Investigations Handbook

Procedure for investigations under FOISA, the EIRs and the INSPIRE (Scotland) Regulations

Scottish Information Commissioner

Acronyms and abbreviations

The table below sets out the abbreviations used in this document:

Abbreviation	Meaning
APP	The Applicant
CST	Corporate Services Team
DHOE	Deputy Head of Enforcement
DN	Decision notice
EIRs	Environmental Information (Scotland) Regulations 2004
ETSA	Enforcement Team Support Assistant
FOISA	Freedom of Information (Scotland) Act 2002
HOCS	Head of Corporate Services
HOE	Head of Enforcement
HOPI	Head of Policy and Information
INSPIRE	The INSPIRE (Scotland) Regulations 2009
IO	Investigating Officer
LIA	Legitimate interests assessment
P&I	The Policy and Information Team
PA	Public authority
SIC, The Commissioner	Scottish Information Commissioner, Commissioner's staff or office (context dependent)
SL	Standard Letter
VO	Validation Officer
WP	WorkPro – the case handling system

Introduction

1. This document sets out the procedures the Scottish Information Commissioner (SIC) follows for dealing with investigations under the:

   (i) Freedom of Information (Scotland) Act 2002(FOISA)

   (ii) Environmental Information (Scotland) Regulations 2004 (the EIRs) and;

   (iii) INSPIRE (Scotland) Regulations 2009

2. There are four main stages to the way we deal with applications:

Stage 1: Validation

3. A number of legal requirements must be fulfilled before SIC has the power to conduct an investigation. If an application is wrongly validated, the SIC would have no power to investigate or to enforce a decision.

4. If SIC decides that an application is invalid, he will explain to the applicant why it is invalid and offer reasonable guidance to help them make a new valid application, where possible.

Stage 2: Resolution

5. SIC takes a resolution based approach to applications. This means that SIC will, where appropriate, and at any point during the investigation, attempt to resolve the application (in line with section 49(4) of FOISA) without the need for a formal decision.

Stage 3: Investigation

6. In carrying out investigations, we will:

   (i) work in an impartial, independent and objective manner

   (ii) communicate with both parties in a clear and courteous manner

   (iii) issue well-reasoned and argued decisions, which clearly set out the SIC's conclusions and the reasons for coming to those conclusions

   (iv) issue decisions as quickly as possible, in line with the targets set by the Commissioner in the Performance and Quality Framework.

Stage 4: Decision

7. Where resolution is not possible, the Commissioner will investigate the application and issue a formal decision notice.

SECTION 1: RECEIPT AND VALIDATION OF APPLICATIONS

Receipt of applications

8. All correspondence received by the Commissioner will be treated as an application if it:

   - expresses dissatisfaction with the way in which an information request has been handled and
   - asks us to take action (as opposed to, for example, giving advice about the next steps)

9. It is important that enquiries are not treated as applications as this is likely to delay a response to the enquiry. Check that it is in fact an application and not, for example, an enquiry. Seek guidance from the VO if unsure.

Hard copy correspondence

10. All hard copy applications (letters, faxes) will be opened, scanned and transferred to the Application scanning folder.

Applications made by email

11. Any member of staff could receive an application by email. All applications must be emailed to the applications inbox for handling by the VO.

File Opening

12. The VO must create a WP file for all new applications. At this stage, VO will complete the following fields in the WP file:

    (i) Applicant

    (ii) Public Authority

    (iii) Any special requirements highlighted by the applicant

    (iv) Update case status to "New case received"

Acknowledgement of applications

13. The VO will acknowledge all new applications (SL01) within two working days of receipt.

14. The VO will also acknowledge receipt of other correspondence received in relation to the application at this stage.

File Opening by ETSA

15. When necessary, for example in the absence of the VO, the HOE/DHOE may pass cases to ETSA to open and acknowledge cases. ETSA must ensure the above steps are completed.

Cases to be validated by IOs

16. More complex cases may be passed to IOs for validation, for example if the application:

    (i) has been made under INSPIRE or

    (ii) will involve research as to whether a body is subject to FOISA or EIRs

    (iii) will involve research as to whether, in RSL cases, the information is subject to the terms of the Section 5 Order

17. In such cases, the VO will add the case to the allocation spreadsheet (**2023/24 VC184482**) to allow HOE to allocate the case to an IO.

18. WorkPro files are destroyed in line with our records management policy. It is therefore important that any research which considers whether a body is subject to FOISA or the EIRs is recorded in VC (Enforcement\Investigation) and also noted in **VC125747**, the spreadsheet which summarises the research.

Preliminary assessment by VO

19. As soon as validation checks are started, update the case status to "validation checks being carried out".

20. If an application is clearly not capable of validation, the VO must issue a letter (SL02a, b or c as appropriate) to the applicant, within 10 working days. This letter must explain why we cannot carry out an investigation and (where possible) advise the applicant how to make a valid request to the authority/application to the Commissioner. Where appropriate, the applicant should be provided with our template application form to help them make a valid application to the Commissioner

21. All supporting documentation supplied in hard copy should be returned to the applicant at this point and any hard copy of the application securely destroyed.

