

# FOISA Guidance

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## Section 25: Information otherwise accessible

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### Exemption Briefing



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## Glossary and abbreviations

| Term used                    | Explanation   |
|------------------------------|---|
| <b>FOISA</b>                 | Freedom of Information (Scotland) Act 2002  |
| <b>SIC, The Commissioner</b> | The Scottish Information Commissioner   |
| <b>Section 60 Code</b>       | Scottish Ministers' Code of Practice on the discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 |

# The exemption

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## The exemption: the main points

1. Section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA) exempts information from disclosure where the requester can reasonably obtain the information without asking for it under FOISA. It has a different focus from most other exemptions. It is not about withholding information from the public; it recognises that where information is already available, there is no need to provide an alternative right of access to it through FOISA.
2. Information might be exempt under section 25 even if a payment has to be made for it.
3. Information will always be exempt under section 25 if:
  - (i) there is legislation requiring the authority which holds the information (or any other body) to communicate it to the public, even if a payment has to be made for it. (Different rules apply if the legislation only requires the information be made available for inspection.)
  - (ii) the Keeper of the Records of Scotland makes the information available for inspection and, where practical, copying, by the public, even if a payment has to be made for it
  - (iii) the authority publishes the information as part of its publication scheme and any payment for the information is specified in the publication scheme.
4. This is an absolute exemption. So, if the information is “otherwise reasonably obtainable”, the public authority dealing with the request doesn’t have to go on to apply the public interest test.
5. Where the exemption applies, authorities should tell the requester why they believe the information is available through other means. This will normally include telling the requester where they can obtain the information.

## Duration of the exemption

6. Unlike some of the other exemptions in FOISA, the exemption in section 25(1) can be applied to information regardless of how old the information is.

## “Reasonably”

7. The public authority should consider carefully whether the requester can access the information readily without asking for it. The exception is there to relieve public authorities of the burden of providing this kind of information, not to prevent or inhibit access. The Commissioner has, for example, refused to uphold the exemption for information where it was not straightforward to find the information within larger, published documents. See **Appendix 1: Resources** for an example decision.

## The identity of the requester

8. This is one of the few exemptions in FOISA where the identity of the requester is relevant. This is because the exemption applies to information which the requester (i.e. the person making the request) can reasonably obtain. Information may be generally accessible to the public at large, but not to an individual requester, if their personal circumstances prevent them from obtaining it. For example:

- (i) a person with a visual impairment might not be able to access information provided only in text form on a website
  - (ii) it might not be reasonable to expect someone who lives a long way from the public authority's offices to travel to inspect the information
  - (iii) it might not be reasonable to expect someone who is prevented from accessing information online to obtain it by another, considerably more expensive, route (see **Appendix 1: Resources** for an example decision).
9. On the other hand, information might be reasonably obtainable by the requester (e.g. because they already have a copy of the information), but might not be reasonably obtainable by the public in general.

### **Information may be reasonably obtainable even if you need to pay for it**

10. Information may be reasonably obtainable even if a requester needs to pay for it.
11. Information which is held by the public authority, but which is also commercially available, such as Ordnance Survey maps, journals or books, is covered by this exemption. The market price for information which is commercially available will generally be taken as "reasonable".
12. Whether other types of information are "reasonably obtainable" may depend on the circumstances of the requester. If the requester's means are limited or the fee payable to access the information is high, the information may not be reasonably obtainable to that requester and the exemption may not apply.

### **Information which authorities are obliged to make public**

13. If there is legislation requiring a public authority (or other body) to communicate information to the public, the information is considered to be reasonably obtainable and the exemption will apply.
14. As an example, the Antisocial Behaviour etc. (Scotland) Act 2004 requires local authorities to publish their antisocial behaviour strategies. This information will, therefore, be reasonably obtainable (provided the authority does publish its strategy).
15. Some legislation requires authorities to make information available for inspection by the public. If an authority wishes to apply the exemption in section 25(1) to information that is only available by inspection, it must satisfy itself that it would be reasonably easy for the requester to inspect the information.
16. It may not be reasonable for the requester to travel to the location within available opening hours and therefore section 25(1) will not apply. Similarly, authorities cannot apply the section 25(3) exemption to information available only by inspection; the Commissioner does not approve publication schemes where access to published information is so restrictive. Many authorities are now publishing online information that used to be available only in paper ledgers and this makes it much easier both for the public to access and for authorities to provide it on request.

