

Investigations

**A guide for Scottish public authorities
(updated September 2022)**



Scottish Information
Commissioner

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Introduction

1. This guidance looks at applications made to the Commissioner under FOI law, i.e.:
 - (i) the Freedom of Information (Scotland) Act 2002 (FOISA) and
 - (ii) the Environmental Information (Scotland) Regulations 2004 (the EIRs).
2. It tells public authorities what to expect during an investigation and what the Commissioner expects from them.

Contact with the Commissioner's office

3. You'll be contacted by different people during the investigation:
 - (i) Our validation team will be your first point of contact: they will let you know when we have received a valid application involving your authority and will ask you to give us information to assist with the investigation.
 - (ii) After we have received information from you, your case will be allocated to a specific investigator. The investigator will contact you and may ask you additional questions about how you dealt with the request. They may also attempt to resolve the case. Unless the case is resolved, the investigator will draft the decision.
 - (iii) Draft decisions go through an approval process and, depending on the case, will either be approved by the Commissioner, the Head of Enforcement or a Deputy Head of Enforcement.¹
 - (iv) You are likely to have some contact with our Enforcement Team Support Assistant during the investigation. They will, for example, acknowledge your initial comments and issue the decision.

Notifying you of the application

4. When an application is made to the Commissioner, FOISA require us to give you notice in writing of the application and invite your comments.²
5. Along with this guidance, you will be sent a letter:
 - (i) notifying you that an application has been made (a copy of the application will be attached)
 - (ii) giving you an opportunity to comment on the application
 - (iii) asking you to give us a copy of any information withheld under an exemption or exception
6. You will normally be given six weeks³ from the date of the letter to provide comments on the application and, if relevant, to provide us with withheld information. The deadline will be

¹ Cases which deal only with a failure to respond (or a failure to respond on time) are likely to be drafted by a member of the validation team and approved by an investigator. This guidance is not aimed at those cases.

² Section 49(3)(a) of FOISA

clearly indicated in the letter. This extends previous timescales, so the deadline will only be extended in exceptional circumstances.

7. If you don't provide a submission we will, wherever possible, move to a decision, based on the information we have about the case.
8. Alternatively, we may issue an information notice⁴ requiring you to provide us with the information we need to allow us to come to a determination. If you don't comply with an information notice, we can refer the failure to comply to the Court of Session. The Court can treat the failure to comply as contempt of court.

Commenting on the application

9. We are legally required to give you an opportunity to comment on the application. You are not legally required to give us comments⁵, but we strongly suggest you do. It is up to you to justify your approach to an information request.
10. If you don't provide sufficient evidence to support your case, we may, for example, order you to disclose information, or to respond to a request which you consider to be vexatious or manifestly unreasonable.

Focussing your comments on the grounds of dissatisfaction

11. If someone is unhappy with the outcome of a review, they can ask us to decide whether, in any respect specified in the application,⁶ their request was dealt with in accordance with FOI law.
12. Our investigation has to focus on the grounds of dissatisfaction raised in the application. However, because the applicant's dissatisfaction must be with the outcome of the review, the applicant cannot raise entirely new issues in their application.
13. Please take this into account when commenting on the application. If there are particular matters raised by the applicant which you don't believe can be investigated, please explain why.
14. **Example:**
 - Alison Smith asked for reports submitted to your Chief Executive from 2016 to 2020.
 - You told her you did not hold any pre-2018 reports. You disclosed the 2018-2020 reports in redacted form.
 - Ms Smith asked you to carry out a review. She did not ask you to review whether you held the pre-2018 reports, but focussed on the exemptions applied to the redactions in the 2018-2020 reports.
 - Following a review, Ms Smith applies to the Commissioner for a decision. She is dissatisfied because (a) she believes you do hold the pre-2018 reports; (b) she does

³ This timescale reflects the Commissioner's caseload and investigative capacity as at September 2022. It will be kept under review and may be reduced in future.

⁴ Section 50(1)(a) of FOISA

⁵ Unless we issue an information notice

⁶ Section 47(1) of FOISA

not agree with the exemptions applied to the redactions in the 2018 to 2020 reports and (c) given the passage of time, she also wants the reports from 2021.

- We can only investigate (b), i.e. the exemptions applied to the redactions. At review, Ms Smith did not query whether you held the pre-2018 reports, so she can't now raise this in her application. Given that her initial request was for reports from 2018 to 2020, she can't extend her application to include reports from 2021.

