

Enforcement Policy

Scottish Information Commissioner



Scottish Information
Commissioner

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Introduction

1. This document sets out the Scottish Information Commissioner's (the Commissioner) policy on the enforcement of Freedom of Information Legislation¹ in Scotland. The policy states what will be enforced and the outcomes that enforcement aims to achieve.
2. This document is supported by guidance that sets out in greater detail when enforcement should be considered and the procedures that will be followed.²

Values and approach

3. Our approach is driven by the vision in our Strategic Plan 2016-20 that FOI will add demonstrable value to public services and contribute positively to the transparency and accountability of public functions in Scotland. Our enforcement policy will help realise this by:
 - (i) Supporting the ongoing development of public sector culture and practice where the sharing and disclosing of information is routine through:
 - (a) Having and maintaining a respected and robust FOI regime;
 - (b) Helping requesters access the information they are entitled to obtain.
 - (ii) Enabling and supporting Scottish public authorities to develop and maintain high standards of FOI policy and practice through a combination of regulation, advice and assistance, and appropriate collaboration.
4. We will be **firm** and **fair**.

Firm

 - (i) We will use the Commissioner's statutory powers appropriately and proportionately to ensure compliance with FOI legislation
 - (ii) We will take objective, evidence-based decisions about enforcement

Fair

 - (iii) We will enforce in line with this policy and without favour or partiality
 - (iv) Where appropriate, we will consider informal measures and their effectiveness, based on negotiation and support, before taking formal enforcement action
 - (v) We will explain our decisions
 - (vi) Our communications will be courteous and professional

¹ Freedom of Information (Scotland) Act 2002 (FOISA), Environmental Information (Scotland) Regulations 2004 (EIRs) and The INSPIRE (Scotland) Regulations 2009 (INSPIRE)

² For example, the Investigations Handbook and the Interventions Procedures.

Reporting and Communication

5. Reporting on enforcement activity, and issues arising from enforcement activity, is an important part of the Commissioner's policy. The Commissioner will be open in communications, reporting through a variety of means, which include:
 - the annual report (under section 46(1) of FOISA, the Commissioner has a duty to lay an annual report; section 46(2) of FOISA sets out what the content must include)
 - special reports (under section 46(3) of FOISA, the Commissioner has powers to lay before the Parliament such other reports with respect to functions under FOISA and the EIRs)
 - publishing decisions, practice recommendations and enforcement notices
 - publicising lessons learned from applications
 - sharing of good practice and learning, in particular through briefings and guidance which authorities (and requesters) are encouraged to follow
 - publishing information about interventions the Commissioner has carried out
 - ad hoc reports, research, consultation, presentations, learning and development materials, and so on.

6. The Commissioner's reports will contain, for example:
 - Statistical information from both the Commissioner's own organisation, and from across Scotland, including analysis of types, sources and outcomes of applications.
 - Information about the issuing of information notices, decision notices, enforcement notices and practice recommendations, including frequency, the authorities which have been made subject to them, outcomes and learning points.
 - Commentary on public authority practice and on subject areas of note (for example, compliance with timescales, proactive publication and good practice in responding to requests).

What we will enforce and how

7. The following tables set out the circumstances under which the Commissioner will enforce FOI legislation.

Publication Schemes

Approach (publication schemes)	Publication Schemes Enforcement		
Context	The Authority	The Commissioner	Relevant sections
<p>Section 23 of FOISA requires a Scottish Public Authority to adopt and maintain a publication scheme and requires the Commissioner to approve publication schemes. This is augmented by the Ministers' Section 60/62 Code of Practice³.</p> <p>The Commissioner will monitor authorities to ensure that they have</p>	<p>An authority:</p> <ol style="list-style-type: none"> 1. does not have an approved publication scheme and refuses after discussion with the Commissioner to adopt a publication scheme or model publication scheme, or 2. refuses to engage with the Commissioner about the lack of a scheme 	<p>The Commissioner:</p> <p>Will give the authority a notice (an enforcement notice) that it has failed to comply with a provision of Part 1 of FOISA and enforce that notice as required.</p>	<p>FOISA S23 S24 S51(1) S53(1)</p>

