

Practice recommendation



Practice Recommendation 01/2010

Scottish Borders Council

Reference No: EN-9003

Practice Recommendation Date: 6 July 2010

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Background

This Practice Recommendation is given to Scottish Borders Council (the Council) by the Commissioner under section 44(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) following an assessment of the Council's practice in relation to the exercise of its functions under FOISA and the Environmental Information (Scotland) Regulations 2004 (the EIRs), carried out on the Commissioner's behalf under section 43(3) of FOISA on 16 and 17 February 2010. The Practice Recommendation specifies the provisions of (i) the Scottish Ministers' Code of Practice on the discharge of functions by public authorities under FOISA (the Section 60 Code) and (ii) the Code of Practice on the discharge of functions by Scottish public authorities under the EIRs (the Section 62 Code) with which, in the Commissioner's opinion, the Council does not conform, and the steps the Commissioner considers the Council ought to take in order to conform with these provisions. By virtue of regulation 18(5) and (6) of the EIRs, section 44(1) of FOISA applies to the Section 62 Code as it applies to the Section 60 Code.

In the Commissioner's opinion, the Council's practice does not conform with the provisions of the Section 60 and 62 Codes in relation to:

- training;
- timeliness in dealing with requests for information;
- monitoring;
- refusal of requests;

as more particularly detailed below. He considers that the authority ought to take the steps detailed below to conform in these areas.

Specific areas of failure to conform

Training

Section 60 Code

Paragraph 15 of the Section 60 Code states that it is essential that all relevant personnel are familiar with the provisions of FOISA, the associated Codes of Practice and any guidance on good practice issued by the Commissioner. Authorities should ensure that appropriate staff training is provided. In planning and delivering training, authorities should be aware of other provisions affecting the disclosure of information, such as the EIRs, and the interaction between FOISA and the Data Protection Act 1998 (the DPA).



Section 62 Code

Paragraph 15 of the Section 62 Code of Practice states that it is essential that everyone working in a Scottish public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIRs and the Code, taking account of any relevant guidance on practice issued by the Scottish Government and the Commissioner. Paragraph 16 further states that Scottish public authorities should ensure that proper training is provided, and should be aware of other provisions affecting the disclosure of information, such as FOISA, the DPA and the Local Government (Access to Information) Act 1985.

Findings

The Commissioner has found that the Council's practice does not conform with the above provisions, in that the general level of knowledge amongst staff in relation to obligations under FOISA, the EIRs and the relevant Codes of Practice is inadequate. There is a distinct (and pressing) need for general awareness raising throughout the authority, and for more focused training for those with specific responsibility for dealing with information requests. Particular attention is required in respect of the identification of environmental information and the appropriate handling of requests under the EIRs, while specific training is also required for those officers who will be called upon to carry out reviews.

Steps to be taken

The Council is recommended to secure the provision of:

- general awareness raising throughout the authority in relation to its obligations under FOISA, the EIRs and the relevant Codes of Practice;
- more focused training for those with specific responsibility for dealing with information requests;
- specific training for those members of staff who will be called upon to carry out reviews;

all of which should address, in particular, the identification of environmental information, the appropriate handling of requests under the EIRs and charging for information under both FOISA and the EIRs. The training should be supported by adequate practical written guidance and should be completed within 3 months from the date of this Practice Recommendation.

Timeliness in dealing with requests for information

Section 60 Code

Paragraph 27 of the Section 60 Code states that public authorities should comply with a request for information as soon as possible but must, in any event, comply not later than 20 working days after receipt of the request. It is essential that authorities respond to requests in good time. This is particularly important where it is clear that the requested information is not held by the authority and the applicant needs to direct the enquiry elsewhere, or if the applicant has a disability and requests information in an alternative format or by alternative means.



Section 62 Code

Paragraph 35 of the Section 62 Code states that Scottish public authorities are required to comply with all requests for information as soon as possible. They should not wait until the end of the 20 working day period under regulation 5(2)(a) if the information asked for could reasonably be provided earlier. Paragraph 36 of this Code goes on to state that authorities should aim to make all decisions as soon as possible and in any case within 20 working days (subject to the arrangements under regulation 7 for extending the time for response in cases involving voluminous and complex information). Paragraph 38 continues that it is for the body receiving a request to meet the timetable (even where, for example, the request is not in writing or other recorded form).

Findings

The Commissioner has found that the Council's practice does not conform with the above provisions, in that since the coming into force of FOISA and the EIRs it has consistently failed to respond to an acceptable percentage of requests for information within the requisite timescales.

Steps to be taken:

The Council is recommended to take immediate action to ensure that responses to requests for information are made within the timescales allowed. The Council should be able to demonstrate a significant improvement in this area within 3 months from the date of this Practice Recommendation.

