

Centre for FOI Practitioners' Conference 2023



Freedom of Information - A Beginners Guide

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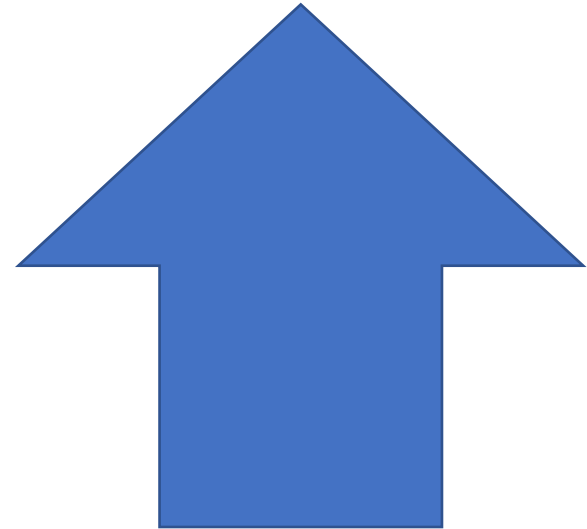
Outline

- Freedom of information – context and international trends
- Freedom of Information (Scotland) Act 2002
- Example information requests

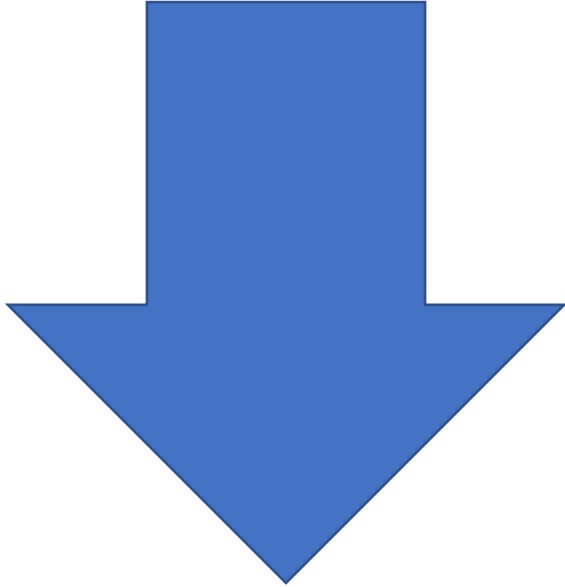
Why Bother with Freedom of Information?

Benefits

- Promote transparency (and ensure accountability) of government and public authorities
- Improve decision-making
- Improve public understanding and trust in government
- Guarantee the “right to know”



Why Bother with Freedom of Information? (Continued)



Drawbacks

- Intrusion on (and potential interference with) government and public authority activities
- Costs in processing requests and disclosing information
- Risk of moving “information” to invisible spaces (e.g. texts)

The Growth of Freedom of Information

Freedom of information (and freedom of information regimes) has seen development and growth across a range of countries



United States of America
Freedom of Information Act
1969



South Korea
Act on Disclosure of Information
by Public Agencies 1996



Germany
Informationsfreiheitsgesetz 2006

As of 2019, 125 countries have implemented freedom of information regimes

Freedom of Information and International Law

Traditionally based on the human right to freedom of expression

- “This right shall include freedom to hold opinions and **to receive and impart information and ideas** without interference by public authority” – Art 10 European Convention on Human Rights

Initially, a right to receive information from the government was not guaranteed under the right to freedom of expression

- *Leander v Sweden* European Court of Human Rights 1987; *Gaskin v United Kingdom* European Court of Human Rights 1989

But this has since changed, and now an obligation to provide information when requested may exist in international law

- *Társaság a Szabadságjogokért v Hungary* European Court of Human Rights 2009; *Khurshid Mustafa and Tarzibachi v Sweden* European Court of Human Rights 2008

Magyar Helsinki Bizottság v. Hungary

A right to access information held by the state arises when:

- where disclosure of the information has been imposed by a judicial order
- where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, and where denial of this information constitutes an interference with that right

The court will take into account the following factors when determining whether a request

1. The purpose of the information request – is the request enabling a person to exercise their freedom to receive and impart information and ideas to others?
2. The nature of the information sought – is there public interest in the information being disclosed?
3. The role of the applicant – has the applicant adopted a role in which they can disseminate information to the public? (This includes journalists and NGOs, but does not exclude private members of the public)
4. The availability of the information - is the information already available elsewhere?