22. An application is clearly not capable of validation where, for example:

    (i) The request was clearly not made to a Scottish public authority (as defined by FOISA or the EIRs) – where it is unclear, VO to seek advice

    (ii) It is clear that no review has been sought (or a review has been sought but it is clear that the applicant has not allowed enough time for the public authority to respond)

    (iii) The request is anonymous

    (iv) The request was not made using the full name of the requester

    (v) The application is clearly excluded under section 48 of FOISA

Criminal allegations

23. Any application/correspondence which raises a section 65/regulation 19 (criminal) allegation should be passed **immediately** to HOE or in their absence a DHOE. No further action should be taken until HOE/DHOE has given guidance on dealing with the allegation. See APPENDIX 9: CRIMINAL ALLEGATIONS.

Content of files

24. The VO will set up the following folders in the WP file for the case:

    (i) Validation

    (ii) Public Authority (for all correspondence with PA during investigation)

    (iii) Applicant (for all correspondence with Applicant during investigation)

    (iv) Internal (e.g. triage notes, discussions around approval)

    (v) Research & Background (e.g. copies of legislation, other relevant information)

(vi) Withheld Information

(vii) DN (correspondence etc. relating to decision notice)

25. Key documents (as identified by VO) should be separated out and appropriately renamed, i.e.:

(i) "YEAR_MONTH_DATE Initial Request"

(ii) "YEAR_MONTH_DATE Initial Response"

(iii) "YEAR_MONTH_DATE Request for Review"

(iv) "YEAR_MONTH_DATE Review Outcome"

(v) "YEAR_MONTH_DATE Application"

26. Only documents pertinent to the validation of the case should appear in the "Validation" section of the hard copy file. This is likely to include all correspondence between the applicant and the PA after the request was made. Documents which are not obviously relevant to the validation of the application should be filed elsewhere, e.g. in the "Applicant" or "Background" folder and named appropriately.

27. VO will complete the synopsis and categorisation fields in WP. The synopsis will be published, so it is important that it is accurate, but that it does not contain information which would identify the applicant. Guidance can be obtained from the DHOE/HOE if the VO is unsure. Keep the synopsis as succinct as possible.

28. Personal data which is clearly unrelated to, and not needed for, the application should be deleted, destroyed securely or returned to the sender with reasons why the information is being returned. Guidance can be obtained from the DHOE/HOE to determine whether the retention of personal data is necessary for the purposes of the application.

Obtaining additional information

29. Where the VO considers that a case may be capable of validation (see Appendix 1), but needs additional information or evidence, the VO should request this from the applicant using (SL03).

30. If no response is received, the VO should issue a reminder a reminder (SL04). If no response is received to the SL04, the case should be closed (outcome code: insufficient information).

VO determines application invalid

31. If, once the additional information has been received, the VO is satisfied that the application is not valid, the VO will issue a letter (SL02a, b or c as appropriate) to the applicant, within 10 working days. This letter must explain why we cannot carry out an investigation and (where possible) advise the applicant how to make a valid request to the authority/application to the Commissioner. Where appropriate, the applicant should be provided with our template application form to help them make a valid application to the Commissioner.

VO determines application valid

32. If, once the additional information has been received, the VO is satisfied that the application is valid, the VO will with the exception of FTR applications, advise the applicant their application is valid (SL07) and provide the applicant with a copy of the Applicant's guide. (See Section 5 for guidance on FTR applications.)

33. The VO will update the validation date in WP. The validation date is the date on which a valid application is RECEIVED by the Commissioner, not the date on which we determine it is valid.

VO wishes to refer the matter to IO for review

34. Where the VO is at all unsure as to whether the application is valid, they must ask the IO for a view, setting out the particular issues the VO wants advice on. (See the rota in **VC164954**.)

35. The IO will, within one week, provide written advice on whether the application is valid. The IO may advise the VO to seek additional information from the applicant or public authority before he/she makes a final determination. (Where the IO is unsure, he/she should seek guidance from the HOE/DHOE.)

Queries about validation decisions

36. If an applicant is unhappy about a decision that an application is invalid, the matter will be referred to the HOE/DHOE for consideration.

Practice issues

37. If the application reveals a potential practice failure on the part of the public authority, the VO must record these in the “Issues/Non-compliance” section in WP. If appropriate, the VO can carry out a level 1 intervention (in line with the Commissioner’s Intervention Procedures) or refer to HOE/DHOE.

Validation in VOs’ absence

38. In the event that the Validation Team’s workload is heavy, or in the event of absence, the DHOE may pass cases to IOs for validation. IOs must ensure that they complete the Validation checklist, which can be obtained from the WP templates. When a case is allocated to an IO, the IO is responsible for taking the case through the whole validation process. On allocation, the IO should therefore transfer the case into their caseload in WorkPro. Guidance on the process can be found in VC76527 called; “Validation in the Validation Officer’s Absence”.

