidance and advice across the Commissioner's website

Guidance on the steps to take to meet each FOI duty

Advice on the management of the FOI function

Best practice hints and tips

Guidance on the interpretation of the order

Template materials (with SFHA and Forum)

**Decisions Round-up** – we publish a regular round-up of the learning points that arise from the FOI and EIR decisions we issue. This is published on our website, but you can also receive notifications on this and other issues by following us on twitter: [@FOIScotland](https://twitter.com/FOIScotland).

**FOI Scotland Forum** – This Forum on Knowledge Hub aims to connect FOI practitioners across Scotland to share good practice, resources and advice.

**Briefings and Guidance** – You're going to hear more about some of the FOI exemptions across the day – we publish details briefings and guidance on many areas of FOI law – an essential resource.

**Section 60 Code of Practice** - the Scottish Ministers Code which sets out good practice when responding to requests – also essential!

**Conference and events** – as well as this event we're also taking part in and supporting a number of other events – including e.g. the annual Holyrood FOI conference in November which will feature a masterclass aimed at helping new bodies prepare for FOI.



**Next steps**  
Take advantage of

- Training
- Guidance
- Advice
- Networking

Please remember that we are here to help you. We will continue working with staff from GWSF and the SFHA to support the development of a range of resources.

There's not long to go now - our RSL web pages should really help you identify what you still need to be doing.

Have you started preparing your guide to information?

Are your processes for dealing with RFIs in place and known throughout your organisation?

Have you appropriate training in place for your organisation's staff to identify and know what to do when they receive a RFI?

Also, please take advantage of all training and network opportunities, and our own enquiries service. The more you can do to prepare effectively, the easier and more straightforward the experience post designation.

## Contact us



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As you know, FOI law places 3 key duties on organisations:

- Duty to publish information
- Duty to respond to requests
- Duty to advise and assist

## FOI: The duty to respond

Duty to  
respond to  
requests



-  Requests must be made in writing
-  Most requests must be responded to in 20-working days
-  Covers **recorded** information only
-  Requests can only be refused in certain circumstances
  -   Information not held
  -  It costs too much
  -  An exemption applies

The remainder of our content for today's session will largely focus on the duty to respond to requests. You'll hopefully be familiar with some of the detail of the duty to respond from our earlier sessions and online resources.

The duty to respond is the one which is most fully described in the legislation, and it's the duty that most often arises in appeals being made to our office.

What we hope to do then, is give you practical advice, assistance and support to help you meet this duty effectively.

As you'll know, under FOI requests can only be refused in certain circumstances. This includes if information is subject to one of the FOI Act's exemptions.

In later sessions we're going to be exploring the application of a couple of key FOI exemptions in more detail. Firstly, though, what I want to do is provide you with some general hints and tips to help you get your FOI response right.

The tips I'm going to highlight are drawn from some of the common mistakes that we see authorities making which lead to cases being appealed to us. Simple advice and guidance on steps that you can take to help FOI run smoothly for your organisation, and minimise the likelihood of an appeal.

## Is it environmental?



My first tip is that you try and get into the practice of asking yourself, very early in the lifespan of a request, whether the requester is looking for environmental information.

You'll be aware from earlier sessions that there are different Regulations which govern access to environmental information, and requests which ask for environmental information **MUST** be responded to under those regulations.

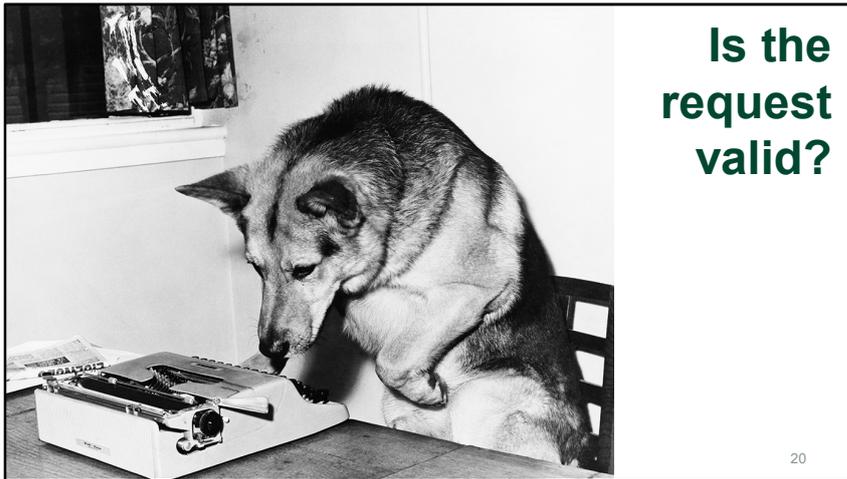
It doesn't matter if the requester mentions FOI, the key thing is the nature of the information requested. If the information is Environmental, you have to deal with it under the EIRs.

This is important, as while FOI and the EIRs are similar, there are some important differences, which can sometimes mean the difference between the disclosure and non-disclosure of information.

For example, unlike FOI, EIR requests don't have to be made in writing - they can be made orally – and there's no upper cost limit under the EIRs. You can also extend the timescales under the EIRs in certain circumstances.

So, get into the habit of asking yourself at the start of every request, whether the information might fall within the definition of Environmental information – there's lots more guidance on this on our website. See: [www.itspublicknowldge.info/EIRs](http://www.itspublicknowldge.info/EIRs).

It's much easier to get things right from the outset, than to start off on the wrong foot down the FOI route, and then have to backtrack to consider a request under the EIRs.



Secondly, under FOI a request must contains certain things for it to be valid.

It must:

- Be in writing
- Contain the person's real name (in the body of the request, not just in e.g. the email address)
- Have an address for correspondence (email or postal)
- Describe the information requested.

If the request doesn't contain the requesters real name, they won't be able to appeal to the Commissioner – we are only able to accept appeals where the request is valid in terms of the FOI Act.

(This is another example where things are different under the EIRs – for environmental information requests, there isn't the same statutory requirement to provide a real name)

If you've received a simple request and you're planning to just disclose information, or point the requester to where it's already published, this might be less of a concern. But if you're in a situation where you have concerns about the validity of the request, the requester may be likely to appeal because you're e.g. withholding information, then you should ensure that you give the requester advice on making a valid request, so that they can take any appeal forward.

**Do you  
understand  
what is being  
asked for?**



Take time at the start of the process to read the request carefully, and be absolutely sure you understand what is being asked for.

Sometimes requests will be ambiguous and will be capable of being interpreted in more than one way. This is understandable: requesters don't have as clear an understanding of the work you do, the information you hold, the language you use. There will inevitably be times where interpretation will be an issue.

If you interpret a request incorrectly, or too narrowly, it will almost certainly come back as a review request – leading to more work, effort, and resource on your part.

So...

## If not, ask for clarification...

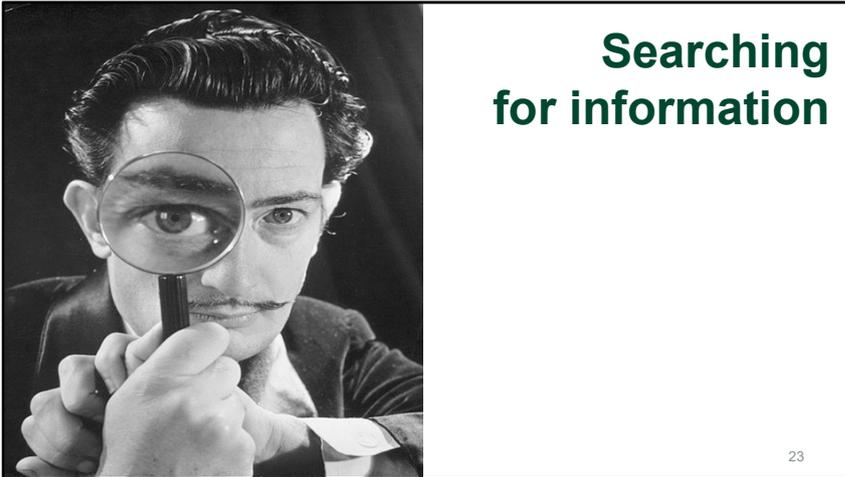


...if it's not clear, ask for clarification.

It's much better to clarify the request up front and start from a firm premise, than to do all the work on a request, only to realise when the review comes in that the requester was seeking something else.

BUT – clarification requests must be “reasonable” – it's not acceptable to seek to clarify a request that is perfectly clear.

If you do need clarification, that the clock won't start until you've received it – so you don't have to worry about the impact that this will have on your fulfilment of the request within the 20 working day period. You should, however, seek it as soon as possible in the lifespan of the request – don't wait until the 20<sup>th</sup> working day.



### Searching for information

We regularly see cases where searches are not adequate.

This often comes to light during our investigations, for example where additional information is identified and provided during the investigation.

When you get a request, think about all the places where relevant information might be held. FOI covers all information that is recorded and held by your organisation, so think about where this might be located. Don't just limit your search to formal reports (unless the request gives you reason to do so) think about where else the information might be held. Emails? Spreadsheets? Paper files?

If you don't identify all the information from the outset, your consideration of the request starts on the wrong foot. You're not considering all the information you hold, and the missed information may be fundamental to your consideration of all other information.

It can **create** a perception, of an authority seeking to delay, or even conceal or hide information.

## Can information be disclosed?



It's always best to start your consideration of an FOI request off by asking yourself whether the information can be disclosed. It's much easier for organisations to disclose information rather than withhold it.