³ The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs

Approach (publication schemes)		Publication Schemes Enforcement		
Context	The Authority	The Commissioner		Relevant sections
<p>an approved publication scheme in place that it is fit for purpose and is reviewed to ensure it remains fit for purpose.</p> <p>The primary way the Commissioner will promote compliance with section 23 is through encouraging authorities to adopt model publication schemes (section 24(1) refers), which are subject to periodic review.</p>	<p>An authority:</p> <ol style="list-style-type: none"> 1. fails to review, if needed, an approved publication scheme, and/or 2. modifies an approved publication scheme without seeking and obtaining Commissioner approval, and/or 3. fails to keep its publication scheme up-to-date in line with changes to the model publication scheme or the Section 60/62 Code of Practice and/or 4. fails to make information available in the manner stated in its publication scheme (including in the supporting guide to information) and/or 5. refuses to engage with the Commissioner about its publication scheme 	<p>The Commissioner:</p> <p>May revoke the approval.</p> <p>If the authority subsequently fails to put in place an approved publication scheme, the Commissioner will enforce as above.</p> <p>Will assess the authority's FOISA practice in relation to publication schemes where considered appropriate to the circumstances.</p>		<p>FOISA</p> <p>S23(5)</p> <p>S24(3)</p> <p>S43(3)</p> <p>S51(1)</p> <p>S53(1)</p>
	<p>An authority refuses to provide information to the Commissioner required to determine (in relation to publication schemes):</p> <ol style="list-style-type: none"> 1. compliance with FOISA, or 2. whether practice conforms with the Section 60/62 Code of Practice 	<p>The Commissioner will give the authority notice in writing (an information notice) requiring it to give the Commissioner information relating to compliance with FOISA, or with the Section 60/62 Code of Practice, as required.</p> <p>The Commissioner will only normally cancel an information notice if the information is provided to the Commissioner's satisfaction in advance of the deadline in the notice. In exceptional circumstances, the Commissioner may cancel a notice for other reasons: it is for the authority to set out the circumstances and why they are exceptional.</p> <p>Where an authority has failed to comply with an information notice, the Commissioner will certify in writing to the Court of Session that the authority has failed to comply.</p> <p>The Commissioner will assess the authority's FOISA practice in relation to publication schemes where considered appropriate to the circumstances.</p>		<p>FOISA</p> <p>S43(3)</p> <p>S50(1)</p> <p>S50(8)</p> <p>S53(1)</p>

Good practice

Approach (good practice)	Good Practice Enforcement		
Context	The Authority	The Commissioner	Relevant sections
<p>Under section 43(1), the Commissioner has a duty to promote the following of good practice (and, in particular, compliance with FOISA and the EIRs and the Codes of Practice (the Section 60/62 Code and the Section 61 Code⁴) by authorities).</p> <p>Good practice encompasses how requests are responded to, the giving of advice and assistance by authorities, proactive publication and records management.</p> <p>The Commissioner's general approach is to work with parties e.g., through the giving of advice</p>	<p>An authority approaches the Commissioner for assistance, information about the application of FOI or advice about practice (circumstances may range, e.g., from an initiative driven by the authority, through to a response to a decision issued by the Commissioner).</p>	<p>Will work with the authority to identify and resolve the challenges facing the authority, within available resources (an "intervention"). The aim will be to enable the authority to achieve and/or maintain good practice. The approach may be based on a mutually agreed set of actions, or an improvement plan, and may include:</p> <ol style="list-style-type: none"> 1. assessment of all or any part of the authority's practice and procedures 2. training, or advice about training 3. development activities such as seminars 4. sharing of good practice from/with other authorities 5. consultation <p>.</p> <p>Interventions may recommend or require action, depending on the issue(s) identified.</p>	<p>FOISA S43(2)(b) S43(3)</p> <p>EIRs Reg17 Reg18</p>

