

Investigations

A guide for Scottish public authorities



Scottish Information
Commissioner

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Introduction

1. Under the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs), if a requester is dissatisfied with the way a Scottish public authority dealt with their request for review, they can apply to the Commissioner for a decision on whether the authority's review complied with FOISA or the EIRs.
2. Provided the application is valid, the Commissioner must carry out an investigation unless the application is frivolous/vexatious or is withdrawn/abandoned.
3. The Commissioner must notify the public authority and give it a chance to comment on the application before coming to a decision. This guidance tells public authorities what happens during the investigation and what the Commissioner will expect from them.
4. This guidance covers the following (when you see **green** text in this document, click on the link for more information):
 - (i) **Who does what?**
 - (ii) **Notification of an application**
 - (iii) **Settlement**
 - (iv) **Sending the withheld information to the Commissioner**
 - (v) **Commenting on the application**
 - (vi) **The investigation**
 - (vii) **The Commissioner's decision**

Who does what?

5. It's likely you'll be contacted by different people in the Commissioner's office at different times during the investigation.
6. Someone from our validation team will usually be your first point of contact. For example, they will let you know if we have received a valid application involving your authority and will ask you to let them have any withheld information.
7. If a case is valid it will be allocated to an investigator. The investigator will be your main point of contact during the investigation. They will contact you to give you a chance to comment on the application and to discuss any questions arising out of your comments. It is the investigator who drafts the decision.
8. Depending on the application, the decision will be issued by the Commissioner, the Head of Enforcement or by a Deputy Head of Enforcement.

Notification of an application

9. When a valid application is made to the Commissioner, we will write to you to let you know. This is a statutory requirement.

10. If you have refused to disclose information you hold under an exemption or exception, we will ask you, at this stage, to give us a copy of the information to allow us to carry out an investigation. Getting the information at this stage lets us conduct an initial assessment of the case before assigning it to an investigator.
11. If the application does not relate to the use of an exemption/ exception (e.g. if you have told the requester that you don't hold the information or have refused to comply with the request on the basis that it's vexatious or manifestly unreasonable), you will only be notified of the application at this stage.

Settlement

12. FOI legislation gives the Commissioner the power to "effect a settlement" between an applicant and the authority before issuing a decision on the application.
13. This means that, during the investigation, we might suggest ways the case could be settled without the need for a formal decision. This might involve you disclosing some or all of the information to the applicant.
14. If, at any point before the decision is issued, you think there is any scope for the case to be settled (either in full or partially), let us know as we may be able to help resolve the case.
15. If you think that information can now be disclosed to the applicant, don't delay. You don't need the Commissioner's approval to do this – but please let us know when you do it.
16. Full settlement normally means that the application to the Commissioner is withdrawn. In some cases, even if you disclose all of the information, the applicant might still want a decision to be issued. We'll let you know.

Sending the withheld information to the Commissioner

What is the best way to send the information?

17. Wherever possible, withheld information should be emailed (but please let us know in advance if the information is in excess of 10MB). We can also accept information in hard copy (paper) or other electronic format (scanned and written to CD/ data stick).
18. Hard copies of information or CDs can be sent by post. If you are sending information in hard copy, please use recorded or registered mail.
19. If you want to send us information in a different format (e.g. via a secure encryption site), let us know in advance so that we can make suitable arrangements.
20. If you intend to hand deliver documents or deliver them by courier, contact us in advance to make sure that someone will be available to accept the documents.

Should we send the original documents?

21. We strongly suggest that you provide copies of information rather than original material, although we will accept original documents if there are very good reasons why they can't be copied.
22. Any original information sent to us must be clearly marked as such.
23. If you send us original documentation, you must be absolutely certain that you will not need to access this during the investigation.

24. Again, please use recorded or registered mail.

Can't you come to our offices to see the information?