You won't be able to do this in every case, of course, but if you start with a presumption of disclosure, and only look at withholding information where you consider that there's a real risk that disclosure would be harmful or might be prohibited for some reason, then you'll should find your FOI path runs more smoothly.

And remember, just because some information in a document falls under an exemption, it doesn't mean that everything in that document will be exempt. In such cases you should look to disclose all non-exempt information, with anything that's exempt – such as an individual's personal data or a piece of sensitive pricing data – redacted, or blacked out.



**Apply  
the tests  
carefully**

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Requests can be refused if an exemption applies. There are 17 categories of exemption in the FOI Act.

We publish a detailed briefing on each of the FOI Act's exemptions (as well as briefings on the exceptions under the EIRs).

As you'll see in some of the examples we'll be providing in the sessions later today, each exemption has a series of tests that must be met for the exemption to apply.

Don't fall into the trap of relying solely on the title of an exemption as a reason for non-disclosure. A document may be marked as "confidential" for example, but that doesn't mean that the information it contains will meet the test for "confidentiality" required by the FOI Act.

**USE OUR EXEMPTION BRIEFINGS!** Each briefing will talk you through the tests that must be applied in relation to each exemption, with examples of how the Commissioner has considered similar cases in the past. Refer to these, use them, follow the steps, and assure yourself that each test is met, before applying any particular exemption.

## Meet the timescales



Be mindful of the timescales – The FOI Act says responses should be made promptly and within 20 working days.

We see too many cases coming to us because of failures to respond within the timescales, so ensure that your procedures enable and support you to respond on time.

Failing to respond on time can be damaging for your reputation. It delays responses, discourages and deters requesters, and fosters mistrust in authorities. It gives the requester the impression of evasion, of authorities having “something to hide” - even though this normally won't be the case. We know that failures to respond will normally arise because of process or resource issues, but it may not look that way to the requester.

Take steps to do what you can to get this right, and it can reduce the risk of problems later.

## Monitor and track requests



To help you meet the FOI timescales you should ensure that you have appropriate procedures in place to monitor and track requests, so you know where you are in the process in relation to each request, and understand when responses should be issued.

Monitoring and tracking is also important for assessing, reviewing and improving your own FOI performance, e.g. through identifying where and when blockages, barriers or problems are arising.

The Scottish Ministers Code of Practice on FOI also sets out that it is good practice for organisations to record, monitor and report on a variety of data relating to FOI performance. This includes information on e.g. the number of FOI and EIR requests received, the proportion answered within statutory timescales, the number of requests refused and the reason for any refusal (Section 60 Code; part 2, section 2).

Since 2013, we have asked organisations subject to FOI to report this information, on a quarterly basis, via an online portal. We wrote to you on Friday with more information on this, including a link to where the schedule of statistics to be submitted is available. If you haven't familiarised yourself with this, therefore, I'd suggest you do it soon, to ensure that you're set up to record and report on the relevant information ([www.itspublicknowledge.info/stats](http://www.itspublicknowledge.info/stats)).

The first submission from RSLs will be due by 7 February 2020, covering the period from 11 November to 31 December 2019.



## Keep an eye on the cost

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Under FOI (but not the EIRs) you can refuse a request if the cost of responding exceeds £600. Fees regulations govern what can and can't be charged for, and set maximum limits on staff time.

If a request is particularly wide ranging or involves a lot of information this may well be an area where the cost limit kicks in. Bear this in mind.

In working out the fee, an authority can charge for:

- staff time to gather the information up to a maximum of £15 per hour
- reasonable costs for photocopying and sending information.

An authority can't charge for staff time or any other cost associated with deciding whether it has the information or if any exemptions apply.

If you are refusing on cost grounds though, remember the duty to advise and assist – e.g. telling the requester about what can be provided within the cost limit.

Which brings us on to my next tip...

**Remember  
the duty  
to  
advise  
and  
assist**



Today we're mostly focussing on the duty to respond to requests, but remember that the duty to advise and assist should run through every element of your FOI practice.

As you know, it's about taking a customer-focussed approach to your FOI duties – thinking about what you can do to help requesters access the information they need (within the legal limits).

Successful fulfilment of this duty should help to build relations, and reduce the likelihood of future appeals (and even requests).

## Use standard templates



There's a lot of technical stuff that has to be included in FOI responses. For example, information on:

- The right to request a review
- Rights of appeal to the Commissioner
- Right of appeal to the Court of Session

It's therefore useful to have a suite of standard templates to use to save time and to make sure all the technical requirements are met, and it's great to hear that SFHA and GWSF are working on the development of these.

BUT – ensure that these are flexible enough that you can adjust them to meet individual needs. If they're too technical, for example, or the reasons for decisions aren't explained clearly enough for a particular requester's needs, then they might result in damage to your relationship with a requester, mistrust, or further requests, reviews and appeals.



## Plan for leave

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Remember that the twenty working day timescale doesn't stop if you go on holiday. We see quite a few cases come to us where organisations that normally perform well find themselves running into issues as a result of absences by key staff.

Always plan for leave and ensure that you have a reasonable degree of resilience in your FOI function. This will include request handlers, any reviewers and anybody involved in the administration of a request.

## Ensure reviews are thorough



Reviews are a really important part of FOI – they give you a second chance to get things right.

Use this. We see too many cases coming to us where authorities only really take a proper second look at the handling of the request when the case is appealed. Indeed, if you follow our decisions Round-up, you'll know that in five of the seven decisions we issued last week the authority corrected a simple mistake on appeal – for example by finding information they'd initially overlooked, or disclosing information that had clearly been wrongly withheld.

You can avoid this by taking reviews seriously. They should never be a 'rubber-stamping' exercise: they should always support a fresh and considered re-examination of the case and should, where possible, be carried out by staff who weren't involved in the original decision.

Doing so can help resolve things far more swiftly - for authorities and requesters - and can avoid unnecessary appeals to the Commissioner.



If you disclose information in response to a request and you think that it's of interest to the wider public, or if you anticipate you might get more requests for it, think about publishing it. Doing so will help manage the impact of future requests, and presents you as an open and transparent organisation.



[www.itspublicknowledge.info/briefings](http://www.itspublicknowledge.info/briefings)

## Contact us



### Scottish Information Commissioner

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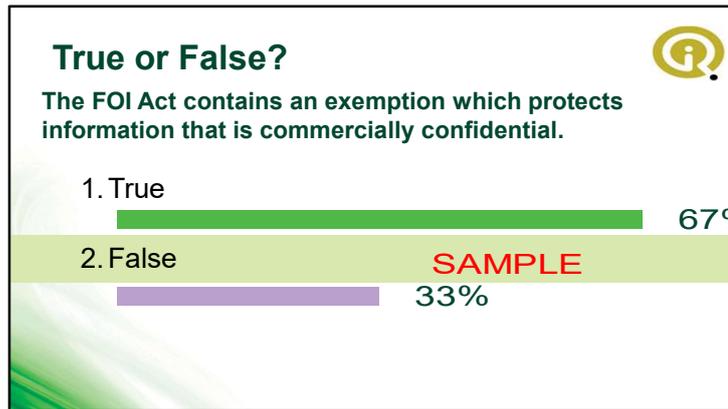


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## Questions & Discussion

**Business as usual?**  
FOI requests for commercial  
information  
Paul Mutch





- True or false – The FOI Act contains an exemption which protects information that is commercially confidential?
  - False – a bit of a trick question - there is no SINGLE exemption that protects information that is commercially confidential – a common misconception.
  - Instead, there are two separate and distinct exemptions that might be applied to information that could traditionally be thought of as “commercially confidential” – the exemptions that cover:
1. [CLICK]

## The FOI Exemptions

<p><b>Commercial interests</b></p> <p>Section 33(1)(b)</p> <ul style="list-style-type: none"> <li><span style="font-size: 1.2em; font-weight: bold; color: green;">?</span> Is there a commercial interest?</li> <li><span style="font-size: 1.2em; font-weight: bold; color: green;">?</span> Would disclosure cause substantial prejudice to that commercial interest?</li> </ul>	<p><b>Confidentiality</b></p> <p>Section 36(2)</p> <ul style="list-style-type: none"> <li><span style="font-size: 1.2em; font-weight: bold; color: green;">?</span> Was the information obtained from another person?</li> <li><span style="font-size: 1.2em; font-weight: bold; color: green;">?</span> Would disclosure lead to a breach of confidence?</li> </ul>
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- Important to note that these are two separate and distinct exemptions, with separate and distinct tests, that must be met before the exemption can be applied. While these two exemptions might often both be applied to the same information – e.g. in relation to procurement information – for each to be applied the relevant – and very different – tests must be met for each exemption.
- In relation to the Commercial Interests exemption, these are:
  - Firstly: Is there a commercial interest? An interest is “commercial” if it relates to any commercial trading activity an organisation undertakes, e.g. sale of products or services, usually (but not always) for the purpose of making money, and normally within a competitive environment. A “commercial interest” could be ANYONE’s commercial interest – not just yours – could be a third party’s, e.g. a contractor or supplier.
  - And the second question is “would disclosure cause harm to that commercial interest?”
  - Under FOI, the test here is one of substantial prejudice – disclosure must cause real, actual and significant harm to the commercial interest before the exemption can be applied.
  - Tests are evidence based (and in event of an application to the Commissioner’s office, we would expect you to have evidence to support your use of the exemptions).
  - For the Confidentiality Exemption, the tests set out in the FOI Act are different.
    - The first question is whether the information was obtained from someone else – information must have been obtained from a third party before this exemption can be applied. It won’t apply to information which has been created internally – and unlikely to apply to information negotiated with third party.
    - The second question is “would disclosure breach the Scots law of confidence?”. “Confidential” means different things to different people, but this exemption is about the Scots law of confidentiality. According to Scots law of confidentiality, there would be no breach of confidence if, e.g.:
      - disclosure wouldn’t cause any detriment to person who communicated the information to you,
      - if it is in the public domain,
      - if it doesn’t have the nature of confidence (it must take skill and labour to reproduce)
      - or if it would be contrary to the public interest to withhold the information. (I will return to this point on the next slide.)