### **Information made available to the public by the Keeper of the Records of Scotland**

17. Information held by the Keeper of the Records of Scotland (also known as the National Records of Scotland) and which is made available to members of the public for inspection

and, where practical, copying, is exempt from disclosure under section 25. This is the case even if it is not practical for the requester to visit the National Records of Scotland to inspect or obtain a copy of the information.

### **Publication schemes**

18. All public authorities must adopt and maintain a publication scheme which has been approved by the Commissioner. Under section 25(3), information made available in accordance with an approved publication scheme is presumed to be reasonably obtainable to everyone and is exempt from disclosure under section 25 of FOISA. (See **Appendix 1: Resources** for a link to further guidance on publication schemes.)
19. Information is only considered to be "published" if it is information which is already prepared and easily available to anyone without having to make a request for it. Information should, wherever possible, be made available on the authority's website. There must be an alternative arrangement for people to access information if they cannot reasonably access it online or by inspection.
20. Charges for published information must not exceed the actual cost of providing the information. Authorities must therefore be careful when agreeing a set charge for a particular kind of document. See **Appendix 1: Resources** for an example decision.

### **Section 25 and the duty to give advice and assistance**

21. Section 15 of FOISA requires public authorities to provide reasonable advice and assistance to people who have made, or intend to make, an information request. If a public authority refuses a request on the basis that the information is otherwise accessible to the requester, the refusal notice must explain to the requester why the exemption applies (for more information on refusal notices, see the Commissioner's guidance on the content of notices – there is a link to the guidance in **Appendix 1: Resources**). The authority should therefore take steps to establish that the specific information the requester has asked for is available elsewhere.
22. The authority should not assume that the requester will know where and how they can obtain the information. If the information is already publicly available, the authority should tell the requester how to access it, and should provide adequate signposting e.g. by giving them direct links to online information.
23. More advice on how to comply with this duty can be found in the Scottish Ministers' Section 60 Code of Practice (see **Appendix 1: Resources**). The duty to advise and assist can be a factor in cases involving section 25 of FOISA.
24. See **Appendix 1: Resources** for example decisions.

### **The format of the information**

25. Under FOISA, requesters have the right to ask for a copy, summary or digest of the information they want. They can also ask to inspect a record containing the information. The authority must provide the information in the format requested where reasonably practicable (section 11 of FOISA).
26. The Court of Session considered the relationship between the section 25 exemption, and the right to ask for information in a particular format in **Glasgow City Council v Scottish Information Commissioner** (see **Appendix 1: Resources**). The Court confirmed that,

where information is exempt under section 25, the requester does not have the right to request the information in a different format.

27. However, public authorities may separately need to consider their duties under the Equality Act 2010 when dealing with any request for the information to be provided in a particular format (e.g. Braille or large print) or language.

# Appendices

## Appendix 1: Resources

### SIC Decisions

| Reference   | Decision Number | Parties  | Summary  |
|-------------|-----------------|--|--|
| Para 7      | 112/2017        | Mr Kevin Keane and Aberdeen City Council           | The Council refused to provide information it considered to be in the public domain, citing a number of published reports. The Commissioner was not satisfied that all of the information could be located where the Council claimed it was to be found. Even where the information could be located via the links provided, finding it (without any further information) was a cumbersome and time-consuming task. The Commissioner was not satisfied that this was information which could be accessed readily without asking for it, and so refused to uphold section 25. |
| Para 8(iii) | 224/2016        | Mr X and the Scottish Courts and Tribunal Service  | The Commissioner refused to accept that information in a Scottish Law Commission report was reasonably obtainable by Mr X. Most people could obtain the information online, free of charge. Mr X's personal circumstances prevented him from doing this, so his only option was to purchase a hard copy, at considerable expense. This placed him at a clear disadvantage if section 25 were to be upheld, which the Commissioner did not believe was intended.  |
| Para 19     | 089/2017        | Q and Aberdeen City Council                        | The Council was asked for a copy of a plan relating to a specific planning application. It replied that the information was available through its publication scheme for a standard £50 fee.<br><br>We found that the Council was not entitled to charge £50 for one plan. The £50 fee was for provision of a complete planning application file. The charge greatly exceeded the cost of providing the information covered by the request.  |
| Para 23     | 162/2014        | Mr Q and the Scottish Prison Service               | The Commissioner accepted that the information requested by Mr Q, which was accessible in the prison library, was reasonably obtainable and therefore exempt under section 25. However, the Scottish Prison Service failed to comply with section 15, by not giving Mr Q sufficient advice and assistance to allow him to locate the information readily within the library.   |
| Para 23     | 013/2007        | Mr D and the Chief Constable of Strathclyde Police | The Police argued that because Mr D could seek a court order (in terms of section 1(1)(a) of the Administration of Justice (Scotland) Act 1972) to obtain the information, the information was otherwise reasonably obtainable by him. The Commissioner  |