What comments do you need?

15. Subject to the comments above on the scope of the application and grounds of dissatisfaction, you need to be able to satisfy us that you were entitled to respond to the request in the way you did. In some cases, this will be relatively simple (for example to provide evidence that complying with a request would incur excessive costs or that you do not hold some information).
16. In other cases, particularly where you have withheld information on the basis of a number of exemptions/exceptions, matters may be more complicated. For example, for each exemption/exception you apply, you need to be able to satisfy us that you have considered all of the relevant tests including, where appropriate, what harm there would be from disclosure and why, on balance, the public interest favours maintaining the exemption/exception.
17. It's really important that your submissions are specific and focus on the information in question. If your submissions are too general, we may simply order you to disclose the information without seeking additional comments from you.
18. **Appendix 1: Providing comments to the Commissioner** gives examples of the types of information we need from you for the most common types of cases, i.e.:
 - (i) Fees/Excessive costs
 - (ii) Vexatious/manifestly unreasonable
 - (iii) Repeated request
 - (iv) Information not held /incomplete response
 - (v) Neither confirm nor deny
 - (vi) Exemptions (or exceptions applied)

Nothing to add?

19. The more considered and detailed your refusal notice (and/or review notice), the simpler it will be to provide comments. And if you have nothing to add to what you have already told the applicant, you do not need to repeat the points you have previously made. However, even if you don't have anything to add, you need let us know, so that we can progress the case as quickly as possible.

Sending us the information which is the subject of the investigation

What do you need?

20. We need a fully marked up copy of the information together with a schedule clearly listing and numbering all of documents you are sending us. We will send you a copy of the

schedule to be completed. Guidance on completing the schedule and on marking up the documents is set out in **Appendix 2: Providing withheld information to the Commissioner**.

21. If the information is not provided in the correct format, we will return it to you and will ask you to resubmit it in the proper format. If we have to do this, we may comment on this in the decision.

The format of the information

22. Wherever possible, withheld information should be **emailed** (let us know in advance if the information is in excess of 10MB). We can also accept information in hard copy (paper) or other electronic format (scanned and written to CD/ data stick).
23. We prefer information to be supplied in PDF form, or some other format which cannot be modified electronically (e.g. scanned .tif files). However, any standard file format is acceptable.
24. Hard copies of information or CDs can be sent by **post**, but please use recorded or registered mail.
25. If you want to send us information in a different format (e.g. via a **secure encryption site**), let us know in advance so that we can make suitable arrangements.
26. If you intend to **hand deliver** documents or deliver them by courier, contact us in advance to make sure that someone will be available to accept the documents.

Should we send the original documents?

27. No – wherever possible, give us copies of information rather than original material. We will only accept original documents if there are very good reasons why they can't be copied.
28. Any original information sent to us must be clearly marked as such and sent securely.

Why can't you view information at our premises?

29. We receive around 500 applications each year, so can't usually view information at your offices. We may agree to view the information at your premises if:
 - (i) there is a very large volume of information covered by the request
 - (ii) the information is exceptionally sensitive
 - (iii) the evidence you wish to submit is unusual (such as an historical document) or
 - (iv) the information cannot be emailed and it would be prohibitively expensive to post it.
30. Bear in mind that, even after doing this, we may still have to obtain copies of documents from you.

How do I know you'll keep the information secure?

31. Any information you provide during the course of an investigation will be held safely and securely.
32. We have secure, safe storage facilities onsite, and we control access to sensitive information. Everyone working for the Commissioner has been security vetted.

33. It is worth noting that, under FOI law, it is a criminal offence⁷ for the Commissioner, or any member of his staff, to disclose, without lawful authority, information obtained for the purposes of an investigation.

Do you need to see personal data?

34. If you have refused to disclose personal data in response to a request, we usually need to see it to satisfy ourselves that it is personal data and, if so, whether it is exempt from disclosure.
35. Providing us with a copy of the personal data to allow us to do this will not breach the UK GDPR or the Data Protection Act 2018. However, you should ensure that any personal data sent to us is sent securely.
36. Information about the steps we take to keep personal data safe and secure can be found in our [Privacy Notice](#).

What if we don't give you the information?