- Because of these different tests, you may have situations where both exemptions can be applied to commercial information, where one can be applied but the other can't or, of course, you may find that you have commercial information but none of the tests from either exemption can be met.
- Of course, it's also worth noting that, unlike the commercial interests exemption, the confidentiality exemption won't apply only to commercial information – it can apply to a much broader range of information and interact with other exemptions, e.g. 'patient confidential' information held by the NHS may well be personal data, so the confidentiality exemption may interact with the exemption for personal data.
- This presentation focusses on the confidentiality exemption only in the context of commercial information.

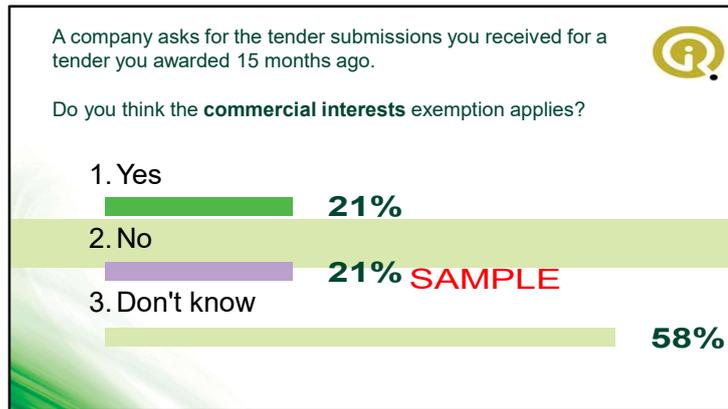


- As you no doubt know, there is a public interest test in section 2 of the FOI Act, which applies to many, but not all, of the exemptions. This public interest test sets out that, even when the exemption applies, the information should be released if the public interest arguments in favour of releasing the information outweigh those in withholding the information.
- The FOI Act’s public interest test applies to the commercial interests exemption. When the commercial interest exemption is applied, therefore, authorities should consider this public interest “balancing test”, before ultimately deciding whether the information should be withheld or disclosed.
- The FOI Act’s public interest test does not apply to the confidentiality exemption.
- **HOWEVER**, the Confidentiality exemption is subject to a different public interest test: that contained in the Scots law of confidentiality.
- If disclosure of the information is in the public interest, under Scots law, it won’t be a breach of confidence to disclose it.
- The key point to note, therefore, is that **EVEN THOUGH THE FOI PUBLIC INTEREST TEST DOESN’T APPLY**, you must nevertheless consider the public interest before applying the confidentiality exemption.
- You cannot forget the public interest when you are applying the confidentiality exemption.

## The importance of time...



- So, to recap then, there are two distinct exemptions, that can cover information we might traditionally think of as “commercially” confidential, with separate and distinct tests that must be considered before each can be applied.
- Alongside these differences, however, there are also similarities to bear in mind when considering the application of these exemptions. Perhaps most significant is that, in both cases, the passage of time means that the exemption are less likely to apply.
- As a general rule, the closer you are to the events which make the information confidential and/or commercially sensitive, the more likely it is that the tests within the exemptions will be met. E.g harm test – disclosure is more likely to harm commercial interests immediately after a contract is negotiated, or a tendering process is completed, than years later. And the further away you get from the event, the less likely it may be that the tests are met.
- But is timing everything?
- Going to give you a number of scenarios and ask you to decide whether or not you think the exemption may apply.
- We're well aware that you don't have all the information here, and the consideration of cases will involve a lot more than we're going to provide you with in these short examples. What we want you to do here though, is just tell us your gut instinct, based on the information you have before you. And don't worry if your answer doesn't reflect the outcome of the case, we obviously had access to a lot more information than we're able to give you here.
- All of the following examples relate to requests for procurement information, as this is one area where we see the confidentiality exemption and the commercial interests exemption being used often.



1. This slide is a ppvote question
2. Involved request about tendering for Christmas lighting.

**Example 1:**  
A company asks for the tender submissions you received for a tender you awarded 15 months ago.

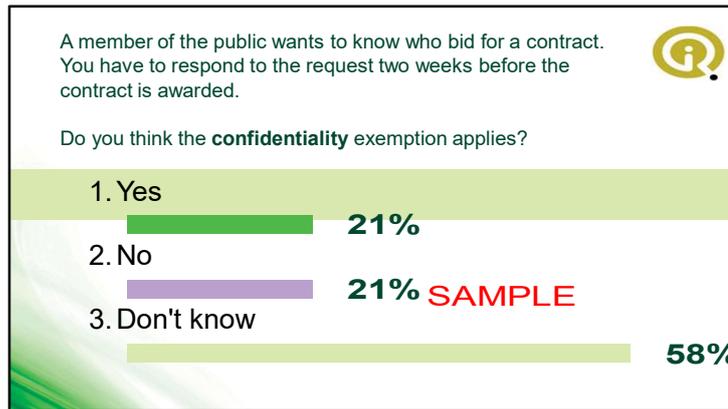
Do you think the **commercial interests** exemption applies?

“...any commercial sensitivity in the information in question which may have existed at the time of the tender award would have significantly diminished in the intervening period.”

Decision 015/2009



1. “The Commissioner considers that any commercial sensitivity in the information in question which may have existed at the time of the tender award would have significantly diminished in the intervening period”.
2. “The likelihood of harm tends to diminish with the passage of time, as prices, service delivery methods and market conditions change.”
3. In this case the authorities arguments were also fairly hypothetical – they did not demonstrate the likelihood of prejudice.
4. No substantial prejudice would be likely to follow from release of information, so exemption did not apply.
5. Decision 015/2009 Lightways (Contractors) Ltd and North Lanarkshire Council



1. This slide is a ppvote question
2. Involved a tender for independent advocacy services.

A member of the public wants to know who bid for a contract. You have to respond to the request two weeks before the contract is awarded.

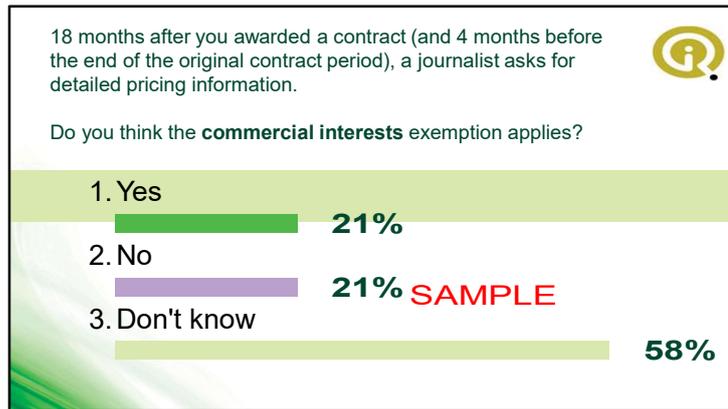
Do you think the **confidentiality** exemption applies?

“...sensitivity surrounding this information would have been short lived, but...it remained until the tendering process had completed and the relevant contracts had been awarded.”

Decision 004/2012



1. “...sensitivity surrounding this information would have been short lived, but...it remained until the tendering process had completed and the relevant contracts had been awarded”.
2. Having considered each of the relevant tests, the Commissioner was therefore satisfied that disclosure at the time would have constituted an actionable breach of confidence.
3. Decision 004/2012 Mr Sam Cairns and City of Edinburgh Council



1. This slide is a pvote question
2. In this example the information in question was pricing information in a tender – contract for hire of plant equipment.
3. Authority was uncertain whether it would retender at the end of original contract term.

18 months after you awarded a contract (and 4 months before the end of the original contract period), a journalist asks for pricing information.

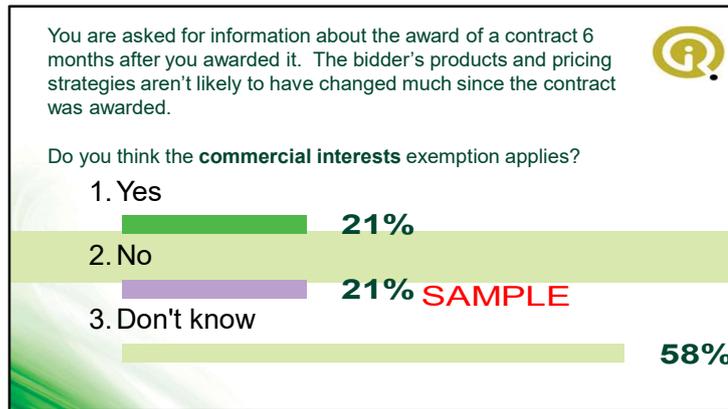
Do you think the **commercial interests** exemption applies?

