



## FOISA/EIRs Guidance

### Does FOI law give a right to information or to copies of documents?

#### Introduction

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1. The Freedom of Information (Scotland) Act 2002 (FOISA) gives everyone the right to ask Scottish public authorities for the information they hold.
2. FOISA gives a right to information, not to documents. This guidance looks at whether requests for copies of documents are valid requests under FOISA and tells public authorities how they should respond to this type of request.

#### The right to information

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3. Under section 1(1) of FOISA, a person who requests information from a Scottish public authority which holds it is entitled to be given the information by the authority. This right is subject to various provisions and exemptions in FOISA.
4. The definition of “information” in FOISA is wide. It means information recorded in any form.
5. Section 8 of FOISA sets out what a request must include for the request to be valid. Section 8(1)(c) makes it clear that the request must describe the information requested.

#### Information v documents and the courts

6. Courts both north and south of the border have concluded that FOI provides a right to receive information rather than a right to receive copies of documents. However, the courts agree that there will be cases where it is necessary in practice to disclose the record (document) itself in order to communicate the entirety of the information contained within it.
7. In 2009, the Court of Session considered a request made to Glasgow City Council. (See **Appendix 1 – Resources** for a link to the judgment.) The requester had asked for – and had insisted on receiving – actual copies of documents. The Court of Session concluded that FOISA gives a right to information and not to receive copies of documents. In that case, there was another way to provide all of the information to the requester without providing copies of the actual documents.
8. The Court also made it clear that, where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. In these circumstances, the request will be valid for the purposes of section 8(1)(c) of FOISA.

9. Six years later, the (English and Welsh) Court of Appeal considered a case where a requester had asked for copies of the original invoices and receipts submitted by three MPs to the Independent Parliamentary Standards Authority (IPSA). (See **Appendix 1 – Resources** for a link to the judgment.)
10. The request had been made under the (UK) Freedom of Information Act 2000 (FOIA). FOIA and FOISA are almost identical when it comes to the right to request information and what an information request must contain for it to be valid.
11. IPSA had provided the requester with a transcript of the information in the documents, but had refused to provide actual copies.
12. The Court of Appeal agreed with the Court of Session that FOI gives a right to information rather than to copies of documents. However, the Court of Appeal also went on to say that there would be cases where, in practice, it is necessary to disclose the record itself in order to communicate all of the information contained within it.

### **Is an information request for a copy of a document a valid request?**

13. A lot of information requests made to public authorities refer to specific documents. As noted in paragraph 5, under section 8(1)(c) of FOISA, a requester must describe the information they are requesting for a request to be valid. FOISA does not set out how information must be described, but the purpose of this description, as section 1(3) makes clear, is to allow a public authority to identify and locate the information.
14. It is therefore possible to describe information by reference to documents – for example, by reference to a contract, meeting minutes or correspondence. It will also help authorities to identify and locate the information the requester wants.
15. In 2009 case, the House of Lords (then exercising its functions as the UK’s highest Court of Appeal) made it clear that a request framed by reference to a copy of a document (“a copy of the report by Mr Michael Balen regarding the BBC’s news coverage of the Middle East”), was within the ambit of FOIA. The House of Lords endorsed the view of the Information Tribunal that such a request “was a request for information that was properly made” under section 1 of the FOIA. (See **Appendix 1 – Resources** for a link to the judgment.)
16. In many cases it will be necessary to describe information by reference to a document, given that the requester is unlikely to know what the document contains
17. **Therefore, where a requester has asked for a copy of a document and it is reasonably clear that it is the information recorded in the document which the requester wants, the public authority should respond to the request as a request properly made under FOISA.**
18. If it is not clear to a public authority what information the requester wants, and the public authority reasonably needs further detail to identify and locate the information, the public authority must tell the requester what other information it needs – section 1(3).

### **Duty to provide advice and assistance**

19. Public authorities have a duty to provide reasonable advice and assistance to anyone who proposes to make, or has made, an information request to it – section 15. Public authorities must comply with the Scottish Ministers’ Code of Practice on the Discharge of Functions by Public Authorities under FOISA and the EIRs (commonly known as the “Section 60 Code”),

when providing advice and assistance. (See **Appendix 1 – Resources** for a link to the Section 60 Code.)

20. The Code provides specific guidance to public authorities about the validity of requests made for copies of documents. Paragraph 5.2.1 of the Section 60 Code says:

“FOISA provides a right of access to information and not a right of access to copies of specific documents. However, authorities should not refuse requests for copies of documents (e.g. a report, a minute or a contract) as long as it is reasonably clear from the request that it is the information recorded in the document that the applicant wants.”

21. Paragraph 5.3 of the Section 60 Code makes it clear that authorities must provide appropriate advice and assistance to enable applicants to describe clearly the information they require.

### **Right to seek review**

22. Where a public authority refuses to respond to an information request on the basis that it is a request for a copy of a document and/or does not adequately describe the information requested, the authority should advise the requester of their right to seek a review and to make an application to the Commissioner. The Commissioner has the power to determine whether the request was in fact a request made in compliance with FOISA. The Commissioner will take account of matters such as:

- the wording of the request and the context in which the request was made;
- whether the public authority sought clarification of the request (and the response from the requester); and
- any advice and assistance given to the requester by the authority.