25. We receive hundreds of applications each year, so can't usually view information at your offices.

26. However, we may consider viewing the information at your offices if:

- (i) there is a very large volume of information covered by the request
- (ii) the evidence you wish to submit is unusual (such as an historical document) or
- (iii) the information cannot be emailed and it would be very expensive to post it.

27. Bear in mind that, even after doing this, we may still have to obtain copies of documents from you.

What information should we send?

28. You must send us:

- (i) **all** of the information withheld from the applicant. If you have only disclosed parts of a document (because an exemption/exception applies or because part of the document is outwith the scope of the request), you must send us two copies of the documents – one unedited/unredacted and one showing what was disclosed
- (ii) a **Schedule of documents**, clearly listing and numbering all documents submitted for consideration, and specifying which exemption(s) have been applied to which information.
- (iii) our case reference (you'll find this at the top of our correspondence)

29. If the schedule is not completed properly, or the information is not set out clearly, we will return it to you to complete. If we have to do this, we are likely to comment on this in the decision.

How do I know you'll keep the information secure?

30. Any information you provide during the course of an investigation will be held safely and securely. It will not be included in a decision notice.

31. We have secure, safe storage facilities onsite, and we control access to sensitive information. Everyone working for the Commissioner has been security vetted.

32. It is also worth noting that, under FOI law, it is a criminal offence for the Commissioner, or any member of his staff, to disclose, without lawful authority, information obtained for the purposes of an investigation.

Should we be sending personal data?

33. If you have refused to disclose personal data in response to a request, we need to see it so we can satisfy ourselves that it what you have withheld is personal data and, if so, whether it is exempt from disclosure.

34. Providing us with a copy of the personal data to allow us to do this will not breach the General Data Protection Regulation or the Data Protection Act 2018 (DPA). (The same applies to special category personal data.)

35. More information about the steps we take to keep information safe and secure can be found in our [Privacy Notice](#).

How much time do we have to provide the information?

36. You will normally be given two weeks to provide us with the withheld information and the schedule. We do not expect this to be a problem. After all, your authority should have collated the information in order to allow it to respond to the request and then to the request for review.
37. The Scottish Ministers' [Code of Practice](#) on the discharge of functions by Scottish public authorities under FOISA and the EIRs makes it clear that it is good practice for public authorities to provide a copy of the withheld information to us within the timescales requested.
38. Failure to respond on time will be recorded and may lead to action being taken against the authority in line with the Commissioner's [Enforcement Policy](#).

What if we don't give you the information?

39. If you don't give us the information we need for the investigation, we are likely to issue you with an information notice under section 50 of FOISA, requiring you to provide us with the information we need.
40. If you don't comply with the information notice, we can refer the matter to the Court of Session. The Court can treat the failure to comply as contempt of court.
41. Information notices issued as a result of a failure by an authority to provide information will be reported in the Commissioner's Annual Report to Parliament.
42. Where a public authority continually delays in providing the Commissioner with withheld information, action may also be taken in line with the Commissioner's [Enforcement Policy](#).

Commenting on the application

43. Once the case has been allocated to an investigator, they will write to you to give you an opportunity to comment on the application.
44. The investigator is likely to ask you a number of questions about the application, particularly if, e.g., your authority's response was unclear or did not address all of the tests required for a particular exemption.
45. While we are legally required to give you an opportunity to comment, you are not legally required to give us comments (or to answer our questions), but we strongly suggest you do so. If you don't provide the submissions we need, we may order you to disclose information, or respond to a request which you consider to be vexatious or manifestly unreasonable on the basis that you have failed to provide sufficient evidence to support your case. We may also order you to carry out a new review.

Making your initial submission: your questions answered

What sort of submission is likely to be requested?