37. If you don't give us the information we need for the investigation, we are likely to issue you with an information notice under section 50 of FOISA, requiring you to provide us with the information we need.
38. Information notices issued as a result of a failure by an authority to provide information will be reported in the Commissioner's Annual Report to Parliament.
39. Any delay in or refusal to give us information will be recorded. Where a public authority continually delays in providing us with information, action may also be taken in line with the Commissioner's [Enforcement Policy](#).

Settlement

40. FOI law gives us the power to "effect a settlement" between an applicant and the authority rather than issuing a decision on the application.
41. During the investigation, we might suggest ways the case could be settled without the need for a formal decision. This might involve you disclosing some or all of the information to the applicant.
42. If, at any time, you think there is scope for the case to be settled (either in full or partially), let us know as we may be able to help resolve the case.
43. If you think that information can be disclosed to the applicant during an investigation, you can go ahead and disclose it to the applicant. You don't need our agreement to do this – but let us know if you do disclose additional information.
44. Full settlement normally means that the application to the Commissioner is withdrawn. In some cases, even if you disclose all of the information, the applicant might still want a decision to be issued.

⁷ Section 45 of FOISA

The investigation

The investigator

45. The investigator will be your main point of contact throughout the investigation. Once a case has been allocated to an investigator, they will contact you to let you know. They will consider your comments in the light of the application and the withheld information.

Seeking additional comments from you/the applicant

46. The investigator may ask you additional questions if they need more information to come to a decision.
47. Additional comments may also be sought from the applicant.
48. We will never tell the applicant what is in the withheld information. However, we may share some of your comments with the applicant to allow them to comment on relevant matters. Similarly, where the Commissioner considers it necessary, your comments may be referred to in his decision on the case.
49. If you do not want us to share specific parts of your comments with the applicant, or refer to them in the decision, let us know, explaining why (with reference to the exemptions in FOISA/to the exceptions in the EIRs). The final decision on whether your comments will be shared or referred to in the decision will be ours.

Will you keep us updated during the investigation?

50. Investigators will keep you and the applicant updated about any significant developments as the case progresses.
51. We also publish our [List of current applications](#) on our website, so you can check the status of the case at any time.

Can we change our approach mid-investigation?

52. You can apply new or different exemptions/exceptions after an appeal has been made to us. If you do, you must explain why the new exemption/exception applies. Again, reference should be made to the [Briefings and guidance pages](#) on our website.
53. Matters can be more complicated if you decide to change your approach to the request during the investigation (for example, if you initially told the applicant you didn't hold the information, but have since located the information and consider that it is exempt from disclosure). In cases like this, it's possible that we'll issue a decision requiring you to carry out a new review.
54. If new exemptions or provisions are applied, we are likely to let the applicant know and ask them to comment on the changes.

Will you want to interview our staff?

55. Most investigations are carried out without staff needing to be interviewed, although it's helpful to speak to authorities by telephone or via MS Teams, etc.
56. If a case is particularly complex or sensitive, or if we need to see your records management systems in action to determine if you hold information, we may arrange a meeting to clarify points in the investigation.

Should we stop contact with the applicant during the investigation?

57. No. While we are dealing with an investigation, you can refer the applicant to us if they have any queries about the investigation. However, there is nothing to prevent you discussing the case with the applicant, especially where this is likely to lead to the case being resolved informally. Please let us know of any discussions you have with the applicant.
58. New information requests made by the applicant, even if they are connected to the case under investigation, must still be responded to.

Our decision

59. Once the investigation has been concluded, and unless settlement has been reached, the investigator officer will draft a decision notice, where necessary taking account of guidance or advice from the Commissioner or other line manager.
60. If we find that you have failed to comply with FOI law, the decision will specify⁸:
- (i) the provision you've failed to comply with
 - (ii) the steps you need to take to comply
 - (iii) how long you have to comply – usually 45 calendar days

Will we get a chance to comment on the draft decision?

61. No. In some cases, the investigator may verify facts with your authority before the decision is issued, but we do not provide drafts of decisions to authorities (or applicants) for comment.

How will we receive the decision?

62. We will email the decision to your Chief Executive (or equivalent). The email will also be copied to our FOI contact in the authority.

Can the decision be changed once it's issued?

63. No. The Commissioner can't withdraw or amend a decision once it's been issued.

What happens if we don't comply with a decision?

