

**MEMORANDUM OF UNDERSTANDING**

**between**

**THE KEEPER OF THE RECORDS OF SCOTLAND ("the Keeper")**

**and**

**THE SCOTTISH INFORMATION COMMISSIONER ("the Commissioner")**

**in relation to their regulatory functions**

**1 PURPOSE**

1.1 The purpose of this memorandum is to set out the understanding between the Keeper and the Commissioner on the operation of the Code of Practice on Records Management<sup>1</sup> ("the Code") made under section 61 of the Freedom of Information (Scotland) Act 2002 ("FOISA")<sup>2</sup> and on the cooperation between the parties in relation to:

- the issuing of practice recommendations relating to conformity with the Code in terms of section 44 of FOISA; and
- practice assessments conducted by the Commissioner under section 43(3) of FOISA and records management reviews conducted by the Keeper under the Public Records (Scotland) Act 2011 ("PRSA").

**2 BACKGROUND**

2.1 National Records of Scotland ("NRS") is a non-ministerial department of the Scottish Government. NRS is headed by the Keeper and the Registrar General for Scotland. The Keeper is responsible to the Scottish Ministers for records transmitted to him under various statutory provisions, including Part II of the Public Records (Scotland) Act 1937 and PRSA, as well as for records of independent or private origin selected for preservation with the public records of Scotland. The Keeper is also responsible to the Lord President of the Court of

<sup>1</sup> <http://www.scotland.gov.uk/About/FOI/18022/13383>

<sup>2</sup> Up to date versions of this and the other legislation referred to in this memorandum can be viewed at [www.legislation.gov.uk](http://www.legislation.gov.uk).

Session for the efficient management of court and other legal records in Scotland.

- 2.2 The Commissioner is responsible for enforcing and promoting FOISA and the Environmental Information (Scotland) Regulations 2004 ("the EIRs") which provide a general right of public access to information held by Scottish public authorities. The Commissioner investigates applications for a decision from any person who has requested information from a Scottish public authority and is dissatisfied with that authority's response. The Commissioner also promotes good practice by Scottish public authorities in relation to freedom of information, informs the public about their rights under FOISA and the EIRs and may assess whether a Scottish public authority is following good practice.

### **3 STATUTORY FRAMEWORK: GOOD PRACTICE IN RECORDS MANAGEMENT**

- 3.1 PRSA imposes an obligation on the authorities listed in the schedule to the Act to prepare records management plans setting out the arrangements for the management of the authorities' public records. Plans must be submitted to, and agreed with, the Keeper. Authorities must ensure that their records are managed in accordance with the agreed plan and keep the plan under review.
- 3.2 PRSA gives the Keeper the power to carry out a review of whether an authority is complying with its records management plan. Where the Keeper considers that an authority has failed to comply with its plan, or with the provisions of PRSA, he may issue an action notice, specifying the alleged breach that has occurred and the action which the authority has to undertake by a specified date.
- 3.3 The Commissioner's Enforcement Policy<sup>3</sup> sets out her approach to tackling, where appropriate, persistent failings by Scottish public authorities listed in schedule 1 to FOISA. The authorities which are listed in the schedules to FOISA<sup>4</sup> and PRSA<sup>5</sup> are not identical, although many authorities are subject to both regimes.
- 3.4 The Code is issued by Scottish Ministers under section 61 of the FOSIA (the s61 Code). The Scottish Ministers must consult the Commissioner and the Keeper before issuing or revising the Code. The Code sets out guidance on the keeping, management and destruction of records relevant to compliance with FOISA.
- 3.5 The Commissioner may issue a practice recommendation under section 44 of the FOISA if it appears to her that the practice of a

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<http://www.itspublicknowledge.info/home/SICPublicationScheme/PSGuidetoInfo.aspx>

<sup>4</sup> See sections 3 – 6 of the Freedom of Information (Scotland) Act 2002

<sup>5</sup> See section 2 of the Public Records (Scotland) Act 2011

Scottish public authority does not conform with the Code. A practice recommendation must be in writing and specify the provisions of the Code with which, in the opinion of the Commissioner, the authority's practice does not conform and the steps which ought to be taken by the authority in order to conform.