Connection to the Freedom of Information (Scotland) Act 2002

The Freedom of Information (Scotland) Act 2002 (and the UK-equivalent) is not an aberration

- Rather, it is part of the broader shift of understanding on the relationship between the government and the individuals it governs

FOISA is the embodiment of this shift in Scotland, providing both:

- The obligations public authorities must meet in guaranteeing the right to information; and
- The limits of the right to information



Legal Requirements - Context

Freedom of information rights should be easy to use and informal for requesters

- But underpinned by legal requirements that need to be followed by public authorities

FOI is working all the time, giving access to information

- not just the hard cases that result in decisions from OSIC

We cannot cover all practical aspects in this session

- e.g. recording and monitoring requests, obtaining information from colleagues, redaction software, etc
- Speak to colleagues, other FOI Officers (Information Requests Network Group)

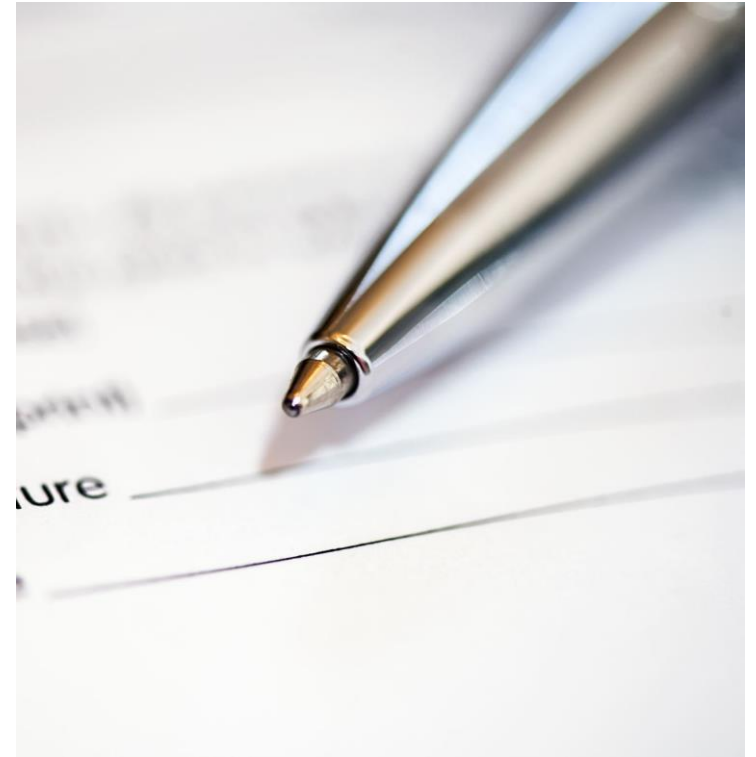
The Request

‘Written’ – Technically, recordable format for FOISA, usually writing

- Request can be ‘hidden’ within other communications e.g. complaints, subject access requests
- No need to say “FOI request” or explain why they want the information
- No need to request via authority’s FOI contact

Full real name of the requester and address (email or postal address) required

- Not simply first name
- Agents must name client
- Remembering that FOISA is “applicant blind”



The Request (continued)



Applicant must also describe the information requested.

- Recorded information held by authority at time of request – i.e. not need to create information.
- Does the authority hold the information on behalf of another person.

