

# FOI in the UK

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## Differences between the Scottish and UK FOI Acts

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## Summary

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1. This briefing looks at the main differences between the Freedom of Information (Scotland) Act (FOISA), which covers Scottish public authorities, and the Freedom of Information Act 2000 (FOIA). FOIA covers public authorities based in England, Wales and Northern Ireland (such as county councils and police forces) as well as some bodies which have bases in Scotland (such as the BBC, the Department of Work and Pensions), but which have reserved functions under the Scotland Act 1998.
2. The Scottish Information Commissioner (the SIC) regulates FOISA. The (UK) Information Commissioner (the ICO) regulates FOIA.
3. The briefing is not designed to be an in-depth look at FOIA – for example, in order to make the briefing easier to read, statutory provisions have not been included. Detailed guidance about FOIA can be found on the ICO’s website: <https://ico.org.uk/>.

## The differences

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4. The key differences between the two regimes are set out in the table below.

	Scotland (FOISA)	UK (FOIA)
<b>Appeals against the Commissioners’ decisions</b>	<ul style="list-style-type: none"><li>• Appeals are heard by the Inner House of the Court of Session.</li><li>• A further appeal can be made to the Supreme Court.</li></ul>	<ul style="list-style-type: none"><li>• Appeals are to the First Tier Tribunal (Information Rights) or, if the case is particularly complex or important, to the Upper Tribunal (Administrative Appeals) Chamber.</li><li>• Further appeals are available to higher courts.</li></ul>
<b>Appointment of Commissioner</b>	<ul style="list-style-type: none"><li>• SIC is appointed by the Queen on the nomination of Scottish Parliament.</li></ul>	<ul style="list-style-type: none"><li>• ICO is appointed by the Queen on the nomination of Government.</li></ul>
<b>Confidentiality of communications</b>	<ul style="list-style-type: none"><li>• Section 36(1) refers to “confidentiality of communications in legal proceedings”. This is broader than the equivalent exemption in FOIA and could cover relations between a doctor/patient and journalist/source.</li></ul>	<ul style="list-style-type: none"><li>• Section 42 applies only to lawyer/client relations in England, Wales and Northern Ireland.</li><li>• If the authority is subject to FOIA but based in Scotland, the exemption applies to “confidentiality of communications”.</li></ul>

	<b>Scotland (FOISA)</b>	<b>UK (FOIA)</b>
<b>Destruction of information</b>	<ul style="list-style-type: none"> <li>Information should not be destroyed once a request has been received unless it's "not reasonably practicable" to prevent the destruction.</li> <li>Offence to alter, deface, block, erase, destroy or conceal information with intention of preventing disclosure. Maximum fine £5,000. Prosecutions must be raised within 3 years.</li> </ul>	<ul style="list-style-type: none"> <li>Not specifically addressed in FOIA.</li> <li>Similar offence (and maximum fine). Prosecutions must be raised within 6 months.</li> </ul>
<b>Disability rights</b>	<ul style="list-style-type: none"> <li>Request can be made in a number of formats.</li> <li>Authorities are reminded of their duties under the Equality Act 2010.</li> </ul>	<ul style="list-style-type: none"> <li>No specific mention of disability rights.</li> <li>Although not specifically mentioned, authorities remain subject to Equality Act 2010.</li> </ul>
<b>Duty to inform requester that the authority holds the information requested</b>	<ul style="list-style-type: none"> <li>Authorities must tell requesters if they <u>don't hold</u> the information.</li> </ul>	<ul style="list-style-type: none"> <li>Authorities must tell requesters whether they <u>hold</u> the information: the "duty to confirm or deny".</li> </ul>
<b>Fees</b>	<ul style="list-style-type: none"> <li>No similar rules for campaigns in force in Scotland. (The Fees Regulations which would have allowed authorities to aggregate fees have never been brought into force.)</li> <li>The "prescribed limit" is £600 for all authorities.</li> <li>If complying with a request costs more than the prescribed limit, it doesn't have to be complied with.</li> </ul>	<ul style="list-style-type: none"> <li>Where requests are made "in concert or in pursuance of a campaign", the authority can aggregate the costs of the requests in determining whether the costs exceed the "appropriate limit".</li> <li>The "appropriate limit" is £600 for central government and £450 for all other authorities.</li> <li>If complying with a request costs more than the appropriate limit, it doesn't have to be complied with.</li> </ul>