SECTION 2: INVITING COMMENTS AND OBTAINING WITHHELD INFORMATION

39. Section 49(3)(a) of FOISA requires us to give an authority notice in writing of an application and invite its comments. Until September 2022, our practice was to notify the public authority of the application and ask it to provide any withheld information. Comments would not be sought until after the case had been allocated to an IO.

40. Our practice changed in September 2022 after the high caseload led to a delay in cases being allocated for investigation. From 1 September 2022, authorities were asked to provide comments at the point we notified them of a new application – typically, this was as soon as the case had been validated.

41. For cases received from 1 January 2024, we will revert to our previous practice (as described in paragraph 39) of not seeking comments until after the case is allocated to an IO.

Notifying the public authority

42. The VO will use the SL06 to:

    (i) notify the public authority an application has been received (a copy of the application form, redacted as necessary – see below – will be sent to the authority with the SL06)

    (ii) invite comments (only for cases received after 1 September 2022 but before 1 January 2024)

    (iii) where an exemption/exception has been applied and information has been withheld, seek a copy of the information (the authority will be sent a schedule to complete – see below)

Redacting the application form

43. As noted above, the application form must be sent to the public authority with the SL06. (The Court of Session has commented that authorities should see the application so they know what the investigation will be about.)

44. However, there will be situations where, for data protection or other reasons, applications should be redacted before being sent to the authority. For example, the application should be redacted if it:

    (i) contains contact details which an applicant does not appear to have shared with the authority

    (ii) contains sensitive information which is entirely unrelated to the application

    (iii) contains an allegation that an offence has been committed under section 65 of FOISA/regulation 19 of the EIRs

    (iv) makes allegations about a third party which have no relevance to the application.

45. If the VO is unsure whether an application should be redacted (or about the extent of any redaction), advice should be sought from an IO.

Seeking withheld information

46. It was our practice, before September 2022, not to ask an authority to provide withheld information when they were notified of an application if the information was minimal and could be easily obtained by the IO at a later stage. However, from September 2022, the information will be sought at the same time as we invite comments. For cases received after 1 January 2024, we will revert to our practice before September 2022.

47. Where an authority is refusing to confirm or deny whether it holds information (section 18 of FOISA or regulations 10(8) or 11(6) of the EIRs), it will be for the IO (following allocation) to determine whether we need to find out if the information exists or is held and, if so, whether we need to see it for the purposes of the investigation. The VO should not ask for it at this stage.

48. In all other cases, advice must always be sought before deciding not to obtain withheld information at this stage. For example, if, given the subject of the request, the information can only be third party special category data (such as information about a named individual's health or sexuality), we may be able to come to a decision without seeing the information.

Schedule

49. A pro-forma document schedule (**VC115623**) will be sent with the SL06. Before sending the schedule, the VO will complete the:

- name of public authority;
- public authority reference (if known);
- name of applicant and
- SIC reference.

Transferring the case to the ETSA

50. The SL06 instructs the authority to send its response to the ETSA. Therefore, after the SL06 has been sent, the VO will:

(i) update the case status to "Case validated: waiting to hear from authority" and

(ii) transfer the WP file to ETSA's caseload

51. If the public authority responds to the VO instead of to ETSA, the VO will forward the response to ETSA.

ETSA: no response received

52. The SL06 will normally give the public authority two weeks to respond. The ETSA will set a reminder for each case to check that a request is received on time. (The deadline will only be extended in exceptional circumstances: the authority should have collated the information already, to allow it to respond to the information request and the request for review.)

No withheld information sought

53. Where the public authority does not respond to the SL06 on time and the SL06 does not require the authority to provide withheld information, ETSA will write to the authority to advise it that the case will be allocated to an investigator.

Withheld information sought

54. Where the public authority does not respond to the SL06 on time and the SL06 does require the authority to provide withheld information, ETSA will contact the authority to remind it that a response is due. If, after discussion with the authority, it appears there may be a delay of more than one week, ETSA will discuss the case with the HOE/DHOE to determine whether an extension should be given or an Information Notice issued. (Whenever withheld information is not provided on time, this must be recorded as a non-compliance issue in WorkPro.)

ETSA: response received

Comments

55. For cases received after 1 September 2022 but before 1 January 2024, in line with section 49(3)(a) of FOISA, the SL06 invited (i.e. did not require) the authority to provide comments. For those cases, the ETSA should check whether comments have been provided or confirm with the authority that it does not intend to provide comments. For all other cases, comments will not be sought until after the case is allocated to an IO.

Withheld information

56. The SL06 asks the authority to provide any withheld information. On receipt of the information, ETSA will check the document schedule against what has been received from the authority. If the schedule does not list everything provided, if there are documents which appear to be missing from the information supplied, or if the information does not appear to have been marked up properly, ETSA will contact the authority. ETSA may return the information and schedule to the public authority for completion if not in a satisfactory form.