“ ... the Commissioner is satisfied that disclosure of the pricing information... would, or would have been likely to, prejudice substantially [the bidder’s] commercial interests. ”

Decision 238/2011



- “In reaching this conclusion, the Commissioner has noted the level of detail with respect to the pricing of individual items within this pricing schedule. Whether or not [the PA] had initiated a further tendering process, disclosure would have offered [the bidder’s] competitors significant insights into the pricing strategy adopted by [the bidder] when bidding for a contract of this type, enabling competitors to gain advantage and prepare their own tenders in the light of that knowledge.”
- Not so much about timing perhaps – regardless of whether or not re-tender happened, level of detail would give competitors an advantage.
- Can see that while timing is important, therefore, it’s not the only consideration.
- Decision 238/2011 Mr Tom Gordon (Sunday Herald) and City Building (Glasgow) LLP



1. This slide is a pvote question

2. Contract for the supply of steel doors.

**Example 4:**  
You are asked about the award of a contract 6 months after you awarded it. The bidder's products and pricing strategies aren't likely to have changed much since the contract was awarded.

Do you think the **commercial interests** exemption applies?

“ ...each procurement process will be unique, taking into consideration the particular needs of the procuring organisation, and the economic and other circumstances of the time. ”

Decision 239/2011



1. The Commissioner did not consider it plausible to assume that [the bidder] would adopt the same pricing strategy in relation to every procurement process.
2. Decision 239/2011 Mr Tom Gordon (Sunday Herald) and City Building (Glasgow) LLP
3. As you can see, much will depend on the particular circumstances and timing of the case.



## Apply the tests carefully

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So, referring back to our earlier slide, make sure you apply the exemption tests carefully. You can't take a blanketed approach to exemptions, or assume that, because similar information has been withheld (or disclosed) in the past you can take the same approach next time. A range of factors will influence the outcome in any particular case.

You need to carefully assess the information you hold against those tests (and applying the public interest test, as relevant).

Use our briefings, guidance and published decisions to help you out.

**Managing confidentiality,  
commercial interests and FOI**

## What does the third party think?



- Ask them!
- Keep a record of their views
- Challenge their views if you're not sure

- If you get a request for procurement or contract information, and you're struggling to know whether to disclose the information, it's worth seeking comments from the third party. The third party will often know better than you do why the information is commercially sensitive or why it is confidential, and why it would be harmful to disclose it.
- Keeping record of their views makes it much easier to provide good arguments to the Commissioner, to back up your decision.

## Section 60 Code



SCOTTISH MINISTERS' CODE OF PRACTICE  
ON THE DISCHARGE OF FUNCTIONS BY SCOTTISH  
PUBLIC AUTHORITIES  
UNDER THE  
FREEDOM OF INFORMATION (SCOTLAND) ACT 2002  
AND THE  
ENVIRONMENTAL INFORMATION (SCOTLAND)  
REGULATIONS 2004  
10 December 2014  
S0/2014/248  
Revised in consultation with the Scottish Information  
Commissioner  
Approved by the Scottish Parliament by the Scottish Ministers on 10  
December 2014 under section 10(1) of the Freedom of Information  
(Scotland) Act 2002 and regulation 6(2) of the Environmental  
Information (Scotland) Regulations 2004.

- Ensure third parties are aware of FOI
- Exercise caution about making confidentiality agreements
- Only consult in relevant circumstances
- Usually appropriate to notify third party about disclosure
- Make clear the decision is yours
- Withhold the requester's identity
- Meeting FOI timescales takes precedent

- Our briefings
- Lots more guidance can be found in the Scottish Minister's section 60 Code of Practice. Covers several areas, but there is a whole chapter dedicated to procurement and contracts. Revised and updated in December 2014, so if you haven't looked at it for a while, it's a good idea to take another look. It gives guiding principles and best practice advice.
- Use our enquiries service.

**Don't wait till the request comes in** 



- **Before contract made:**
  - Discuss FOI with contractors
  - FOI schedules in tenders
- **Making the contract:**
  - Build FOI into contract terms
  - Set out what you need from contractor if a request is made

- Before the contract is made:
- Raise awareness of FOI with third parties who provide information to you. Establish a good working relationship with the contract manager – all public authorities are subject to FOI and have been for the past 10 years, so FOI shouldn't come as a surprise to them.
- Ask third parties providing you with information to identify at the time of providing it what is commercially sensitive and what is confidential. Think about how long that sensitivity and/or confidentiality is likely to last for.
- This will save you a lot of time and effort in the event of a request. Any experience in room of needing to get views from a third party within the 20 working day limit? How did it affect your timescales?
- Making the contract:

Acknowledge information may be requested under FOI Act.

Use contractual terms that clearly set out what information is confidential and/or commercially sensitive.

Set out what assistance and co-operation will be required from the third party in the event of a request – e.g. do you want them to come back with comments in, say, 5 days?

Remember – the decision about whether information is subject to an exemption is yours, and yours alone to make. Don't give the impression that that the third party has any decision making powers. In fact, be clear about the fact they don't. Set out clearly what their role will be in the event of a request, while keeping it clear that the discretion about applying exemptions is yours.

## Records and relationships



- After contract made:
  - Records management
- Within the organisation:
  - Link procurement and FOI staff

1. After contract made:
2. Make sure you know which contracts require consultation. Keep a record. And, of course, stick to what you've said you'll do in the contract.
3. Within your own organisation:
4. How many of you would say you have a strong link between the procurement team and the FOI team? Are you working together? Do you have shared understanding of what will happen in the event of a FOI request?

**Is it environmental?**



## Environmental information

### Confidentiality of commercial information



Reg. 10(5)(e)

<p> Is it environmental information of a commercial or industrial nature?</p>	<p> Does a legally-binding duty of confidence exist in relation to the information?</p>
<p> Is the information publicly available?</p>	<p> Would disclosure substantially prejudice a legitimate economic interest?</p>

1. So far this session has concentrated on the exemptions in the FOI Act. You, as public authorities, are also, of course, subject to the EIRs, and requests for environmental information which may be commercially sensitive or confidential must be dealt with under the EIRs.
  2. The exception under the EIRs is different from the exemptions under the FOI Act, with, I'm afraid, different tests in place. That said, however much of what we've covered so far:
    - The relevance of the passage of time
    - The value of consulting third parties
    - The importance of thinking about FOI when preparing contracts
    - The importance of records management
1. ...will be equally relevant under the EIRs.
  2. The EIR exception is contained under Regulation 10(5)(e). Tests to check if applies:
    - **Is the environmental information commercial or industrial in nature?**
    - **Does a legally-binding duty of confidence exist in relation to the information?**
    - **Is the information publicly available?** Information which is available in the public domain will be highly unlikely to engage the exception under regulation 10(5)(e).
    - **Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest?**
  1. The term "legitimate economic interest" is not defined within the EIRs. The interest in question will, however, be financial, commercial or otherwise "economic" in nature, and the prejudice to that interest must be "substantial".
  2. Exception is also subject to the public interest test.

**FOI and EIR:** 

-  The passage of time
-  Consulting third parties
-  Preparing contracts
-  Records management

1. While the EIR exception tests are different, much of what we've covered so far will be equally relevant when considering however much of what we've covered so far:

- The relevance of the passage of time
- The value of consulting third parties
- The importance of thinking about FOI when preparing contracts
- The importance of records management

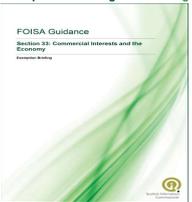
1. ...will be equally relevant under the EIRs.

**Further guidance**

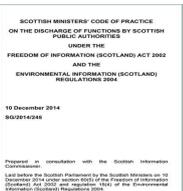


**Our Briefings**

[www.itspublicknowledge.info/briefings](http://www.itspublicknowledge.info/briefings)



**Section 60  
Code of Practice**



**Our  
Enquiry Service**



- Our briefings
- Lots more guidance can be found in the Scottish Minister's section 60 Code of Practice. Covers several areas, but there is a whole chapter dedicated to procurement and contracts. Revised and updated in December 2014, so if you haven't looked at it for a while, it's a good idea to take another look. It gives guiding principles and best practice advice.
- Use our enquiries service.

**Workshop exercise –  
commercial information**

## Workshop – commercial information



Your organisation receives an FOI request for information relating to a tender exercise carried out around 18 months ago.

The requester has asked for –

- (a) The names of all companies that submitted a bid, and your organisation's evaluation of the top 3 bids
- (b) The bid documents from the chosen supplier, including product specifications and pricing structure
- (c) The duration, expiry date and value of the contract with the chosen supplier

### 1. Points to Consider

2. Commercial interests – whose are they, what are they, and how might they be affected
3. Consultation with companies involved (but your organisation makes the decision)
4. Passage of time, including likely changes to prices and products/services
5. Is any information already in the public domain?
6. Good practice to disclose with redactions if possible, or withhold entirely
7. Confidentiality – actionable breach of confidence?
8. Public interest test

## Workshop – commercial information



Questions –

- 1) Would disclosing the information prejudice a commercial interest?
- 2) Who would you consult before responding to the request?
- 3) What effect does the passage of time have on the information?