	<b>Scotland (FOISA)</b>	<b>UK (FOIA)</b>
<b>Harm test</b>	<ul style="list-style-type: none"> <li>• Authorities must usually show disclosure would “substantially prejudice” a specified interest before applying an exemption. This is a higher test than under FOIA.</li> <li>• For example, under section 28 of FOISA, information is exempt if disclosure would, or would be likely to, <u>prejudice substantially</u> relations between administrations in the UK.</li> </ul>	<ul style="list-style-type: none"> <li>• Authorities must show disclosure would “prejudice” a specified interest.</li> <li>• For example, under section 28 of FOIA, information is exempt if disclosure would, or would be likely to, <u>prejudice</u> relations between administrations in the UK.</li> </ul>
<b>Information intended for future publication</b>	<ul style="list-style-type: none"> <li>• Information can be withheld if it’s to be published less than 12 weeks after the request is made.</li> </ul>	<ul style="list-style-type: none"> <li>• Information can be withheld if it is to be published at “some future date (whether determined or not)”.</li> </ul>
<b>Information received from UK Government "in confidence"</b>	<ul style="list-style-type: none"> <li>• Information supplied by the UK Government and held in confidence is not “held” by a Scottish authority for the purposes of FOISA.</li> <li>• The request should be made to the UK Government under FOIA.</li> </ul>	<ul style="list-style-type: none"> <li>• No reciprocal arrangement in relation to information from Holyrood.</li> </ul>
<b>Internal review</b>	<ul style="list-style-type: none"> <li>• Authorities have 20 working days (30 days if information held by Keeper and another authority has to carry out review) to review their decision.</li> <li>• Requesters <u>must</u> exhaust the review process before applying to the Commissioner.</li> </ul>	<ul style="list-style-type: none"> <li>• No provision in FOIA for internal review.</li> <li>• The Government’s Code of Practice says authorities should have a complaints system, but there is no set time limit for responding to the complaint.</li> <li>• ICO can refuse to come to a decision if the requester has not exhausted all remedies.</li> </ul>

	<b>Scotland (FOISA)</b>	<b>UK (FOIA)</b>
<b>Investigations: time limit</b>	<ul style="list-style-type: none"> <li>• Appeals should be made to the SIC within 6 months.</li> <li>• SIC can accept a late appeal where appropriate to do so.</li> <li>• SIC expected to issue decision within four months, or within a reasonable time limit.</li> <li>• SIC must report annually to Scottish Parliament on the number of decisions which take longer than four months.</li> </ul>	<ul style="list-style-type: none"> <li>• ICO can refuse to investigate a case where there has been undue delay in appealing.</li> <li>• No statutory time limit for ICO to complete an investigation.</li> </ul>
<b>Jurisdiction</b>	<ul style="list-style-type: none"> <li>• SIC responsible for FOI in Scotland.</li> <li>• SIC not responsible for data protection (DP).</li> <li>• Some overlap with DP when considering the personal data exemptions in section 38 of FOISA.</li> </ul>	<ul style="list-style-type: none"> <li>• ICO responsible for DP in the whole of the UK.</li> <li>• ICO responsible for FOI in the UK, except Scotland. ICO responsible for UK-wide public authorities based in Scotland.</li> </ul>
<b>Ministerial certificate</b>	<ul style="list-style-type: none"> <li>• The First Minister, following consultation with the Scottish Ministers, can issue a certificate overriding the SIC's decision where certain exemptions.</li> <li>• The information must be "of exceptional sensitivity" before a certificate can be applied.</li> <li>• A certificate can only be issued in relation to a decision served on the Scottish Administration.</li> <li>• No certificates have ever been issued.</li> </ul>	<ul style="list-style-type: none"> <li>• A Minister of the Crown or the Attorney General can issue a certificate overriding a decision of the Commissioner.</li> <li>• A certificate can only be issued in relation to a decision served on a government department or other designated public authority.</li> <li>• Certificates have been issued on a number of occasions.</li> </ul>
<b>National Security Certificates - system of appeal</b>	<ul style="list-style-type: none"> <li>• Appeals from national security certificates not addressed in FOISA, although judicial review would be possible.</li> </ul>	<ul style="list-style-type: none"> <li>• The ICO or a requester can appeal against national security certificates.</li> <li>• See the Data Protection Tribunal (National Security Appeals) Rules 2000.</li> </ul>