Monitoring

Section 60 Code

Paragraph 62 of the Section 60 Code states that authorities should adopt appropriate systems to monitor their performance under FOISA. It will be for each public authority to determine what information can most effectively be recorded under its administrative procedures, while satisfying itself that it is complying with the law (and able to demonstrate this). While monitoring all requests may be problematic for authorities, monitoring activities should generally include collecting:

- the numbers of requests under section 1(1) which have been refused and the reasons for the refusal;
- the numbers of fees which have been charged under sections 9, 12 and 13;
- the numbers of reviews which have been carried out under section 20 and 21 and the outcome of such reviews;
- instances when the time limit for reply has been exceeded, and reasons.

This list is not exhaustive and, with experience, authorities may, in discussion with the Commissioner, agree upon a standard set of statistics which more aptly reflect their compliance.



Section 62 Code

Paragraph 66 of the Section 62 Code states that for the purposes of monitoring, authorities should put in place appropriate systems to monitor their performance under the EIRs. It will be the responsibility of each public authority to determine what type of information should be recorded under its own administrative procedures, whilst ensuring that it is working, and demonstrating it is working, within the law. All requests for environmental information could be classified as a request under the EIRs but monitoring all requests may be difficult or unrealistic. However, monitoring procedures should generally include available information on the following:

- the number of requests which an authority receives but has refused, along with the reason for the refusal;
- the number of fees charged by the authority for information requested under EIRs;
- the number of reviews carried out by the authority and the outcomes of the reviews;
- the number of requests not responded to by the time limit for reply and the reasons.

This list is not exhaustive and, with experience and after discussion with the Commissioner, authorities may come to an agreement on a standard set of data which would indicate more appropriately an authority's compliance with the EIRs.

Findings

The Commissioner has found that the Council's practice does not conform with the above provisions, in that the administrative arrangements and systems it has in place for dealing with requests for information do not permit the extraction of reliable monitoring data as described above.

Steps to be taken:

The Council is recommended to put in place adequate systems and procedures to ensure resilient administrative arrangements allowing data storage and retrieval meeting the requirements set out above.

Refusal of request

Section 60 Code

Paragraph 71 of the Section 60 Code states that in issuing a refusal notice, the authority should explain which exemption in Part 2 of FOISA applies and, if otherwise not apparent, why it applies. (However, under section 18 the authority can, in certain cases and where this is in the public interest, issue a refusal notice which does not state whether or not the requested information exists). FOISA also requires authorities, when withholding information other than under an 'absolute exemption', to state (insofar as it is possible to do so without disclosing exempt information) the reason for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure. In



paragraph 63, the Section 60 Code states that where an authority refuses to disclose information in whole or in part, it is required to notify the applicant both of their right to request a review and of their right to apply to the Commissioner.

Section 62 Code

Paragraph 65 of the Section 62 code states that where a request for information is refused or partially refused in accordance with an exception, the EIRs require that the Scottish public authority notifies the applicant in writing which exception has been claimed, and the reason that exception applies. Scottish public authorities should not merely paraphrase the wording of the exception unless to say any more would involve the disclosure of information which would itself be withheld in accordance with the EIRs. The Scottish public authority should state clearly in the decision letter why they have decided to apply that exception in the case in question. The EIRs also require Scottish public authorities, when withholding information, to state the reasons for claiming that the public interest in maintaining the exception outweighs the public interest in disclosure. Scottish public authorities should specify the public interest factors - for and against disclosure - they have taken into account before reaching the decision, unless that statement would involve the disclosure of information which would itself be withheld in accordance with the EIRs. They should also include details of the procedure for review of the decision and for application for a decision by the Commissioner.

Findings

The Commissioner has found that the Council's practice does not conform with the above provisions, in that it does not provide applicants with adequate reasons in support of its decisions to withhold information, or inform applicants of their right to apply to the Commissioner for a decision.

Steps to be taken:

The Council is recommended to ensure that its responses to requests for information are compliant with the provisions of the relevant Codes of Practice as set out above, in particular by providing applicants with adequate reasons in support of the refusal of information and by informing them of their right to apply to the Commissioner for a decision. Template letters are recommended with a view to achieving this. The Council should be able to demonstrate a significant improvement in this area within 3 months from the date of this Practice Recommendation.



Further action

In order to monitor progress with the steps specified in this Practice Recommendation, the Commissioner requests the Council to provide him with a report within 3 months from the date of the Practice Recommendation, setting out the measures it has taken in implementation of these steps with evidence to demonstrate improvement in the areas where it has been found not to conform with the Section 60 and 62 Codes.

A Practice Recommendation cannot be directly enforced by the Commissioner. However, a failure to take steps specified in a Practice Recommendation may also be failure to comply with a provision of Part 1 of FOISA or with the requirements of the EIRs, which may result in the issuing of an Enforcement Notice under section 51(1) of FOISA. Further, a failure to take steps specified in a Practice Recommendation may lead to a report to the Scottish Parliament by the Commissioner under section 46(3) of FOISA.

Kevin Dunion
Scottish Information Commissioner
6 July 2010