### Points to Consider

1. Commercial interests – whose are they, what are they, and how might they be affected
2. Consultation with companies involved (but your organisation makes the decision)
3. Passage of time, including likely changes to prices and products/services
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## Questions & Discussion

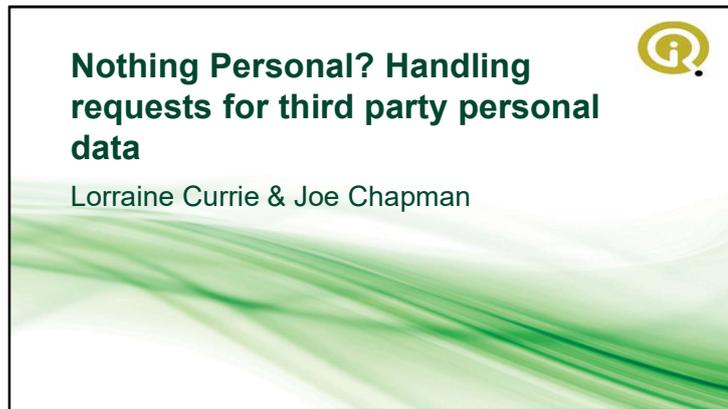
## Contact us



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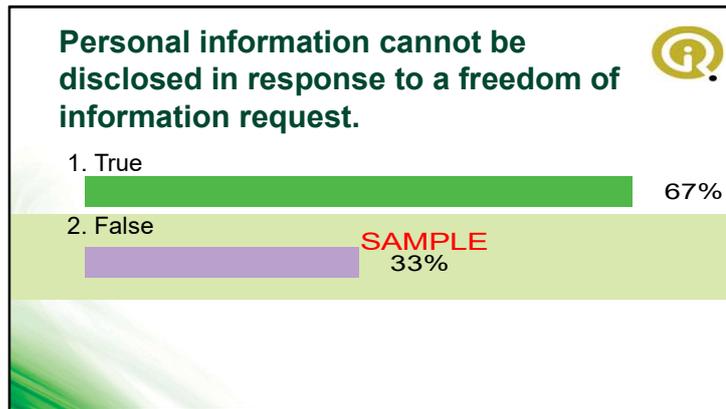
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1. Post lunch slot – so we're going to keep this as interactive as possible.
2. One of the things we know some public authorities can feel apprehensive about is handling requests for third party personal data. We're not talking here about the times when the requester asks for their own personal information, but when they ask for someone else's personal information.
3. This is the exemption that is used most often when information is withheld in response to an FOI request.
4. In 2018/19, public authorities used the exemption for third party personal data over 4,000 times, which makes this **by far** the most cited exemption.
5. As will have been hard to escape your attention, the world of data protection changed in May 2018 with the introduction of the GDPR, which did make some changes to how FOI requests for personal data should be handled.





1. And we're going to start with a statement and ask you whether you think it's true or false.
2. "Personal information cannot be disclosed in response to a freedom of information request". What do you think? Press 1 if you think that's true, or 2 if you think it's false.
3. False – personal information can be disclosed in response to an FOI request. In this presentation the aim is to give you an idea of what personal data can be disclosed, and in what circumstances.

# What is “personal data”?



“Personal data” means...

- ...**any** information **relating to a living** individual...
- **who is or can be identified, directly or indirectly...**  
1. First, though, we need to be clear about what information we're talking about.
- ...**by an identifier (such as their name, an ID number, location data, online identifier etc)**  
2. I've used the term “personal information” a few times, but the correct term is actually **personal data**. This is the term used in Data Protection Legislation (DPA 2018), and it is defined. You might have some awareness of this already – in your preparations for GDPR you might have looked at this.
- ...**or one or more aspects of their physical, genetic, mental, economic, cultural or social identity.**  
3. The definition's on the screen, but, as all legislation tends to be, it's a bit wordy.

4. So let's pick out the important bits of the definition.

5. [CLICK]

6. It tells us that personal data means any information relating to a living individual. So if someone is deceased, information cannot be their personal data.

7. [CLICK]

8. It also tells us that the person must be either identified, or capable of being identified, directly or indirectly.

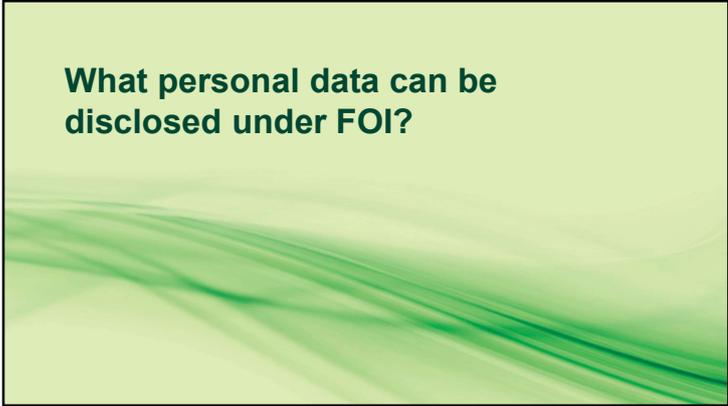
9. [CLICK]

10. The definition also tells us what things can be used to identify the individual. It's not just the obvious things like name, an ID number (like a customer number) or location data or an online identifier like a username.

11. [CLICK]

12. It can also be one of more aspects of the person's physical, genetic, mental, economic, cultural or social identity.

You might be wondering what all of this means in the real world, so we're going to look at some examples and have a think about whether you can disclose it under FOI.



## **What personal data can be disclosed under FOI?**

One key thing to remember is that all information disclosed under FOI is in the public domain. Obviously, it can be inappropriate to put someone's personal data into the public domain. No-one would expect their GP to put their medical records into the public domain for all and sundry to see.

So what types of personal data can be disclosed under FOI and in what circumstances?

I'm going to hand you over to Joe to work through some examples.

## Board members' names and responsibilities



1. Yes, it can be disclosed



39%

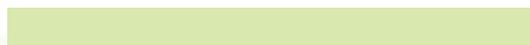
2. No, it cannot be disclosed

We're going to ask a handful of questions about different types of personal data and whether it can be disclosed under FOI. First up – the names and responsibilities of board members or senior management. Vote now.



SAMPLE 30%

3. Maybe it can be disclosed



32%

# Senior staff expenses



1. Yes, it can be disclosed



2. No, it cannot be disclosed

1. Another one, and quite a popular subject of information this – expense claims by senior staff.

**SAMPLE**

2. This can be disclosed, in fact you should publish it – it's in the Guide to Information.

3. Maybe it can be disclosed





# Pay scales for all staff

## 1. Yes, it can be disclosed

39%

## 2. No, it cannot be disclosed

... Moving on to payments to staff more generally – the pay scales, or salary bands covering all staff in your organisation. What do you think?

**SAMPLE**

## 3. Maybe it can be disclosed

... Again, this can be disclosed, and should be published – it's in the Guide to Information.

Note that we're talking about a pay scale or salary band, not an exact amount.

It may be appropriate to publish exact salaries of staff, especially at the most senior levels – for example, the Commissioner's salary is published in our Annual Report & Accounts.

In general, though, for less senior staff, it may be unfair to publish exact salaries, so salary bands should be given instead, e.g. "£20,000 to £25,000".

The overall message is, if it's in the Guide to Information, you should publish it.

# Payments to individuals outside the authority (non-staff)



1. Yes, it can be disclosed

2. No, it cannot be disclosed

1. Our next question is about payments made to people who don't work for you. It happens a lot – for example, people who are not employees but have done work for you. Can you ever disclose how much a particular individual's been paid?

3. Maybe it can be disclosed

The answer to this (as is often the case regarding data protection!) really is 'it depends'! We have an example of when it is appropriate to disclose this information...

## Third party payments - example



- Fee paid to David Coulthard for the rural road safety campaign
- About a public figure, using his professional skills for public benefit
- Nothing which would have led Mr Coulthard to believe the information would be kept in confidence



1. You might remember a few years ago, David Coulthard featured in a Scottish Government TV advert to promote road safety on rural roads.
2. Someone asked about the fee paid to David Coulthard for the campaign. The information was withheld and the requester appealed to us.
3. The Commissioner found that the information should be disclosed. Why? Well, largely because:
  - The information was about a public figure who was using his professional skills for public benefit.
  - There was nothing which would have led Mr Coulthard to believe that the information would be kept in confidence, i.e. nothing had been done to give him that expectation.
1. Of course, in other cases, it may be perfectly reasonable for a person receiving payments from a public authority to expect that this information will not be shared with the world at large – we have to look at everything on a case-by-case basis.
2. [Decision 263/2013]
3. Apparently, the fee was £10,000, and as the end result was a 40 second ad, some reported that he was paid £250 per second! In reality I think it took a bit longer than that to film the advert... He also asked for a £5,000 donation to be donated to a spinal injuries charity.



# Photographs of people

1. Yes, it can be disclosed



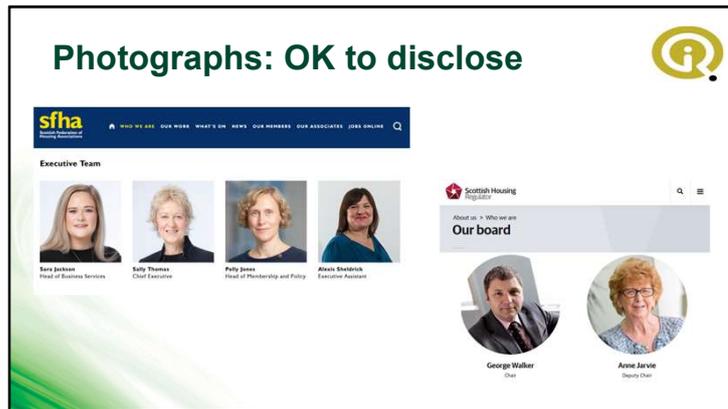
2. No, it cannot be disclosed



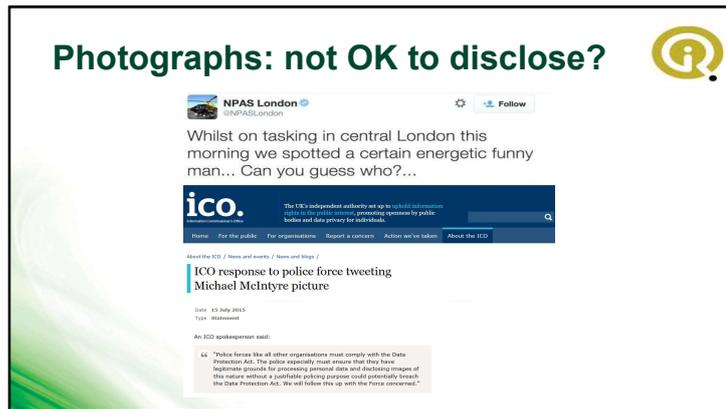
2. ...It's another case of 'it depends'! So in a way all 3 answers could be correct depending on the circumstances. Here are a couple of examples to explain...