57. The document schedule must be saved as a separate entry in the WP file. The following naming conventions must be used in WP:

    (i) Year/Month/Date WITHHELD INFORMATION UNDER CONSIDERATION

    (ii) Year/Month/Date Document Schedule

    (iii) Year/Month/Date Cover email or letter.

Original documentation

58. If we have been provided with original documentation (i.e. the only hard copy of a document – this is exceptionally unusual), ETSA must:

    (i) arrange for the receipt of the documents to be recorded in the log book (kept with the mail book) and

    (ii) note we have received original evidence in the WP file.

59. All original evidence must be stored in the secure store except when actively being viewed for the purposes of the investigation.

"Top secret" information

60. When a public authority advises that the withheld information is classified as "Top Secret", ETSA will consult the HOE/DHOE. Arrangements may be made to view the information on the premises of the authority. When this is not possible, the HOE/DHOE will consider alternative approaches, in consultation with the public authority.

ETSA: next steps

61. Where a response to the SL06 letter is received (and, where relevant, ETSA is satisfied the information provided ties up with the schedule), ETSA will:

    (i) acknowledge the response

    (ii) add the case to the allocation spreadsheet (**2023/24 VC184482**) for weighting and allocation by the HOE (ETSA to complete the following fields: WorkPro; Applicant; Authority; Synopsis and Date to HOE)

    (iii) move the case into the "BOW" caseload in WorkPro

    (iv) update the case status to "Case validated: initial assessment before allocation to investigator."

62. ETSA will regularly notify the HOE (generally weekly) when cases have been added to the allocation spreadsheet.

Early resolution

63. The HOE and DHOEs will regularly review (generally weekly) the cases added to the allocation spreadsheet to determine if they are suitable for early resolution.

64. These are the types of situations where cases may be considered as suitable for early resolution:

    (i) The public authority has changed its approach at review and is now **happy to disclose** the information

    (ii) **SIC has a clear position** on the issue and we would be able to refer the public authority or application to previous decisions

    (iii) A request has been made for **personal data** which clearly will not be disclosed – particularly if we're talking about special category or criminal personal data

    (iv) The information request is, in effect, a **SAR** which has been dealt with under FOI legislation

    (v) The request is for information which clearly would **not be held** by the authority – the comments received from the authority may help here

    (vi) The public authority has applied **excessive costs** and it is clear, from the comments from the authority, that we would (or would not) accept this

    (vii) The applicant's only concern is that the request has been dealt with under the EIRs but the information is clearly **environmental information**

    (viii) The information has since been **published** (also relevant if section 27 of FOISA has been applied)

    (ix) The authority is suggesting that it would be willing to **disclose information outwith FOISA/EIRs**

    (x) There is a suggestion from the applicant that they'd be **happy to withdraw** if the authority agrees to take a particular action (e.g. apologise)

(xi) The applicant is not aware that disclosure under FOI is a disclosure into the public domain – and the request is for information (e.g. care records) **the applicant would not want to be published**

(xii) The applicant wants a subset of the information by a **set deadline** – and we think we may be able to get the authority to disclose that information in time (even if other information can't be)

(xiii) A public authority has **refused to confirm or deny** whether it hold information and it's clear we would order them to confirm whether or not the information is held

(xiv) The information is subject to an **absolute exemption** – e.g. section 26(a) – and it is clear the exemption applies

(xv) Where the basis of the application may be better handled under the **intervention procedures**

(xvi) Where the request **has clearly been misinterpreted** by the PA – this often only comes to light when we see the withheld information/comments from the PA

65. If a case is considered to be suitable for early resolution, it will be allocated to a VO/IO using the "early resolution rota" (2023/24 VC184663) and the allocations spreadsheet (VC184482) will be updated to show that early resolution is being attempted.

66. When a case is passed to an IO/VO for early resolution:

(i) the case should remain in "BOW"

(ii) the attempt at resolution should, generally, be a one-off attempt. The case is not subject to full investigation at this stage. The applicant (or public authority as appropriate) should be told that, if the case cannot be resolved at this stage, it will be allocated for full investigation in due course. (SL11e should be used when writing to the applicant.)

67. If early resolution is not successful:

(i) the VO/IO should notify the HOE that early resolution has not been successful

(ii) HOE will update the allocation spreadsheet (2023/23 VC184482)

68. If early resolution is successful the VO/IO should:

(i) transfer the case into their own caseload

(ii) weight the case as "1 DHOE"

(iii) close the case in the usual way (i.e. treat the application as withdrawn)

(iv) notify the HOE that the case has been withdrawn so that it can be removed from the allocation spreadsheet (2023/23 VC184482).

SECTION 3: WEIGHTING AND ALLOCATION

Weighting

69. All cases, except FTR cases, are "weighted" by the HOE before allocation to particular teams. Weighting allows for an equitable distribution of workload between the teams and individual IOs.