⁴ The Scottish Ministers' Code of Practice on Records Management

Approach (good practice)	Good Practice Enforcement		
Context	The Authority	The Commissioner	Relevant sections
<p>and providing guidance.</p> <p>The Commissioner will also monitor practice, through a variety of means including:</p> <ul style="list-style-type: none"> • lessons learned from applications • intelligence gleaned from applications, decisions, enquiries and complaints (that do not constitute applications for an appeal) • analysis of statistical information • assessments of authority practice <p>If poor FOI practice is the result of requesters' actions, the Commissioner may (where appropriate) offer support and guidance to either or both requester and authority to achieve improvement (section 43(2)) (an "intervention").</p>	<p>Monitoring suggests that an authority's practice does not conform to the Codes of Practice.</p>	<p>The Commissioner may initially engage with an authority to clarify what its practice is, and whether it can be improved through an agreed improvement plan (as above).</p> <p>If an authority's practice fails conform to the Codes of Practice, where these are less serious breaches, the Commissioner may issue a practice recommendation.</p> <p>If the authority's practice concerns conformity with the Section 61 Code of Practice, the Commissioner will consult the Keeper of the Records of Scotland before giving a practice recommendation (other than where it concerns the Keeper).</p> <p>If practice continues to fail to conform, and the failure constitutes a failure to comply with Part 1 of FOISA or with the EIRs, the Commissioner may issue an enforcement notice.</p> <p>If the authority fails to comply with an enforcement notice, the Commissioner may certify in writing to the Court of Session that the authority has failed to comply.</p> <p>The Commissioner will only normally cancel an enforcement notice if evidence of a change in practice leading to compliance with Part 1 of FOISA/the EIRs and the Codes of Practice is provided to the Commissioner's satisfaction in advance of the deadline in the notice. In exceptional circumstances, the Commissioner may cancel it for other reasons: it is for the authority to set out the circumstances and why they are exceptional.</p>	<p>FOISA S44(1) S44(3) S51(1) S51(4) S53(1)</p> <p>EIRs Reg17 Reg18</p>

Approach (good practice)	Good Practice Enforcement		
Context	The Authority	The Commissioner	Relevant sections
	Monitoring suggests that an authority's practice does not conform to Part 1 of FOISA.	<p>The Commissioner will initially engage with an authority to clarify what its practice is, and whether it can be improved through an agreed improvement plan (as above).</p> <p>If an authority's practice fails conform to FOISA, the Commissioner will either, depending on the circumstances:</p> <ol style="list-style-type: none"> 1. issue a practice recommendation (for less serious breaches), or 2. issue an enforcement notice (for more serious, and/ or persistent breaches). <p>If the authority's practice concerns conformity with the S61 code of practice, the Commissioner will consult the Keeper of the Records of Scotland before giving a practice recommendation (other than where it concerns the Keeper).</p> <p>If practice continues to fail to conform after issuing a practice recommendation, the Commissioner will, depending on the circumstances, issue an enforcement notice.</p> <p>If the authority fails to comply with an enforcement notice, the Commissioner will certify in writing to the Court of Session that the authority has failed to comply.</p>	<p>FOISA S44(1) S51(1) S51(4) S53(1)</p> <p>EIRs S17 S18</p> <p>INSPIRE S12</p>
	An authority refuses to engage with the Commissioner and/or provide information to establish what the authority's practice is.	<p>The Commissioner will give the authority notice in writing (an information notice) requiring it to give the Commissioner information relating to compliance with FOISA, or with the Codes of Practice, as required.</p> <p>The Commissioner will only normally cancel an information notice if the information is provided to the Commissioner's satisfaction in advance of the deadline in the notice.</p> <p>In exceptional circumstances, the Commissioner may cancel it for other reasons: it is for the authority to set out the circumstances and why they are exceptional.</p> <p>Where an authority fails to comply with an information notice, the Commissioner will certify in writing to the Court of Session that the authority has failed to comply.</p>	<p>FOISA S44(1) S50(1) S50(8) S53(1)</p> <p>EIRs Reg17 Reg18</p>