- 3.6 Under section 44(3) of FOISA, the Commissioner must consult the Keeper before giving a practice recommendation to a Scottish public authority (other than the Keeper) in relation to conformity with the Code.
- 3.7 A generic FOISA Model Action Plan ('MAP')<sup>6</sup> provides detailed operational guidance on compliance with the Code and FOISA. The contents of the MAP have been incorporated into statutory guidance published by the Keeper.
- 3.8 A records management workbook<sup>7</sup> has been produced by the Keeper, which assists organisations or auditors to check their records management procedures against the requirements in the Code.
- 3.9 PRSA requires the Keeper to prepare and publish a model records management plan ("the model plan") and guidance on the model plan. Authorities must, in preparing and revising their records management plans for the Keeper's agreement, have regard to the published model plan and guidance. PRSA permits him to issue further guidance to authorities about their duties.

#### **4 MONITORING CONFORMITY WITH THE CODE**

- 4.1 Scottish public authorities are responsible for their internal monitoring of their compliance with the Code, although, as noted above, the Commissioner may assess whether authorities to which FOISA applies are following good practice and complying with the Code.
- 4.2 The Keeper will consider requests from the Commissioner:
  - to carry out joint assessments of the records management arrangements of Scottish public authorities,
  - for advice and comment on records management issues in relation to implementation of the Commissioner's Enforcement Strategy.
- 4.3 The Keeper will provide statutory guidance under PRSA to Scottish public authorities concerning their compliance with the Code.

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<sup>6</sup> <http://www.nas.gov.uk/foi/modelactionplan.asp>

<sup>7</sup> <http://www.nas.gov.uk/foi/recordsmanagementworkbook.asp>

## **5 OPERATION OF ISSUE OF PRACTICE RECOMMENDATIONS**

- 5.1 Where the Keeper becomes aware that a Scottish public authority has failed to conform with the Code to a serious or significant degree, he will raise this with the Commissioner. The Keeper and Commissioner will then discuss whether it would be appropriate for the Commissioner to issue a practice recommendation to the authority. They may consider another action more appropriate, for example, where the authority is also subject to PRSA, the Keeper may undertake a records management review.
- 5.2 Where the Commissioner becomes aware that a Scottish public authority has failed to conform with the Code, and where she considers that the non-compliance may be such that a practice recommendation may be issued, she will consult with the Keeper.
- 5.3 Although under no statutory obligation to do so, the Commissioner may consult the Keeper in other circumstances. For example, where she becomes aware of a Scottish public authority's failure to comply with the Code, but decides that a practice recommendation will not be issued. In such cases, the Commissioner may seek advice and assistance from the Keeper on the best way to guide the Scottish public authority concerned to rectify the non-compliance.

## **6 COMPLIANCE ASSESSMENTS AND RECORDS MANAGEMENT REVIEWS**

- 6.1 The Keeper will notify the Commissioner of his intention to conduct a records management review of an authority under PRSA where that authority is also subject to FOISA. The Commissioner may recommend to the Keeper that he considers conducting a records management review of an authority where that authority is subject to both PRSA and FOISA.
- 6.2 The Commissioner will notify the Keeper of her intention to conduct a practice assessment of a Scottish public authority under FOISA. The Keeper may recommend to the Commissioner that she considers conducting a practice assessment of an authority which is subject to both PRSA and FOISA.
- 6.3 Where the Keeper and Commissioner are considering such action in relation to the same authority, they will consider whether a joint inspection would be practicable and desirable.

## **7 CONFIDENTIALITY OF INFORMATION**

- 7.1 Section 45(1) of FOISA allows the Commissioner to disclose information she has obtained, or which has been furnished to her, for

the purposes of the Act, where the information is not otherwise publicly available and where disclosure is made for the purposes of, and is necessary for, the discharge of one of her functions.

- 7.2 The Commissioner may therefore disclose information to the Keeper where it is necessary to do so for the discharge of her functions as set out in this MoU. The Keeper agrees to keep such information confidential except insofar as its disclosure is necessary for the purpose of the MoU.

## 8 REVIEW OF THE MEMORANDUM OF UNDERSTANDING

- 8.1 The Commissioner and the Keeper will meet regularly by mutual agreement to review the operation of the MoU and to consider any amendments to it. Any such amendment will be by agreement of both parties.
- 8.2 This MoU supersedes earlier versions of the MoU between the Keeper and the Commissioner.



**Rosemary Agnew**  
Scottish Information  
Commissioner

Date: *26 May 2014*



**Tim Ellis**  
Keeper of the Records of Scotland

Date: 23-05-2014