46. The investigation will focus on the matter or matters which gave rise to the applicant's dissatisfaction with the outcome of the internal review. This will vary from application to application, but may include dissatisfaction with:

- (i) the exemptions/exceptions applied by the authority
 - (ii) the way the public interest test was carried out
 - (iii) your views on the harm arising from disclosure
 - (iv) a claim that a request is vexatious, repeated or manifestly unreasonable
 - (v) a fee which has been charged – or the refusal to comply with a request on excessive cost grounds
 - (vi) the claim that you do not hold the information requested (or have disclosed all of the information you hold)
47. Applicants may also be unhappy that your authority did not fulfil its statutory obligations under FOISA/the EIRs. Investigators may therefore investigate whether:
- (i) timescales were adhered to
 - (ii) refusal notices comply with the legislation
 - (iii) applicants were advised of their right to appeal to the Commissioner
 - (iv) the review was carried out in a fair and independent manner
 - (v) you provided reasonable advice and assistance
48. By asking you questions, we hope to be able to assess accurately and objectively the issues which gave rise to the applicant's dissatisfaction and to be able to come to a conclusion, based on the balance of probabilities, as to whether the request was dealt with properly.
49. How much we have to ask you will depend on what information the investigator has before them. Fewer questions are likely to be asked where a public authority has already provided a detailed response to a request or to the request for review.
50. In all cases, you will be given an opportunity to comment on any aspect of the application, and not just on those questions specifically put to you by the investigator.

What type of submissions do you need?

51. You need to be able to satisfy us that you were entitled to respond to the request in the way you did. In some cases, this will be relatively simple (for example to provide evidence that complying with a request would incur excessive costs or that you do not hold some information).
52. In other cases, particularly where you have withheld information on the basis of an exemption or exception, matters will be more complicated. For example, if you apply an exemption or exception, you need to be able to satisfy us that you have considered all of the relevant tests including, where appropriate, what harm there would be from disclosure and why the public interest favours maintaining the exemption.
53. It's really important that your submissions are specific and focus on the information in question. If your submissions are too general, we may have no option but to order you to disclose the information.

54. **We suggest that you read our guidance on the provision you're relying on not to disclose information before you make your submissions. See the [Briefings and guidance pages](#) on our website for links to all of our guidance.**
55. It will also be helpful for you to include:
- (i) copies of documents that evidence the points made in the submission;
 - (ii) background information about the information to help us understand its context and sensitivity – if you need to tell us something to justify your position but don't want it to be referred to in the decision notice, let us know;
 - (iii) any legal advice you have received that may help your authority's arguments (although you are not obliged to provide this type of legal advice to the Commissioner)

How long do we have to make our submissions?

56. You will normally have two weeks to make your submissions. This deadline will be clearly indicated in the letter requesting additional details.
57. The more detailed your response to the request and request for review has been, the less time this is likely to take.

What if we don't provide a submission in time?

58. The deadline will only be extended in exceptional circumstances.
59. We are expected to issue decisions in four months and that it is your responsibility to satisfy us that information should not be disclosed, etc. We are aware there may be other pressures on you at certain times (e.g. around holidays), but it's up to the authority to ensure it has arrangements in place which will allow it to co-operate with the Commissioner in a timely manner, even in the absence of key members of staff.

What if we just don't provide a submission?

60. If you don't provide a submission we will, wherever possible, move to a decision, based on the information we have about the case.
61. In some cases we may issue an information notice requiring the authority to provide us with the information we need for the investigation. If you don't comply with the notice, we can refer the matter to the Court of Session. The Court can treat the failure to comply as contempt of court.

The investigation

62. The investigator will be your point of contact throughout the course of the investigation. Once the investigator has received your submissions, these will be examined and considered. The investigator will take into account case law, legislative requirements, developing precedent, etc. when considering the case.
63. In some cases, additional comments and submissions will be sought from applicants during the investigation. In such circumstances, the investigator will be careful not to disclose information to the applicant in breach of section 45 of FOISA. The investigator may also consider whether to attempt to settle the case.

Will you keep us updated during the investigation?

64. Investigators will keep both the public authority and the applicant updated about any significant developments as the case progresses.