3. Maybe it can be disclosed

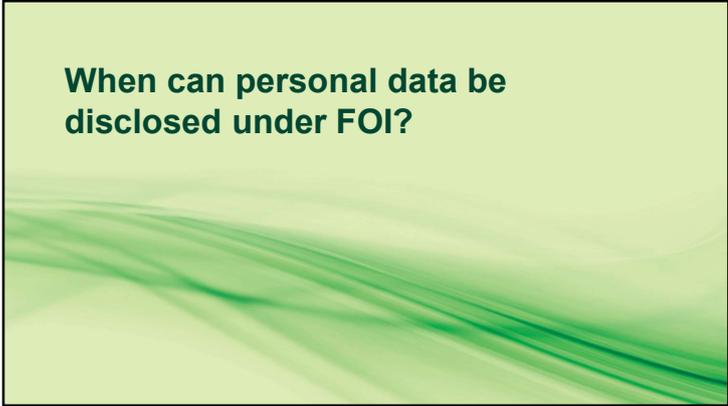
32%



1. You can disclose photographs under FOI. Again, sometimes they are proactively published, like the photographs of your Senior Management Team or Board, which often appear on your website, alongside their contact details and often information about their career and background. That's a lot of personal data.
2. Here you can see some of the SFHA's Executive Team and the senior board members of the Scottish Housing Regulator – just a small snapshot of what is quite common practice across many of the organisations represented here today.



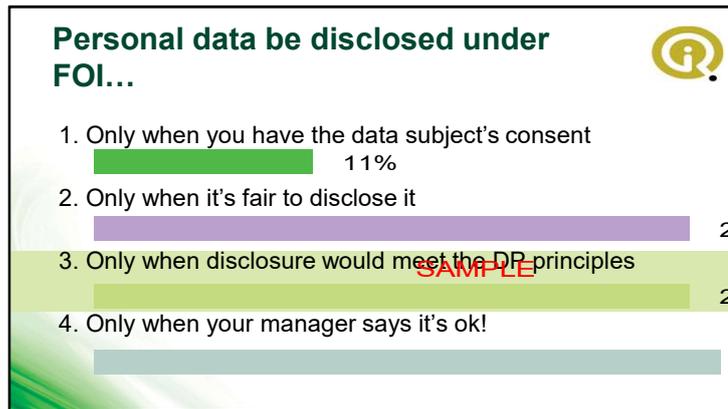
1. But that doesn't mean all photos are OK to disclose! As the National Police Air Service (NPAS) down south found out a few years ago, when they tweeted an image of the comedian Michael McIntyre going about his business in London. This was called out and led the ICO to issue a statement saying:
2. "The police especially must ensure that they have legitimate grounds for processing personal data and disclosing images of this nature without a justifiable policing purpose could potentially breach the DPA". They were going to follow up with the force.
3. Strictly speaking this had nothing to do with FOI, but the point is while it is sometimes OK to disclose, or even proactively publish, photos, sometimes it definitely won't be OK.



**When can personal data be disclosed under FOI?**

Lorraine is now going to take you through how the principles of data protection law apply when deciding whether or not you can disclose personal data under FOI.

Listen carefully because we have a workshop exercise for you to discuss in your groups afterwards!



1. As we've said several times with those examples, you may be able to disclose it under FOI - it depends. But what **does** it depend on?
2. We can see it's not just about what type of information it is, e.g. there are no hard and fast rules that say "you can't disclose salary information", or "you can disclose photographs".
3. So when **will** it be ok for personal data to be disclosed under FOI?
4. =====
5. First of all, I want to hear what you think. – vote now.
6. This is where we have to start thinking about the data protection principles.
7. The disclosure of personal data must comply with all 6 data protection principles, set out in Art 5 GDPR.
8. But we can narrow the focus for you somewhat, because when it comes to disclosure of third party personal data under FOI, the first principle is the most relevant.

## First Data Protection Principle



Personal data must be processed:

- Fairly
- Lawfully
- In a transparent manner re data subject

AND

- Must meet at least one Article 6 condition for processing,  
AND
- (If special category personal data) must meet an  
additional condition for processing

1. The first principle is that any processing of personal data (in this context, the processing is the disclosure of the personal data into the public domain) must be fair,
2. [CLICK]
3. =====
4. Found in Art 5 GDPR

## First Data Protection Principle



Personal data must be processed:

- Fairly
- Lawfully
- In a transparent manner re data subject

AND

- Must meet at least one Article 6 condition for processing,  
AND
- (If special category personal data) must meet an  
additional condition for processing

1. Lawful

2. [CLICK]

## First Data Protection Principle



Personal data must be processed:

- Fairly
- Lawfully
- In a transparent manner re data subject

AND

- Must meet at least one Article 6 condition for processing, AND
- (If special category personal data) must meet an additional condition for processing

1. Done in a transparent manner in relation to the data subject...

2. [CLICK]

## First Data Protection Principle



Personal data must be processed:

- Fairly
- Lawfully
- In a transparent manner re data subject

AND

- Must meet at least one Article 6 condition for processing,  
AND
- (If special category personal data) must meet an  
additional condition for processing

1. and meet one of the conditions in Art 6 of the GDPR.

2. [CLICK]

## First Data Protection Principle



Personal data must be processed:

- Fairly
- Lawfully
- In a transparent manner re data subject

AND

- Must meet at least one Article 6 condition for processing, AND
- (If special category personal data) must meet an additional condition for processing

1. As an aside, if it's special category data, such as information about your race, religion, health, sex life or sexual orientation, the disclosure must also meet one of the additional conditions for processing set out in Article 9 of the GDPR and in the DPA.

2. [CLICK]

3. =====

Disclosure of special category data under FOI is incredibly rare.

## First Data Protection Principle



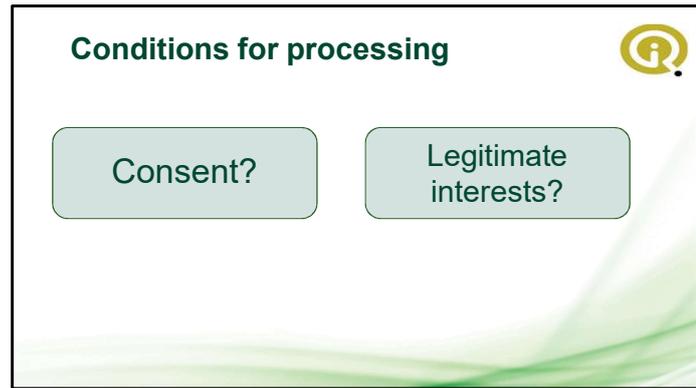
Personal data must be processed:

- Fairly
- Lawfully
- In a transparent manner re data subject

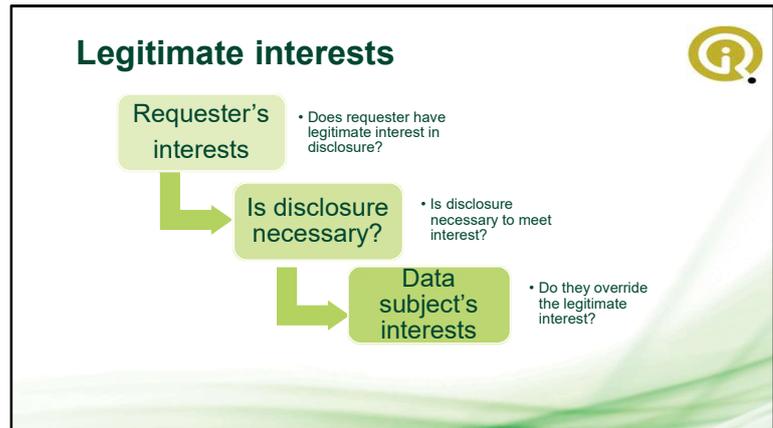
AND

- Must meet at least one Article 6 condition for processing,  
AND
- (If special category personal data) must meet an  
additional condition for processing

1. There are, therefore, a number of separate tests built into this principle, which all have to be met before you can say disclosure of personal data would be in line with it.
2. However, we can offer you a shortcut here, because we find that, in general, if a condition for processing is met, disclosure will usually meet the other tests.
3. That's why we go on to look at the Art 6 conditions for processing next. And, in fact, we can offer you an even better shortcut, because although there are several conditions for processing, there are just two which are most likely to be relevant when it comes to disclosing personal data under FOI.



1. And those two conditions are:
2. Condition (a) (consent)
3. Condition (f) (legitimate interests)
4. I'm not going to say anything else about the consent condition, except to be aware that you must have GDPR compliant consent to rely on this – e.g. the individual has to have been fully informed about what you're proposing to do with their personal data, including that you are proposing to put it into the public domain, and in DP terms you should keep a record of this.
5. Sometimes it's not possible to get consent, e.g. because you don't have a way of contacting the individual to ask for it, or because the requested information might be the personal data of a large group of individuals and you can't realistically, within your 20 working day limit, get consent from all of them.
6. But consent is not the only basis for disclosing personal data under FOI, and if you don't have consent, that doesn't mean the information can't be disclosed. You don't need consent to disclose personal data under FOI.
7. And that's where the legitimate interests condition comes in. We are going to look at it in a bit more detail.
8. =====
9. "Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data in particular where the data subject is a child."