Must respond as soon as possible, and no later than 20 working days

- Interpretation (usually ordinary sense of words) and seeking clarification “stops the clock” on timescale

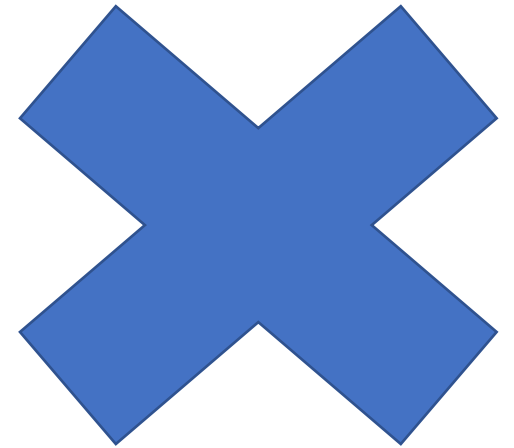
Withholding Information

Alternative information regimes

- Personal data – s.38 FOISA
- Environmental information – Environmental Information (Scotland) Regulations

Provisions of FOISA that are not exemptions (but can be used to withhold information)

- Information not held – s.17 FOISA
- Excessive cost of compliance - s.12 FOISA
- Vexatious or repeated requests – s.14 FOISA



Withholding Information - Exemptions

Range of exemptions – Part 2 of FOISA

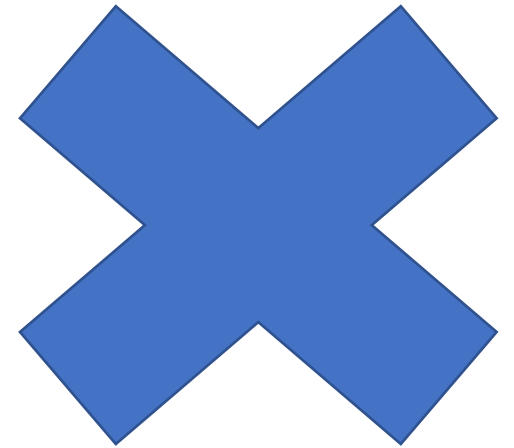
- Absolute exemptions – s.2(2) FOISA
- Qualified exemptions

Qualified exemptions subject to the public interest test

- Balances the public interest in withholding/disclosure the relevant information
- Presumption of disclosure

Duty (and good practice) to give reason(s) why information is being withheld

- Be clear why request is being refused (templates used by authorities can help)



Reviews

“A second chance” – i.e. look at the request afresh in light of applicant’s dissatisfaction

- Identifying and addressing dissatisfaction is key to review
- Reviews should be flexible, fair, impartial
- Review request should be submitted within 40 days from the initial decision (but can accept a late review under FOI(S)A)

Three options:

1. Confirm
2. Substitute
3. Reach a decision

Review gives rights of appeal to Scottish Information Commissioner

Appeals to the Commissioner

The basis is the dissatisfaction with the authority's review

- Requester must apply within 6 months (discretion if late)

Procedure - Public authority is legally required to be notified by OSIC

- Onus is then on the authority to make case

How to avoid appeals?

- Good practice when refusing requests
- Advice and assistance throughout the process
- Redactions clear and specific



Fictional request 1

Dear Sir/Madam, I phoned your authority yesterday as I had still not received a reply to my outstanding complaint. When I phoned, I asked to speak to someone senior, preferably the CEO, but the person who answered the phone – I think it was a man – was rude and peremptory and rang off.

I'd like to request the name and job title of the person who answered the phone. I'd also like to know what qualifications he has, and whether they extend to customer care. Please also send me any email or telephone note that he created about my conversation.

Could you please tell me if any anyone in your authority engages callers with a customer-focused attitude?

As I was phoning to find out if my complaint was ever going to be actioned by your authority, I'd be grateful if you could inform me of the subjects of all complaints received by your authority, and how many were appealed to another regulator such as the SPSO, or indeed any other regulator.

Yours faithfully, Adrian Smith (asmith8935@gmail.com)

Fictional request 2

Dear FOI officer,

Request for Information under section 1 of the Freedom of Information (Scotland) Act 2002

Please supply us with any legal advice – either external or internal – that your authority has sought or received about the legality of any alterations to the employment conditions of your staff during the COVID-19 pandemic.

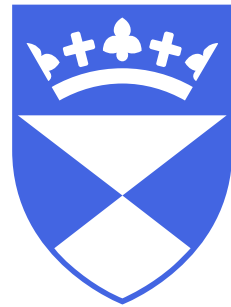
Please supply us with all personal data of Graham Brown of 12 Main Street

Kind regards,

Denise Callaghan (Bond Solicitors). Litigation@bondsolicitors.co.uk



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