Applications to the Scottish Information Commissioner

Approach (applications)	Applications Enforcement		
Context	The Authority	The Commissioner	Relevant sections
<p>Under section 49(1), the Commissioner is required to make a decision in relation to an application which is not excluded by section 48 (see below) unless, in the opinion of the Commissioner, the application is frivolous or vexatious or appears to have been withdrawn or abandoned (i.e. it is 'valid').⁵</p> <p>The underlying principle is that requesters should receive information to which they are entitled, or be able to understand why they are not entitled to the information, at the earliest possible time.</p> <p>The Commissioner will investigate each valid application. Where possible and appropriate, the Commissioner will endeavour to effect settlement. If that is not appropriate, the Commissioner will issue a decision notice.</p>	<p>An authority discloses some of the withheld information during the investigation but maintains reliance on exemptions/exceptions for some of it.</p> <p>or</p> <p>An authority discloses all the withheld information during the Commissioner's investigation.</p>	<p>The Commissioner will discuss the options for settlement with the applicant, with an aim to achieving settlement and withdrawal where appropriate. This will take account of the following:</p> <ol style="list-style-type: none"> 1. whether the applicant is content with the outcome; and/or 2. whether the Commissioner considers more information should be disclosed (as opposed to could be disclosed), and/or 3. whether there are practice matters that should be raised with the authority (whether raised by the applicant or resulting from the investigation) and whether this needs to be through advice and assistance or through an enforceable decision, and/or 4. whether the case is likely to be a precedent that requires an enforceable decision, and/or 5. whether a decision notice would be the most efficient way of resolving the case. 	<p>FOISA S49(4)</p> <p>EIRs Reg17</p> <p>INSPIRE Reg12</p>
	<p>An authority fails to deal with a request in accordance with Part 1 of FOISA (and/or the EIRs where appropriate), and settlement is not reached.</p>	<p>The Commissioner will issue a decision notice specifying:</p> <ol style="list-style-type: none"> 1. the provision with which the authority failed to comply, and 2. the steps which, in the opinion of the Commissioner, the authority must take to comply with the provision, and 3. the time within those steps must be taken 	<p>FOISA S49(6)</p> <p>EIRs Reg17</p> <p>INSPIRE Reg12</p>

⁵ Applications may be made to the Commissioner for a decision as to whether a Scottish public authority has failed to respond to an information request in line with the requirements of Part 1 of FOISA or of the EIRs. An application may also be made to the Commissioner for a decision as to whether a Scottish public authority has acted or is acting in a way which is not compatible with regulations 8(4)(c) or 10 of the INSPIRE (Scotland) Regulations 2009

Approach (applications)	Applications Enforcement		
Context	The Authority	The Commissioner	Relevant sections
	An authority fails to comply with a decision notice.	The Commissioner will certify in writing to the Court of Session that the authority has failed to comply	FOISA S53(1) EIRs Reg17 INSPIRE Reg12
	An authority refuses/fails to provide information to the Commissioner required to determine (in relation to applications): <ol style="list-style-type: none"> 1. compliance with FOISA or the EIRs, or 2. whether practice conforms with Codes of Practice 	<p>The Commissioner may give the authority notice in writing (an information notice) requiring it to give the Commissioner information relating to compliance with FOISA, or with the Codes of practice, as required.</p> <p>The Commissioner will only normally cancel an information notice if the information is provided to the Commissioner's satisfaction in advance of the deadline in the notice.</p> <p>In exceptional circumstances, the Commissioner may cancel it for other reasons: it is for the authority to set out the circumstances and why they are exceptional.</p> <p>Where an authority has failed to comply with an information notice, the Commissioner will certify in writing to the Court of Session that the authority has failed to comply.</p>	FOISA S50(1) S50(8) S53(1) EIRs Reg17 Reg18 INSPIRE Reg12