1. If relying on legitimate interests, your task is to balance the privacy rights of the person whose personal data has been requested, and the FOI rights of the person who has asked for the information. This is the complicated bit. But we can make it a bit simpler for you.
2. There are three questions to ask...
3. Does the person making the request have a **legitimate interest in obtaining the personal data?**
4. If yes, the second question: **Is disclosure necessary to achieve those interests?**
5. **Do the interests or fundamental rights or freedoms of the data subject override that legitimate interest?** This is the real balancing exercise.

This is best demonstrated with an example, so we're going to move on to a workshop where you'll actually apply the legitimate interests condition to decide if information should be disclosed.

# Workshop

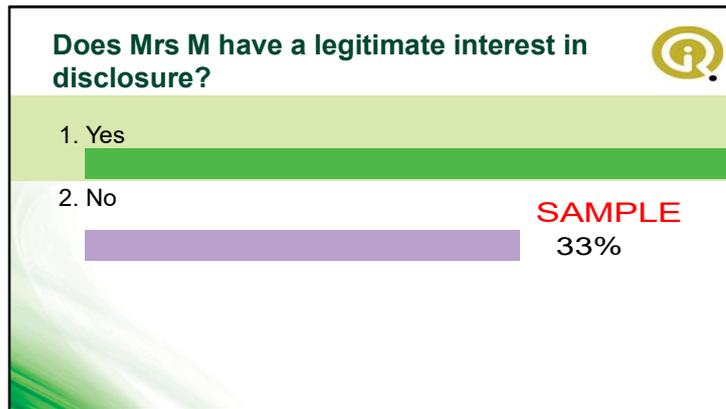
Legitimate interests

## Condition 6 – legitimate interest?



- Ms M asks for the parents' responses on the future rebuild or discontinuation of a primary school
- Clearly personal data
- Differing views on legitimate interest

1. This is the scenario we want you to consider. This was a case that came to us on appeal, in Decision 272/2013. It was based on the old Data Protection Act, but it's still a good example of how to carry out the balancing exercise under the new legislation.
2. Ms M made an FOI request to South Lanarkshire Council. There had been an informal consultation of parents carried out about whether a local primary school should be closed, or rebuilt.
3. Ms M wanted a copy of the written responses from all parents who had responded to give their views on the future of the primary school.
4. Obviously, the responses contained the personal data of the parents and, in some cases, their children.
5. The Council didn't think Ms M had a legitimate interest – it didn't believe she was interested in the content of the responses, just how many there had been.
6. Ms M said she wanted to verify the Council's handling of the consultation, and in particular she wanted to check how it had attributed to each response the position of either being in favour / not in favour / or undecided about the future reinstatement of the school.
7. In these circumstances, do you think Ms M had a legitimate interest in disclosure?



1. We found that Ms M did have a legitimate interest. She'd responded to the consultation and was affected by it and any decision made about the school. She had a legitimate interest in not only the number who had responded, but also who had responded and how they had responded,
2. Aside from this, more "personal", legitimate interest, there was also a wider community interest in these things. So, legitimate interest might be something unique to an individual requester or it might be a wider public interest. Here, it was a mixture of both.
3. FOI is generally what we call "**applicant blind**" (i.e. who the applicant is and what they're concerned about individually shouldn't be relevant in handling the request) but we can't ignore the identity of the requester when we're looking at their legitimate interest. If you're in any doubt as to whether a requester has a legitimate interest, it may help to ask them.
4. In this case, we also found that disclosure was necessary to meet the legitimate interest – Mrs M's interest couldn't be met in any way other than disclosing the information. So the second question or test was met.
5. The last question is whether the legitimate interests and rights of the data subject or subjects override the requester's legitimate interest.

### Data subject rights – things to think about



- Work or home life?
- Seniority
- Harm or distress
- Objections
- Expectations
- Is it a child's personal data?

1. The kinds of things you should think about in relation to the data subject's rights, and how weighty they are in that balancing exercise:
  - Is the information about someone's **work or home life**? Information about someone's home life is more likely to be withheld than information about their work for a public authority.
  - If it's related to work, you should think about the position the person has – the more **senior** they are, the less likely that it would be unfair to disclose information (although this is just a factor, not something set in tablets of stone).
  - Would disclosure of the information cause **harm or distress** to the person it's about?
  - Has the data subject **objected** to the release of the information? Just because they have doesn't mean it can't be disclosed, and vice versa, but you need to take account of their views.
  - Finally, what **reasonable expectations** does the data subject have about the way their personal data will be processed? People can have unreasonable and/or unrealistic expectations, so you need to think about what it would be *reasonable* to expect, which will be influenced by things like what you have or have not told them about what might be done with their personal data. You need to look at the privacy notices given to data subjects, the legislative power that you collected the personal data under etc.
  - It's also a relevant consideration if we're looking at a child's personal data: condition includes wording "in particular if the data subject is a child".
1. Remember the first data protection principle talks about fairness and transparency as respects the data subject? You should be able to see some links between those requirements and these considerations.

### **Condition 6 – where does the balance lie?**

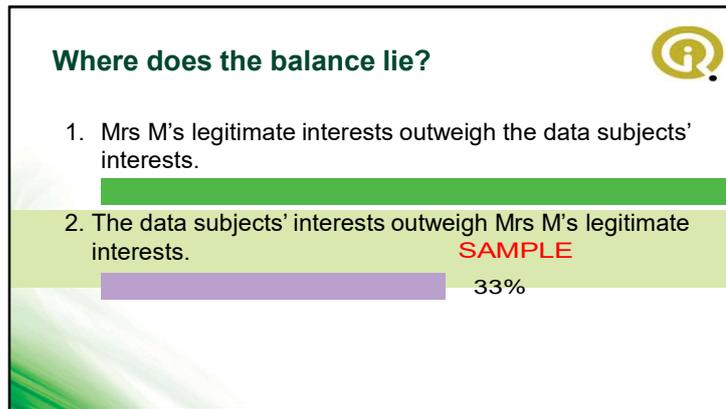


- Council highlighted the expectations of the data subjects
- Informal consultation
- No indication the information might be made public
- Opinions and views they wouldn't wish to be publicly known

1. So back to our scenario about Ms M. The Council argued that the data subjects would not expect this information to be made public. They had never been given any indication that it would, as they would have been if the consultation had been more formal. It described the views expressed as being views individuals wouldn't wish to be publicly known.

## Legitimate interests





1. Do you think Ms M's legitimate interests outweighed the data subjects' interests?
2. Or do you think the data subjects' interests override Ms M's legitimate interest?
3. This was a case where we found that the data subjects' interests outweighed Ms M's legitimate interests.
4. We bore in mind that information about an individual's private, home life (which this was) was more likely to require protection. This was information about the data subjects' personal lives, much of it about the personal lives of young children. Although, at the time (this being pre-GDPR), it wasn't technically special category data, but we still recognised it was information that should be approached with a greater degree of sensitivity than data relating to adults.
5. This is now captured in the condition – when considering if data subject's rights override legitimate interest it says "in particular if the data subject is a child".
6. Therefore, on balance, we were of the view that disclosure would cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects, i.e. the data subjects' rights did override the requester's legitimate interest, and therefore the Council was right to withhold it.

**Find out more:**

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)



# Resolving challenging requests

## Options, strategies and tools

The focus of this session is on managing and resolving challenging requests. That's not to say that every request is a challenge.

Remember: 74% of requests result in full or partial disclosure of information – at the first time of asking. That's  $\frac{3}{4}$  of requests (the majority). Over half (54%) result in full disclosure.

So only a tiny proportion of overall requests are challenging, but these are the ones that may have the most impact.

## Challenging behaviours



- Frequency of contact – phone calls, emails
- Same question, but different ways
- Vague, lack clarity
- Unfounded accusations
- Rude, antagonistic language



What makes a request challenging?

Behaviours like ...

- Frequency of contact – phone calls, emails
- Same question, but different ways – not accepting your answers
- Vague, lack clarity – requests buried in other correspondence
- Unfounded accusations – picking apart the answers you've given
- Rude, antagonistic language – accusations of fraud or that you are in a conspiracy

Raise your hand if you have experienced behaviours like this in the past?

None of these behaviours exist because of FOI. But the duty to respond to requesters means you can't just ignore the request – you have to do something about it.



### Impacts

They impact on our work by:

- taking time
- taking more effort
- imposing a burden and diverting resources from normal FOI activity

They make us feel:

- upset
- harassed
- frustrated or annoyed
- overworked or undervalued
- vulnerable

Those are the behaviours that make communication difficult. But what really makes it challenging are the impacts

They take more time and more effort to process

Because we're all human. This kind of contact can also affect our emotions.

They can make us *feel*: frustration, annoyance, disruption to workload, even vulnerable

### Why do we get challenging requests?



- People who are angry or upset or frustrated
- Not reading or understanding a situation well
- Past negative experience with the authority

(It's rarely something you've done!)

Why do we get challenging requests?

Challenging requests may come from people who are angry, upset or distressed about something that happened much earlier, or haven't got what they want.

Perhaps they don't understand what your authority does, or what information you actually hold. Perhaps they have misread a situation, or a communication from a colleague.

Perhaps they have had a terrible experience and want answers.

(By the way, it's rarely something you've done personally – you're just bearing the brunt of it!)

## Tools and strategies



We all recognise the problem, and we know it's not just something that FOI practitioners deal with.