	<b>Scotland (FOISA)</b>	<b>UK (FOIA)</b>
<b>Neither confirm nor deny</b>	<ul style="list-style-type: none"> <li>• Can refuse to confirm or deny whether information exists or is held if the information would be exempt under a limited number of exemptions <u>and</u> if revealing whether the information is held would be contrary to the public interest.</li> </ul>	<ul style="list-style-type: none"> <li>• “Duty to confirm” can be set aside for virtually every FOIA exemption.</li> </ul>
<b>Parliamentary Privilege</b>	<ul style="list-style-type: none"> <li>• There is no concept of “parliamentary privilege” in relation to the Scottish Parliament or its members in the sense understood by Westminster.</li> </ul>	<ul style="list-style-type: none"> <li>• Information that falls under Parliamentary Privilege can be exempt.</li> <li>• ICO can’t challenge the application of this exemption where it is supported by appropriate certificate.</li> </ul>
<b>Power to investigate Procurator Fiscal, Lord Advocate or self</b>	<ul style="list-style-type: none"> <li>• SIC cannot investigate the way a PF or Lord Advocate (where the information is held by the Lord Advocate as head of the systems of criminal prosecutions, etc. in Scotland) responded to a request.</li> <li>• SIC cannot investigate how own office responded to a request.</li> </ul>	<ul style="list-style-type: none"> <li>• No restrictions on which authorities the ICO can investigate.</li> <li>• ICO can investigate and issue decisions in relation to how their own office responded to a request.</li> </ul>
<b>Prejudice to public affairs</b>	<ul style="list-style-type: none"> <li>• The exemption in section 30 of FOISA applies an objective test.</li> </ul>	<ul style="list-style-type: none"> <li>• Under section 36 it is left to “the reasonable opinion of a qualified person...” to decide whether disclosure of the information would prejudice the “effective conduct of public affairs”.</li> <li>• The exemption is absolute in relation to information held by either House of Parliament.</li> </ul>
<b>Public interest test</b>	<ul style="list-style-type: none"> <li>• Test: “Is the public interest in disclosing the information requested outweighed by the public interest in maintaining exemption?”</li> <li>• Verbal reversal has little, if any, significance.</li> </ul>	<ul style="list-style-type: none"> <li>• Test: “Does the public interest in maintaining the exemption outweigh the public interest in disclosing information?”</li> </ul>

	<b>Scotland (FOISA)</b>	<b>UK (FOIA)</b>
<b>Publication schemes</b>	<ul style="list-style-type: none"> <li>• When adopting a publication scheme, an authority must have regard to public interest in allowing access to information relating to costs, standards, facts or analyses.</li> <li>• No equivalent of the duty to publish datasets under FOISA.</li> </ul>	<ul style="list-style-type: none"> <li>• FOIA simply refers to the need to have regard to public interest.</li> <li>• Publication schemes under FOIA include a requirement to publish datasets.</li> </ul>
<b>Settlement</b>	<ul style="list-style-type: none"> <li>• SIC can attempt to effect a settlement before reaching decision.</li> </ul>	<ul style="list-style-type: none"> <li>• No provision for settlement in FOIA, although ICO routinely resolve complaints informally.</li> </ul>
<b>Time limits for responding</b>	<ul style="list-style-type: none"> <li>• FOISA gives authorities a maximum of 20 working days to respond (can be extended to 30 working days where information transferred to Keeper of Records).</li> <li>• The Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016 varies the 20 day time limit for grant aided and independent special schools during school holidays.</li> </ul>	<ul style="list-style-type: none"> <li>• Authorities are expected to respond to requests within 20 working days.</li> <li>• Can be extended “for a reasonable period” if the authority is applying an exemption which is subject to the public interest test or if it wants to confirm or deny whether it holds the information.</li> <li>• The Freedom of Information (Time for Compliance with Request) Regulations 2004, 2009 and 2010 vary the 20 day time limit e.g. for requests to schools, the armed forces and for information held outside the UK.</li> </ul>





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