64. If you don't comply with a decision by the specified date, we can refer the failure to comply to the Court of Session. The Court has the right to inquire into the matter and may deal with your authority as if it had committed a contempt of court.
65. Read the Commissioner's [Enforcement Policy](#) for more information about our powers.

Can we appeal against your decision?

66. Yes. Both you and the applicant have the right to appeal the decision to the Court of Session on a point of law only. An appeal must be made within 42 calendar days of the date of intimation of the decision (this might not be the same as the compliance date). If you want to appeal the decision, we suggest you seek legal advice as quickly as possible. We can't give you advice on how to appeal.

⁸ Section 49(6) of FOISA

What happens to the withheld information we send you?

67. We securely destroy all withheld information (with the exception of original documents) three months after the case is closed.
68. If you do not want us to destroy the information (for example, because you have destroyed your copy in error), it is your responsibility to let us know.

What if you receive an information request for the information or for our submissions?

69. We sometimes get requests for withheld information or submissions, either during the investigation or once the case has been closed.
70. We are subject to FOI law and must respond to information requests. The Commissioner will normally seek comments from you if an information request is received, in line with the Scottish Ministers' [Code of Practice](#) on the discharge of functions by Scottish public authorities under FOISA and the EIRs.

Appendix 1: Providing comments to the Commissioner

General

- This gives you some idea of what we need from you in order to come to a decision for the most common types of cases.
- Remember to cover all aspects of your response. If you've told the applicant you don't hold some of the information they asked for and that some of the information you do hold is exempt from disclosure, you'll need to tell us about the searches you've carried out as well as why the exemption applies.
- We suggest you read the relevant [Briefings and Guidance](#) on our website before providing comments.

Fees/Excessive costs

- Evidence of charges being in line with the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 or, where appropriate, with regulation 8 of the EIRs
- Estimated projected spend, including a breakdown of the cost of staff time; the type of work to be undertaken and how long the work is likely to take
- What advice and assistance has been given to the applicant on narrowing the scope of the request?

Vexatious/manifestly unreasonable

- Evidence that the request is vexatious/manifestly, for example that:
 - complying would impose a significant burden
 - the request does not have serious purpose of value
 - the request is designed to cause disruption or annoyance
 - the request has the effect of harassing the authority
 - in the opinion of a reasonable person, the request would be considered as manifestly unreasonable or disproportionate
- Details of previous contact with the applicant if relevant – e.g. “x requests in the last three months on the same subject” instead of “the applicant has been a persistent correspondent”
- Comments on the public interest test if applying the exception in regulation 10(4)(b) of the EIRs

Repeated request

- Evidence that the request is identical or similar to a previous request – provide the request
- Evidence that you complied with that request
- Evidence that a reasonable period has not passed between the requests – consider matters such as the timing of the request and how often the information requested is updated

Information not held/incomplete response

- Which searches were carried out including:

- search terms used and timeframe searched against; why these were considered likely to retrieve the information
- who carried out the searches and why were they the people best placed to carry out the searches
- which sets of records or data were searched (information may be held on WhatsApp, mobile phones, etc.)
- If no searches were carried out, why did you consider no searches were needed?
- Comment on the public interest test if applying the exception in regulation 10(4)(a) of the EIRs

Neither confirm nor deny: FOISA

- If the information was held (and it need not be), which of the exemptions mentioned in section 18(1) of FOISA would apply and why
- If the exemption is subject to the public interest test in section 2(1) of FOISA, why, on balance, if the information was held and existed, the public interest in maintaining the exemption would outweigh that in disclosing the information
- Why revealing whether the information exists or is held would be contrary to the public interest.
- Note: you do not need to tell us at this stage whether the information actually exists or is held, although you can if you wish.

Neither confirm nor deny: EIRs

- If the information was held (and it need not be), specify which of the following would apply and why.
 - regulation 10(5)(a): substantial prejudice to international relations, defence, national security or public safety. Explain why it would not be in the public interest to reveal whether the information exists or is held (regulation 10(8))
 - regulation 11: personal data. Explain why revealing whether the personal data exists or is held would in itself be contrary to regulation 11 (regulation 11(6)).
- Note: you do not need to tell us at this stage whether the information actually exists or is held, although you can if you wish.