70. Each new case will be given a weighting (see the options in the table below). These reflect the complexity of the case and who can approve the decision. For example, (authorised) IOs may only sign cases weighted "1 IO" and no other cases.

Weighting options	Criteria
1 SIC 1 HOE 1 DHOE 1 IO	• Failure to Respond (FTR) applications where no additional issues raised
1 SIC 1 HOE 1 DHOE	• Failure to Respond (FTR) applications where additional issues raised (e.g. finding on balance of probability) • Straightforward cases, e.g. applications for information which is clearly subject to an absolute exemption; "information not held" cases where it is apparent that the information sought by the applicant is not held by the authority or where the cost of complying would clearly exceed £600.
2 SIC 2 HOE	• Straightforward cases which involve a certain amount of judgement, but which do not involve new issues. • Straightforward cases weighted "2 SIC" are likely to be high profile and/or of media interest.
3 SIC	• Likely to involve complex arguments or legal points not previously considered, or complex public interest arguments.

71. HOE will alert ETSA once cases have been weighted. ETSA will then update the weighting in the WP file and issue the SL07b to the Applicant to update them on progress with their application.

72. A weekly report of all cases which have been weighted and allocated that month is provided to the SIC. At any point, the SIC may:

    (i) alert the IO that he wishes to consider/comment on the case early in the process

    (ii) amend the weighting and/or approver (and alert the HOE)

73. The weighting of a case may be changed, with the approval of HOE/SIC, at any time. A change may be appropriate, for example, where an authority changes its approach mid-investigation or where it becomes clear that what was initially considered a straightforward case is in fact more complex.

Allocation

74. As far as possible, cases should be weighted and allocated regularly to avoid “batching” of cases. HOE and DHOEs will agree the most appropriate team (Conan or Doyle) for allocation of newly weighted cases. This will take account of any potential conflicts of interest, overlapping or linked cases and the overall current workload of the team and particular skill sets.

75. Once HOE has decided which cases should be allocated to which team, she will alert ETSA. ETSA will then move the cases into the relevant DHOE’s caseload in WorkPro.

76. DHOEs will allocate cases to specific IOs will take place as soon as possible (taking into account the current workload of the team). Allocation will take account of the overall workload of a particular IO, their skill set, any actual or potential conflicts of interest and their past dealings with particular requesters/authorities.

77. DHOEs must review the cases and, if appropriate, add any directions/advice about the investigation to the WP file, e.g.:

    (i) any notes of discussions arising during case allocation meeting e.g. overlapping cases/linked appeals

    (ii) whether a triage note is required to be completed

    (iii) on the need to seek comments/submissions from public authorities. If the public authority was notified of the application before 1 September 2022, a SL08 will need to be sent to seek submissions. If the authority was notified of the application on or after 1 September 2022, it will already have been given an opportunity to provide comments. In this case, the DHOE will advise IO whether, in their view, the IO needs to obtain further submissions from the public authority before coming to a decision.

Case status

78. When a case is transferred to an IO in WP, the person allocating the case must update the case status to “Case allocated to investigator.”

SECTION 4: CASES WHERE NO DECISION REQUIRED

79. Section 49(1) of FOISA set outs the instances in which the Commissioner does not have to reach a decision in respect of a valid application. These are where it appears to the Commissioner that the application:

    (i) the application is frivolous or vexatious; or

    (ii) has been withdrawn or abandoned.

80. In these cases, a determination must (section 49(2) of FOISA) be made within one month of receipt of the application, or within such other period as is reasonable in the circumstances.

Section 49(1) Frivolous or vexatious applications

81. Given the expectation that a determination is made within one month, frivolous or vexatious applications are most likely to be identified on receipt (the HOE/DHOEs review new applications received on a weekly basis) or during the validation process. However, it can also happen at a later date.

82. Where an IO or VO considers an application may be frivolous/vexatious, they should discuss with the HOE/DHOE what steps need to be taken. Comments should be sought from the applicant before such a determination should be made. It might also be relevant to seek comments from the public authority.

83. Account should be taken of the Commissioner's guidance on Vexatious or repeated requests when considering how to deal with such an application.

84. Approval from the SIC, HOE or DHOE must be secured before refusing an application on this basis.

85. Where an application is determined to be frivolous or vexatious, the IO must send:

    (i) SL10a to the applicant – this must set out why the application is frivolous/vexatious. This should be sent by email and signed by the DHOE/HOE. If we do not have an email address, this should be sent recorded delivery, again signed by the DHOE/HOE.)

    (ii) SL10b to the public authority (this is not a formal notice and can be signed by the VO/IO).

Section 49(2) Withdrawn or abandoned applications

Withdrawn

86. It is usually clear when an applicant has withdrawn an application. In many cases we will receive confirmation (either in writing or verbally) that an applicant wishes to withdraw after some discussion with the VO or IO. (See also **SECTION 6: RESOLUTION**.)

