



Commissioner's response to revised s60 Code of Practice

Sent to the Scottish Government FOI Unit on 23 November 2016

1. I am content with majority of the changes made to the Code and am pleased to note that all but one of the suggestions (that relating to section 38 and consulting about legitimate interests) made by my office have been included in the revised Code.
2. I understand that the Scottish Government, on behalf of the Ministers, felt it was inappropriate to include a reference to obtaining a requester's legitimate interests on the basis that it would be better suited to inclusion in my guidance on section 38 of FOISA/regulation 11 of the Environmental Information (Scotland) Regulations 2004. I am not entirely clear why this was the Scottish Government's position, but have assumed it was because it was felt to be too detailed.
3. With that in mind, I question whether the level of detail about contacting the Royal Household (paragraphs 7.5.3 to 7.5.5) is appropriate for the Code. I am supportive of the Ministers' intention to provide clear guidance to Scottish public authorities, but am concerned that the approach is inconsistent: the Code, as it stands, recognises that consultation with third parties will not always be appropriate, but the new text suggests that the Royal Household should always be consulted. This is not a requirement under FOISA and the suggested text could misleadingly create the impression that it is.
4. The text also appears incongruous in context: the Code, as drafted, would not provide the same level of detail in relation to all of the third parties who might have to be consulted.
5. I would not want to lose the information about the Royal Household as it provides good guidance, so suggest that we add it to my briefing on section 41 of FOISA instead of the Code.
6. In terms of the actual wording, I also question whether paragraph 7.5.5 is required, given that paragraph 7.4.2 already instructs public authorities to identify interested third parties as soon as possible to give them sufficient time in which to respond.
7. Perhaps, if it is considered appropriate to include this amount of detail about contacting the Royal Household in the Code, you would also reconsider the inclusion of the text about legitimate interests.
8. Please get back in touch with me or Margaret Keyse if you have any questions or would like clarification of any of my points.