Approach (applications)	Applications Enforcement		
Context	The Authority	The Commissioner	Relevant sections
<p>“Excluded applications”: under section 48(b) and (c), the Commissioner cannot accept an application for decision as respects a request for review made to a procurator fiscal (PF) or the Lord Advocate, to the extent that the Lord Advocate holds the information as head of the systems of criminal prosecution and investigation of deaths in Scotland⁶.</p>	<p>Following a request for review, a procurator fiscal or the Lord Advocate (COPFS) has refused to disclose information in full and it is unclear whether the information is subject to the exclusion in section 48(b) and/or (c) of FOISA.</p>	<p>The Commissioner will ask COPFS to provide the information to allow Commissioner to determine whether the exclusion applies.</p> <p>If COPFS refuses to provide the information and the Commissioner reasonably requires the information in order to determine whether the exclusion applies, the Commissioner will issue an information notice under section 50(1)(b)(i) of FOISA, requiring COPFS to provide the information.</p>	<p>FOISA S50(1)</p> <p>EIRs Reg17 Reg18</p> <p>INSPIRE Reg12</p>
<p>The Commissioner may use other enforcement powers in relation to a procurator fiscal or the Lord Advocate.</p>	<p>COPFS has failed to respond to a requirement for review.</p>	<p>The Commissioner will contact COPFS and ask it to confirm whether a response has been made. Where there is evidence of an unacceptable level of failure to comply with timescales, the Commissioner may issue an enforcement notice under section 51 of FOISA.</p>	<p>FOISA S51</p> <p>EIRs Reg17 Reg18</p> <p>INSPIRE Reg12</p>

⁶ All references to the Lord Advocate in this section are to the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Miscellaneous

Approach		Miscellaneous Enforcement	
Context	The Authority	The Commissioner	Relevant sections
Schedule 3, para 1, of FOISA gives the Commissioner powers of entry and inspection. These permit the Commissioner to apply to a sheriff for a warrant authorising the Commissioner or a member of the Commissioner's staff to enter and search premises; inspect and seize documents and inspect, examine, operate and test equipment in the premises in which information held by the authority may be recorded.	<p>The types of activity that might lead to 'entry and inspection' are, where generally, negotiation has failed and (this list is illustrative and not exhaustive):</p> <ol style="list-style-type: none"> 1. where the authority has failed to explain properly its actions and activities, for example, how searches are carried out or records accessed 2. where it is expedient to obtain withheld information because of a real threat to the integrity of the information 3. where it is necessary to obtain information or explanations sooner than issuing an information or enforcement notice would provide for. 	<p>The Commissioner will apply these powers only when necessary.</p> <p>The Commissioner will normally give the authority notice of applying to the sheriff for a warrant, except where the case is urgent or giving such notice would defeat the object of the entry.</p>	<p>FOISA Schedule 3</p> <p>EIRs S17</p> <p>INSPIRE Reg12</p>
Under section 65 (and regulation 19 of the EIRs) it is an offence to alter, destroy conceal etc. records with intent to prevent disclosure.		<p>The Commissioner has a Memorandum of Understanding with the Police Service of Scotland and COPFS. If the Commissioner has reason to believe an offence has, or is likely to have, been committed, the case will be reported to the police for investigation, and a joint investigation may be carried out by the Commissioner and the police.</p> <p>Similarly, where an offence is reported directly to the police, a joint investigation may be carried out by the Commissioner and the police.</p>	<p>FOISA S65</p> <p>EIRs Reg19</p>

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