87. Where the applicant withdraws an application, send:

    (i) SL05 to the applicant – this must set out why the application is determined to be withdrawn. (This is a formal notice. It can be sent as an attachment to an email. If we do not have an email address, this must be sent by recorded delivery.) The notice can be signed by the IO/DHOE/HOE/SIC (and by the VO where the case has not yet been allocated to an IO).

(ii) SL05b to the public authority, even if it had not previously been made aware of the application. The letter should, where possible, explain what led to the applicant withdrawing their application (e.g. they may have withdrawn following advice from the IO that the Commissioner was likely to find that the information was exempt from disclosure). However, the applicant's data protection rights must be respected. For example, if an applicant withdraws on grounds of ill health, it would not be appropriate to share this information with the PA. Seek advice from the HOE/DHOE if unsure. (This is not a formal notice.)

Abandoned

88. An application may be deemed to be abandoned *at any time during the investigation* if the applicant fails to reply to correspondence from SIC and there is no evidence that the applicant remains otherwise engaged with their application.

89. If an applicant fails to respond to a request for comments etc., this may indicate that they no longer wish to pursue their application for a decision from the Commissioner. Where this appears to be the case, the IO should discuss the case with their DHOE. Where agreed, the IO should write to the applicant (SL04) to ask them to reply within 10 working days, and to warn them that their application may be regarded as abandoned if they fail to do so. The IO may also attempt to contact the applicant by phone or email.

90. If no reply is received from the applicant, send:

(i) SL05 to the applicant – this must set out why the application is determined to have been abandoned. (This is a formal notice. It can be sent as an attachment to an email. If we do not have an email address, this must be sent by recorded delivery.) The notice can be signed by the DHOE/HOE/SIC.

(ii) SL05b to the public authority (this is not a formal notice)

If the application identifies a potential failure on the part of the public authority, the IO must complete the "Issues/Non-compliance" section using the drop down list to indicate the relevant compliance issue. Comments can be added if necessary.

If an IO is carrying out a level 1 intervention (in line with the Commissioner's Intervention Procedures), this should be recorded in the relevant fields in the right hand side of the "Issues/non-compliance" page in WorkPro.

SECTION 5: FAILURE TO RESPOND

91. Where an applicant has complained about a public authority's failure to respond to an information request or request for review, or their failure to respond to a request for review within timescales laid down in the legislation, this will be treated as a Failure to Respond (FTR) investigation.

92. FTR applications are generally validated, allocated to and investigated by a VO.

93. An FTR investigation will only consider the public authority's compliance with the timescales under FOISA/the EIRs; all other procedural failings will be considered as (or as part of) a substantive investigation and allocated to IOs.

94. This means that FTR investigations will not consider whether the applicant should have received any or all of the information they asked for. If the Commissioner finds that the authority failed to respond to a request or a request for review, the decision notice will require the authority to respond to the applicant's request for review. Depending on the response issued, the applicant may then wish to submit a fresh application for decision from SIC.

95. Once validated, the VO must send the SL7a to the applicant to advise them that their application will be treated as a FTR application and explaining that the decision notice will only consider compliance with procedural requirements.

96. The VO must email SL08a to the public authority as soon as possible and, where possible, within one week. The letter gives the public authority 10 working days to reply:

    (i) If no response is received, the VO will draft a decision using the appropriate FTR decision template, finding a breach

    (ii) If a response is received and the VO considers there are sufficient submissions to reach a conclusion, the VO will decide whether to attempt resolution of the case without a decision (see Section 6: Resolution), or draft a decision.

97. Once approved, the VO must follow the procedure as set out in "Issue of decision notice" of this handbook.

98. If no compliance is required, the case should be transferred to ETSA for destruction once decision is published on the website, unless compliance is required.

99. The documents should be transferred by the VO into the new substantive application, if received. A note should be made by the VO in the FTR case file that the documents have been transferred and the electronic version copied into the new file.

If the application identifies a potential failure on the part of the public authority, the IO must complete the "Issues/Non-compliance" section using the drop down list to indicate the relevant compliance issue. Comments can be added if necessary.

If an IO is carrying out a level 1 intervention (in line with the Commissioner's Intervention Procedures), this should be recorded in the relevant fields in the right hand side of the "Issues/non-compliance" page in WorkPro.

SECTION 6: RESOLUTION

100. Section 49(3)(b) of FOISA requires SIC to issue decision notices where settlement has not been effected. This suggests that Parliament expects SIC to take reasonable steps to resolve cases informally. Resolution may be initiated by either party or by the IO (subject to the considerations set out below) at any point during the investigation.

101. Resolution is a process by which one or both parties agree to a course of action, which results in the applicant withdrawing their application for decision.

102. Informal resolution could, for example, include:

- Partial disclosure of information.
- Identification of an alternative/more appropriate route to receive the information e.g. Subject Access Request, access to social work records, etc.
- Additional explanation provided by the PA e.g. explaining why certain information is not held, clarification of misunderstandings.
- Submission of a revised request for information by the applicant.