There are strategies for dealing with challenging requests.

They allow us to process and deal with challenging requests. And importantly, they give us control over the process.

FOI law also has legal provisions for exactly this type of situation.

## Customer Service principles

**Do**

- Talk to them
- Offer help
- Set reasonable expectations

Colleagues in other organisations use customer service principles to resolve most challenging issues they come across.

Firstly some Do's:

- Talk to the other person (pick up the phone). By talking, you can help understand a problem better
- Offer help
- Set reasonable expectations about what you can do (or can't do)

## Advice and assistance



- Legal duty to advise (section 15)
- Applies before, during, after request is made

It's your opportunity to:

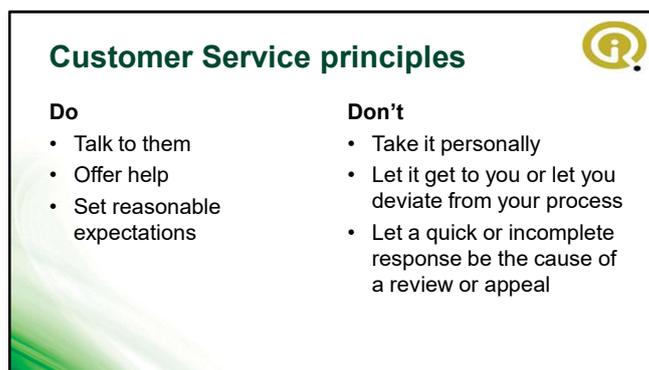
- Understand what they want
- Help them get what they want
- Set reasonable expectations

FOI law has a customer service provision – Advice and Assistance, under section 15.

But unlike regular customer service, it's a statutory duty, not something we can choose to do. It also applies at every stage of a request (before, during and after).

Yes, it's there to help the requester seek information from you. But it's also an opportunity for you to go to the requester to:

- Understand a problem
- Offer to help
- Set reasonable expectations



Colleagues in other organisations use customer service principles to resolve most challenging issues they come across.

We've heard about the 'do's'. There are also some 'don't's' in terms of customer service that equally apply to FOI:

**Don't**

- Take it personally
- Don't let it get to you so much you get flustered and deviate from the process. Keeping a request on track through the three steps of a request, review and appeal limits its impact on you
- Give yourself a calm moment to check that the response actually covers everything in the request. Don't let an incomplete response be the cause of a review or an appeal.

**What if they won't talk to me?** 

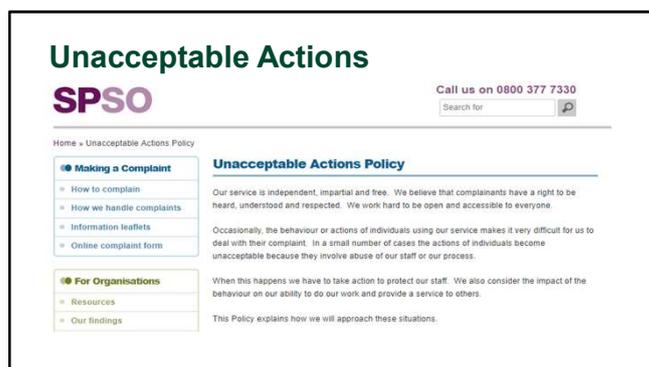


Open up the conversation:  
- tell them about your duty to assist  
- explain what you do  
- offer clarification

And keep a note of your correspondence

Ah, but what if the requester won't talk to me? These are ways to open a conversation:

- Tell them you're under a statutory duty to provide Advice and Assistance.
- Before the request is made, offer to talk them through what information the authority is likely to hold or what it's called – it'll help them make a request that's clearly understood.
- Offer clarification. Again, talk to them about what information the authority might hold. NB don't use this provision if the request is already clear. And only use it at the point of receiving the request. Don't create more conflict.
- If you are considering charging, you must offer Advice and Assistance. You can explain how to narrow the request to bring it under the cost ceiling or avoid costs altogether.
- At the point of issuing a response, give some context to explain the information disclosed. Be seen to be helpful and also correct any likely misunderstandings.
- And keep a note of any advice and assistance you give – it may be useful later if it comes to appeal



If the customer care approach doesn't work, look at your authority's unacceptable actions policy (you might want to develop one if you don't already). It's a recommendation from the Scottish Public Services Ombudsman.

Its rules about reasonable behaviour apply to FOI requests too. You can follow your policy to restrict, for example, how a requester contacts you or how they speak to you – and put it online, so that you can point people to it.

If the requester's actions or demands reach the ceiling of what is acceptable under your policy, that's when you would consider the vexatious or manifestly unreasonable provisions in FOI law.

**FOI's "vexatious" provision** 

Requests ...

... not requesters




S14 of FOISA has a vexatious provision (under the EIRs, you'll know it's called 'manifestly unreasonable'). The provision is there in FOISA for you to say that you don't have to comply with the request ..... The law recognises that one single request can have such a significant impact on u that it can be vexatious, even if you've never heard from the requester before.

But... vexatious is a strong word, and the bar is high... And there is an important distinction to be made between "challenging" requests and "vexatious" requests –

- Not every challenging request is vexatious, but
- Every vexatious request is challenging

A request isn't necessarily vexatious if:

- It is a difficult, complex or embarrassing question (there is a place for difficult questions in democratic society!)
- It comes from a certain person or from a certain profession
- You have a full workload or are understaffed, or don't have organisational support for your FOI function

And remember, requests can be vexatious, but not person who made the request.

### The vexatious provision

Section 14 - A public authority does not need to comply with a request if it is 'vexatious'

- Exhaust advice and assistance first
- Look at our guidance - [www.itspublicknowledge.info/s14](http://www.itspublicknowledge.info/s14)
- Weigh up relevant factors – burden vs value
- Evidence the impact
- It's not a subjective decision!
- You must tell them

So, how to use the provision:

[Click] First advice and assistance - it's a tool to use if you have tried and exhausted the customer care options, including advising and assisting the requester.

[Click] Look at our guidance [www.itspublicknowledge.info/s14](http://www.itspublicknowledge.info/s14)

[Click] Weigh up the relevant factors - the burden on the authority versus the value of the request.

So first, the burden on the authority – would complying with the request require a disproportionate amount of time and diversion of unreasonable proportion of resources away from other statutory functions? If the request (regardless of the requester's intentions) had the effect of harassing the organisation or staff, this would also be a relevant factor. Where the request is one of many, you can consider them collectively. This can include cumulative or historical burden on staff members. However, a large number of requests on its own does not necessarily mean all or any are vexatious.

Then the value of the request - it's very difficult to quantify the value of a request. This has to be an objective assessment – remember, from your position, you sometimes only know half the story (made more difficult by the fact that the requester doesn't have to tell you why they want the information).

[Click] The onus is on the authority. You have to provide evidence of impact or burden that has been created as a result of the request or requests. This could be volume of pas correspondence, past history, responses provided, whether you have used the unacceptable actions policy, any warnings given. If it is appealed to us, you may have to evidence the reasons the provision was applied for our investigation. And evidence the weighing up.

[Click] It's not a subjective decision – how would a reasonable person view this request?

[Click] Finally, you must tell the requester that their request is vexatious. While you don't need to tell them why, it's good practice to do so – it might help them learn for next time



## A third way!

- Proactive publication
- 77% more likely to trust an organisation that publishes a lot of information

We've talked about advice and assistance, customer service, and the vexatious provision

Here's a third way – and it's a winner! proactive publication – not publishing in response to a request, but proactively.

There is positive relationship between requester behaviour and proactive publication.

Interest rises when information is withheld. People want to know what's going on and what information is being withheld

If you have to withhold information, publish what you can and the public is more likely to understand why you can't publish the rest

In March 2017, we commissioned a poll from Ipsos MORI that found that 77% of the Scottish public would be more likely to trust a public authority that published a lot of information

The more we can publish, the more we reduce conspiracy, distrust and challenging requests

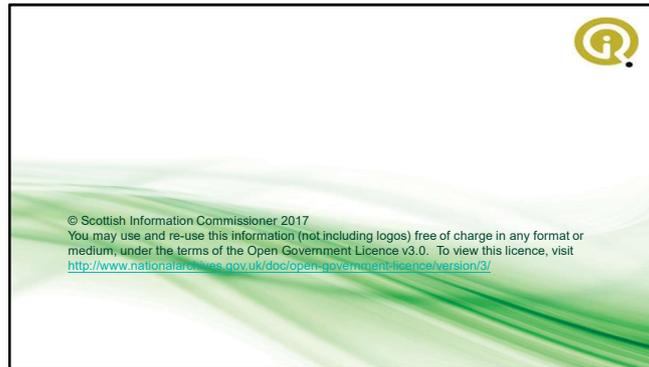
## Contact us



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### **Information to give the audience**

1. All questions have multiple choice answers, numbered 1-6. Numbers next to the answers correspond to the numbers on the voting pad.
2. When we tell you to vote, you'll have 10 seconds in which to do so.
3. You can answer as quickly as you like!
4. There's a timer to let you know how long you have to think about it.
5. If you change your mind or hit the wrong button by mistake, just press the correct one before the timer runs out and that will amend your answer.
6. And just to clarify, we can't identify you from your answers today so all of your answers will be in confidence.
7. And lastly, please don't leave the room with the voting pads, and don't forget to return them at the end of the day – they are expensive!

### **Using the Clickapads**

1. Press "Spacebar" to start the vote
2. Press "Spacebar" again will end the vote and bring up the results.
3. You can also use the spacebar to move through the rest of your presentation slides