23. See **Appendix 1 – Resources** for decisions issued by the Commissioner on this point.

### **How to respond to requests for copies of documents**

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24. There is nothing to stop public authorities providing copies of documents in response to a request. In many cases, it will be much easier for a public authority to provide copies of a document rather than to try to describe the information, copy the information into another document, or transfer it into another format.

25. **Where a public authority chooses not to provide copies of original documentation, it must ensure that any information which falls within the scope of the request and which is contained in the document is disclosed completely and accurately.** So, a public authority will need to consider how it will convey information regarding annotations, highlighting in a document, manually underlined or deleted text, etc. It will also be very difficult to provide visual material (charts and graphs, photographs, CCTV recordings, etc.) in a complete and accurate form other than by providing a copy.

26. This is why the Court of Appeal said that, in practice, there would be cases where it is necessary to disclose the record itself in order to communicate the entirety of the information contained within it.

27. One advantage of this approach is that requesters are more likely to rely on the completeness and accuracy of the information if they receive a copy, and may be less inclined to seek a review or make an application to the Commissioner. (In the IPSA case

referred to in paragraph 9, one of the reasons the requester wanted copies of actual documents was to check that the invoices and receipts were genuine.)

28. Public authorities should also be aware that it is a criminal offence to alter, block or conceal etc. a record held by the authority with the intention of preventing the disclosure of information (section 65 of FOISA). Disclosing copies of documents is likely to lessen concerns as to whether an offence has been committed.
29. Of course, in some cases it won't be appropriate or necessary to provide copies of documents. It all depends on the wording of the request. For example:
  - (i) If the request is for the number of people employed by a particular organisation, the correct response would be to give the number. The authority is under no obligation to provide documentation such as a redacted version of each employee's contract of employment.
  - (ii) If the request is for a list of attendees at a particular meeting, the authority can simply list the names in the response, rather than providing a redacted copy of a minute of a meeting.
30. In some cases, it will be good practice to provide extracts of documents rather than full documents if doing so would bring the cost of complying with a request below £600. See **Appendix 1 – Resources** for a link to the Commissioner's guidance on fees and excessive costs.

## Requests for environmental information

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31. The Environmental Information (Scotland) Regulations 2004 (the EIRs) provide a separate right to environmental information. Under regulation 5(1) of the EIRs, a Scottish public authority which holds environmental information has to make it available when requested to do so. (This right is subject to various provisions and exceptions in the EIRs.)
32. None of the court cases mentioned in this guidance looked at whether the EIRs give requesters a right to documents as opposed to information. And it's worth bearing in mind that there are differences in the legislation. For example:
  - (i) the EIRs don't specifically require that a request describes the information in order for the request to be valid – although an authority can refuse to make environmental information available if the request is formulated in too general a manner, provided it has asked the requester to provide more particulars about the request.
  - (ii) regulation 4 of the EIRs sets out the types of environmental information public authorities must actively disseminate. These are all referred to by document type – policies, plans, reports, impact studies and risk assessments, etc.
33. This means that the Commissioner cannot definitively say that the EIRs do not give a right to receive copies of documents as well as a right to information. However, provided public authorities follow the guidance in this document for responding to requests under FOISA, they are highly likely to comply with the EIRs.

# Appendices

## Appendix 1: Resources

### SIC Decisions

Reference	Decision Number	Parties	Summary
23	096/2010	Rami Okasha and the Scottish Ministers	Mr Okasha asked the Ministers for copies of the notes of meetings of the Scottish Government's Senior Management Team within two specified time periods. The Ministers argued that the request was invalid because it didn't describe the information Mr Okasha was requesting. The Commissioner disagreed. It was clear that it was the information in the notes of the meetings that Mr Okasha wanted. The descriptions given by Mr Okasha were sufficiently clear to enable the Ministers to identify and locate the information, the primary consideration in determining whether a description is valid.
23	017/2011	Sidlaw Executive Travel Scotland Ltd (SETS) and Dundee City Council	SETS asked the Council for a copy of the legal advice it had received on a specified matter. The Council argued that the request was invalid because it "was clear that what was sought by SETS was not the information contained in the opinion, but the documentation containing the opinion." The Commissioner disagreed.
23	034/2012	Ross Gilligan and the Scottish Ministers	Mr Gilligan asked the Ministers for correspondence with or mentioning Brian Souter since a specified date. The Ministers argued that the request was invalid because it did not specify the subject matter of the correspondence. The Commissioner disagreed.

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
7	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>
9	The Independent Parliamentary Standards Authority and Information Commissioner and Ben Leapman [2015] EWCA Civ 388	<a href="http://www.bailii.org/ew/cases/EWCA/Civ/2015/388.html">http://www.bailii.org/ew/cases/EWCA/Civ/2015/388.html</a>
15	Sugar v British Broadcasting Corporation and another [2008] EWCA Civ 191	<a href="http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090211/sugar-1.htm">http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090211/sugar-1.htm</a>
19	The Scottish Ministers' Code of Practice on the discharge of functions by Scottish Public Authorities under FOISA and the EIRs	<a href="https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/">https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/</a>
30	Fees and excessive costs of compliance	<a href="http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Fees_and_charging/ChargingFOISA.aspx">http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Fees_and_charging/ChargingFOISA.aspx</a>



## **Contact us**

### **Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**

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