103. Resolution opportunities can be considered at any point.

104. VOs may attempt to settle a "FTR" case without a decision where this is appropriate (e.g. where the authority has now sent a response).

105. For substantive applications, IOs should consult with their DHOE (or, in their absence, HOE) before resolution/settlement is proposed, and before contacting the applicant to suggest withdrawal of the application.

106. Resolution/settlement may be proposed by either of the parties or the IO. In all cases where resolution is attempted, it is important that the applicant's right to a decision by SIC is protected.

IO proposes resolution/settlement

107. IOs may be able to identify opportunities to resolve an application at any point during the investigation.

108. Paragraph **63** gives examples of the types of situations where cases may be considered as suitable for resolution.

109. In all cases the IO must consider whether there is an overriding public interest in issuing a decision, for example to set a precedent or make it public knowledge that the SIC has made a finding (for or against an authority)

PA proposes resolution/settlement

110. If the PA suggests a settlement to the IO, the IO should assess whether it is in the applicant's and in the public interest to propose it to the applicant, taking into account the types of issues as at paragraphs 102 and 108.

111. If the PA suggests a settlement directly to the applicant, the IO should make the same assessment and advise the applicant accordingly.

Applicant proposes resolution/settlement

112. If the applicant informs the IO by letter or email or during a telephone conversation that they wish to withdraw their application, the IO should review the settlement to confirm that it is in the applicant's interest to withdraw, consulting with the DHOE/HOE/SIC as appropriate.

113. If the IO considers that it is not in the applicant's interest, the IO should contact the applicant (ideally by phone) to advise them of this, and to confirm whether they still wish to withdraw their application.

114. If the applicant raises this unexpectedly during a telephone conversation, the IO should offer to review the proposed settlement and arrange further contact as appropriate.

115. If the applicant is adamant about withdrawing the application, then we should take action to close the application.

Action to take

116. If settlement is agreed and the PA is willing to disclose further information or provide further explanation to the applicant to achieve resolution, the IO should agree a date (no later than three weeks from the agreed settlement) by which the PA should have delivered the terms of the settlement.

117. The IO should ensure that they have confirmation that the terms of the settlement have been met before accepting formal withdrawal from the applicant. If this has not been done, the IO should move to decision, informing both parties that this is what is being done.

118. See **SECTION 4: CASES WHERE NO DECISION REQUIRED** for guidance on notifying the applicant/public authority that the application has been withdrawn.

SECTION 7: UNDERSTANDING THE APPLICATION

Clarifying the application

119. The investigation must focus on those aspects of the PA's handling of the case with which the applicant is dissatisfied (section 47(1) of FOISA). The applicant may have raised matters in their application which were not included in the request for review and therefore cannot be considered by SIC.

120. IOs must therefore ensure that they are clear on the grounds of the application and that these grounds fall within the Commissioner's remit.

121. Once identified, it is important that the grounds are confirmed in writing with the applicant using the SL09. (If the applicant expects the investigation to cover issues which SIC is unable to investigate, this must be made clear to the applicant in the SL09)

Is this actually a new application?

122. If, as a result of seeking clarification with the applicant, the grounds of the application change, the IO should send an updated SL06 to the PA so that it can comment on the revised application. (Clearly, if the PA has already, for example, provided us with withheld information, it will not be required to send it again.)

123. The validation date must also be changed to reflect the receipt of the new application.

The validation date is the date on which a valid application is RECEIVED by the Commissioner, not the date on which we determine it is valid. Where the applicant significantly changes the grounds of their application to the Commissioner, the VO should consider whether this is a new application and, if so, change the validation date.

Seeking submissions from the applicant

124. The IO should invite the applicant to make submissions:

(i) on their legitimate interests where the authority has applied section 38(1)(b) of FOISA or regulation 11(2) of the EIRs (third party data)

(ii) on the public interest in disclosure of the information where the authority has applied an exemption/exception which is subject to the public interest test

if not already provided. These should be sought when confirming the scope of the investigation.

125. Depending on the case, IOs might also find it useful to ask the applicant for comments on other matters raised by the PA. This is addressed in more detail below.

SECTION 8: ASSESSING THE WITHHELD INFORMATION

126. Where it is not possible to establish what information is being withheld by the PA or which provisions are being relied upon by the PA, the IO should alert their DHOE and consider whether an Information Notice should be issued. (If an Information Notice is issued, record this as a non-compliance issue in WorkPro.)

127. The IO must be satisfied that:

    (i) Information withheld was not, at the time of the request, or subsequently, in the public domain.

    (ii) The cost of dealing with the information would not be likely to have exceeded the prescribed amount in the Fees Regulations – the PA may not have raised this issue, but if the cost did exceed £600 it would be ultra vires for SIC to order disclosure of the information under FOISA (nb the different rules for considering whether a request is manifestly unreasonable under the EIRs).