Can we change the exemptions or provisions we have relied on?

65. If, before an appeal is made, an authority realises that it has applied the wrong exemptions/exceptions, or realises it holds information when it initially thought it didn't, it should use the review process to substitute its decision.
66. A public authority may apply new or different exemptions/exceptions after an appeal has been made to us. If it does this, it must explain in detail why the new exemption/exception applies. Again, reference should be made to the [Briefings and guidance pages](#) on our website.
67. Things can be more difficult if a public authority decides, following an application to the Commissioner, to completely change the way it approached the request (for example, if an authority told the applicant that it didn't hold the information but, following an appeal, realises it does hold the information but that it's exempt from disclosure). In cases like this, it's possible that the Commissioner's decision will require the public authority to carry out a new review.
68. If new exemptions or provisions are applied, we will let the applicant know and ask them to comment on the changes.

Will you want to interview staff?

69. Most investigations are carried out without staff needing to be interviewed, although we often find that it's helpful to speak to the authority by telephone.
70. If the case is particularly complex or sensitive, or if we need to see your records management systems in action to determine if you hold information, we will arrange a meeting to clarify points in the investigation.

Should we stop contact with the applicant during the investigation?

71. No. While we are dealing with an investigation, you can refer the applicant to us if they have any queries about the investigation. However, there is nothing to prevent you discussing the case with the applicant, especially where this is likely to lead to the case being resolved informally.
72. New information requests made by the applicant, even if they are connected to the case under investigation, must still be dealt with in line with FOISA/the EIRs.

The Commissioner's decision

73. Once the investigation has been concluded, and unless settlement has been reached, the investigator officer will draft a decision notice, taking into account direction or advice from the Commissioner or other line manager.
74. Depending on the case, the decision may be signed off by the Commissioner, by the Head of Enforcement or by a Deputy Head of Enforcement.
75. Should we find that you have failed to comply with FOISA/the EIRs, the decision will make that clear and, where relevant, set out what steps you must take.

Will there be an opportunity to comment on the draft decision?

76. No. The investigator may verify facts with your authority, but we do not provide drafts of decisions to authorities or applicants for comment.

How will we receive the Commissioner's decision?

77. We will send the decision by recorded delivery to your Chief Executive (or equivalent). (Under FOISA and the EIRs, we are required to send a hard copy to the authority and the applicant.) However, we will also email a copy of the decision to our FOI contact in the authority.

Can the decision be changed once it's issued?

78. No. FOISA and the EIRs don't allow the Commissioner to withdraw or amend a decision once it's been issued.

What happens if we don't comply with a decision?

79. If you fail to comply with a decision by the specified date (usually 45 days from issue), the Commissioner has the right to certify to the Court of Session that you have failed to comply. The Court has the right to inquire into the matter and may deal with your authority as if it had committed a contempt of court.

80. Read the Commissioner's [Enforcement Policy](#) for more information about our powers.

Can we appeal against the Commissioner's decision?

81. Both you and the applicant have the right to appeal the decision to the Court of Session on a point of law only. An appeal must be made within 42 calendar days of the date of intimation of the decision. If you want to appeal the decision, we suggest you seek legal advice as quickly as possible.

What happens to the withheld information we send the Commissioner?

82. We securely destroy all withheld information (with the exception of original documents) three months after the case is closed.

83. You must let the investigator know if you want the information returned to you.

What if the Commissioner receives an information request for the withheld information, or for the authority's submissions?

84. We sometimes get requests for withheld information or submissions, either during the investigation or once the case has been closed.

85. The Commissioner is subject to FOISA and the EIRs and must respond to information requests. In dealing with such information requests the Commissioner must take account of the criminal offence under section 45 of FOISA. The Commissioner will normally seek comments from you if such an information request is received, in line with the Scottish Ministers' [Code of Practice](#) on the discharge of functions by Scottish public authorities under FOISA and the EIRs.

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