Exemptions/exceptions applied

- Note: each exemption/exception has different tests, so make sure you comment on all of the correct tests. Our exemption briefings should be particularly helpful here. Remember to specify why, where relevant:
 - disclosure of the information would, or would be likely to, cause the required level of harm and
 - on balance the public interest in maintaining the exemption outweighs that in disclosing the information
 - which part of the exemption/exception is being applied and why. For example, “section 35(1)(g) with section 35(2)(b)” rather than “section 35” or “section 38(1)(b) as read with the first condition” rather than “section 38”.

Appendix 2: Providing withheld information to the Commissioner

Completing the schedule of documents

1. The schedule must be completed, even if only one document has been withheld.
2. All documents must be named and numbered, and must accord with the numbering on the schedule. If the documents have attachments, the attachments must be listed with the document on the schedule.
3. Email chains: wherever possible, each email in an email chain must be numbered separately in the schedule. Where an email is duplicated in a different email chain, it should bear the same number for each occasion it is present. (See also below.)
4. The schedule must include a brief description of the document. See the example given on the attached pro forma schedule.
5. The schedule must set out clearly which exemption(s)/exception(s) you are relying on to withhold information in the document and must specify if information in the document is considered to fall outwith scope. Again, see the example given on the pro forma schedule.
6. When completed, email the schedule and information to amcewan@itspublicknowledge.info.
7. If the schedule is not completed properly, it will be returned to you for further work.

Duplicates

8. Wherever possible, do not send duplicates of documents (including emails in email chains). We recognise that more than one document may have to be included where:
 - one version includes comments from one individual and another version the comments from another individual or
 - what might appear to be a duplicate is in fact a different version (e.g. an earlier draft) of the document

Marking up documents

9. If you responded to the information request by disclosing redacted copies of documents, you must send us **one** copy of the information clearly marked up to show specifically which information has:
 - been withheld under which exemption(s) or exception(s) and/or
 - not been disclosed because it is not within scope.
10. It is very important that, regardless of the way the text is marked up, all of the text can still be clearly read. For example, do not use dark grey highlighting which has the effect of hiding the text (or other colours against which the text does not stand out) or add comments in yellow text which is difficult to read.
11. At the end of this guidance, you will find some examples of how redacted documents can be marked up.
12. Any information provided to us in hard copy will be scanned and (like any information supplied electronically) stored in the case file within the Commissioner's case handling system.

13. The information you provide will be retained in our electronic and paper case files for the duration of the investigation, and any subsequent appeal.

Marking up information: examples

14. These are some examples of how documents can be marked up.

Example 1 – using colour coding

From: Janice McDonald
Sent: 1 February 2021 12:34
To: Peter O'Neill
Subject: Tender

Dear Peter

Thank you for recent tender on behalf of P O'Neill & Son. I note that you have quoted £3,150. I will be in touch once I had had an opportunity to consider the other tenders I have received.

On a separate point, I was sorry to hear that you had been unwell. I hope you are feeling much better.

Regards,

Janice McDonald
Contracts Manager

Key:
Red: section 38(1)(b)
Purple: section 38(1)(b) and 33(1)(b)
Blue: section 33(1)(b)
Green: outwith scope

Example 2 – using comments

From: Janice McDonald
Sent: 1 February 2021 12:34

Section 38(1)(b)

To: Peter O'Neill

Section 38(1)(b)

Section 38(1)(b) and 33(1)(b)

Subject: Tender

Dear Peter

Thank you for recent tender on behalf of P O'Neill & Son. I note that you have quoted £3,150. I will be in touch once I had had an opportunity to consider the other

Section 33(1)(b)

tenders I have received.

On a separate point, I was sorry to hear that you had been unwell. I hope you are feeling much better.

Outwith scope

Regards,

Janice McDonald
Contracts Manager

Example 3 – using highlighting

From: Janice McDonald

Sent: 1 February 2021 12:34

To: Peter O'Neill

Subject: Tender

Dear Peter

Thank you for recent tender on behalf of P O'Neill & Son. I note that you have quoted £3,150. I will be in touch once I had had an opportunity to consider the other tenders I have received.

On a separate point, I was sorry to hear that you had been unwell. I hope you are feeling much better.

Regards,

Janice McDonald
Contracts Manager

Key:

Red: section 38(1)(b)

Purple: section 38(1)(b) and 33(1)(b)

Blue: section 33(1)(b)

Green: outwith scope

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