| Reference | Decision Number | Parties  | Summary  |
|-----------|-----------------|--|--|
|           |                 |  | disagreed.   |
| Para 23   | 206/2010        | Ian Benson and the University of Glasgow                       | Although the email addresses requested by Mr Benson were all available through the University website, each one had to be accessed individually. The Commissioner did not accept that information which would take around 25 hours to obtain could be described as "reasonably obtainable".  |
| Para 23   | 059/2010        | John McKnight and Glasgow City Council                         | The Commissioner could not accept the Council's argument that information was accessible under its publication scheme: it had no approved publication scheme in force and, in any event, its last approved publication scheme made no reference to information of the type Mr McKnight was seeking. The Commissioner had not been given sufficient evidence that the information was fully obtainable elsewhere – even if some of it could be obtained elsewhere, the effort involved in searching for it meant that it was not reasonably obtainable. |
| Para 23   | 196/2014        | Mr R and Scottish Prison Service                               | In line with all other exemptions, section 25 can only apply if the authority actually holds the information the requester is looking for. Here, the Scottish Prison Service purported to apply the exemption to information in a number of publications. These were publicly available, but were not held by the authority – the proper course of action was to give the requester notice in terms of section 17(1) of FOISA.   |
| Para 23   | 169/2017        | Robert M Patterson and the Keeper of the Registers of Scotland | This involved a request about changes to a property title. We agreed that some of the information Mr Patterson wanted was exempt under section 25, even though the Keeper was entitled to charge a fee for it under the Registers of Scotland (Fees) Order 2014.   |

All of the Commissioner's decisions are available on the Commissioner's website. To view a decision, go to [www.itspublicknowledge.info/decisions](http://www.itspublicknowledge.info/decisions) and enter the relevant decision number (e.g. 032/2014).

If you do not have access to the internet, contact our office to request a copy of any of the Commissioner's briefings or decisions. Our contact details are on the final page.

## Other Resources

| Paragraph | Resource   | Link  |
|-----------|--|---|
| 15        | National Records of Scotland   | <a href="http://www.nrscotland.gov.uk/">http://www.nrscotland.gov.uk/</a>   |
| 16        | Publication scheme guidance  | <a href="http://www.itspublicknowledge.info/ScottishPublicAuthorities/PublicationSchemes/PublicationSchemesHome.aspx">http://www.itspublicknowledge.info/ScottishPublicAuthorities/PublicationSchemes/PublicationSchemesHome.aspx</a> |
| 20        | Content of notices guidance  | <a href="http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Contentofnotices/Content_of_notices.aspx">http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Contentofnotices/Content_of_notices.aspx</a>                   |
| 19        | Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (the Section 60 Code) | <a href="http://www.gov.scot/Resource/0051/00510851.pdf">http://www.gov.scot/Resource/0051/00510851.pdf</a>   |
| 21        | Glasgow City Council v Scottish Information Commissioner [2009] CSIH 73  | <a href="http://www.scotcourts.gov.uk/search-judgments/judgment?id=cc8f86a6-8980-69d2-b500-ff0000d74aa7">http://www.scotcourts.gov.uk/search-judgments/judgment?id=cc8f86a6-8980-69d2-b500-ff0000d74aa7</a>                           |

## Appendix 2: The exemption

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### Section 25 Information otherwise accessible

- (1) Information which the requester can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- (2) For the purposes of subsection 1(1), information –
  - (a) may be reasonably obtainable even if payment is required for access to it;
  - (b) is to be taken to be reasonably obtainable if –
    - (i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or
    - (ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by, members of the public on request, whether free of charge or on payment.
- (3) For the purposes of subsection (1), information is to be taken to be reasonably obtainable if –
  - (a) it is available –
    - (i) on request from the Scottish public authority which holds it, and
    - (ii) in accordance with the authority's publication scheme, and
  - (b) any associated payment required by the authority is specified in or determined under the scheme.



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