128. If the information is subject to an absolute exemption which the public authority has not relied on, advice should be sought from the DHOE on raising this with the public authority. There may be a legal prohibition on disclosure even in cases where the PA has not recognised this. In some cases it could be a criminal offence for information to be disclosed but the person in the PA dealing with the request is unaware that this is the case.

129. The IO should check whether they agree with the PA's interpretation of the information request: if the IO takes the view that the public authority has interpreted it too narrowly, too broadly or simply unreasonably the PA should be advised of this.

130. Before seeking submissions, the IOs must also ensure that they understand the context of the application. The IO should conduct reasonable research to understand the circumstances within which the request was made.

131. The IO should check previous cases and active investigations for overlapping/connected or substantially similar cases.

132. Equally, where it is clear that an exemption/exception does not apply e.g. erroneously cited by the PA or where the exemption/exception has been clearly misunderstood by the PA, the IO should contact the PA prior to seeking submissions to clarify. The applicant must be advised of any alterations to the exemptions/exceptions relied upon as well as any change to the key reasons why an exemption/exception has been applied.

133. Where additional clarification is required prior to seeking formal submissions, IOs should make telephone contact, if possible, ensuring that an adequate record of the conversation is kept and confirming the outcome/action points arising from any conversation with public authorities or applicants in writing.

SECTION 9: SEEKING FORMAL SUBMISSIONS

IMPORTANT NOTE: EFFECT OF CHANGES INTRODUCED ON 1 SEPTEMBER 2022

On 1 September 2022, we changed the way we ask public authorities to comment on applications.

Before that date, authorities were not asked to comment on the application until the case was allocated to an investigator. This could be some months after the application was made to us.

From 1 September 2022, authorities are asked to provide comments at the point we notify them of a new application – typically, this will be as soon as the case has been validated

This is the opportunity for authorities to provide comments on the case, in terms of section 49(3)(a) of FOISA. Unless, in all the circumstances, we consider it necessary to do so, we will not come back for further comments before completing our investigation. We may, therefore, make a decision – which may be a decision requiring the disclosure of withheld information – on the basis of these submissions alone, and authorities should prepare their comments with that in mind.

Where the authority was notified of the application on or after 1 September 2022, the authority has already been given an opportunity to comment, so IOs must send the "SL08 FROM SEP 22 NOTIFICATION." This letter introduces the IO and can, exceptionally (with DHOE approval), be used to ask the authority additional questions, but it does not perform the same statutory function (inviting comments under section 49(3)(a)) as the original SL08.

The IO should be able to proceed to **SECTION 10: ASSESSING THE SUBMISSIONS** below.

This change will allow us, in the vast majority of those cases, to proceed to decision without seeking additional submissions from the authority. In some of those cases, we will, exceptionally (with DHOE approval), need to ask additional questions to satisfy ourselves whether an exemption has (or has not) been applied properly (and may also have to give the applicant a chance to comment).

However, as above, our general position for those cases will be to proceed to decision on the basis of the review outcome and any comments provided by the authority (even in cases where previously we may have asked additional questions).

In cases where an IO does need to ask additional questions, **APPENDIX 2: KEY QUESTIONS** will be helpful.

Where the authority was notified of the application before September 2022 and for cases received from 1 January 2024, the procedures set out below should be followed.

Formal submissions from the authority

In order to comply with section 49(3) of FOISA the PA MUST be provided with an opportunity to comment

134. Once the IO is clear about the grounds of the application and, where relevant, about the withheld information, the IO must draft and issue the formal letter seeking submissions from the PA (SL08).

135. As soon as the SL08 has been issued, the case status must be changed to "Investigation: waiting on submissions from PA."

136. The purpose of the SL08 is to provide the PA with an opportunity to comment on the application, as required by FOISA. A PA is not required to provide comments in response, but we strongly recommend it.

137. The PA should be advised that SIC will, in the vast majority of cases, proceed to decision on the basis of the authority's review outcome and first response to the SL08, with further comments only being sought exceptionally (with DHOE approval). SIC may, therefore, make a decision – which may be a decision requiring the disclosure of withheld information – on the basis of the first submissions received from the PA, and the authority should provide comments with that in mind.

138. Wherever possible, the SL08 should be issued within 15 working days from allocation. If longer is needed to establish the grounds of application and clarity on the withheld information, the IO should alert their DHOE and discuss whether further clarification is required to seek submissions or whether an Information Notice would be appropriate. (If an Information Notice is issued, record this as a non-compliance issue in WorkPro.)

139. There may also be cases where the IO needs further information from the applicant before sending the SL08 – e.g. if the IO is unsure about the scope of the application or considers that it would be helpful to know more about the applicant's legitimate interests or views on the public interest before contacting the PA.

140. The SL08 should invite comments from the PA on the application and the matters raised by the applicant in line with the requirements for section 49(3)(a), and request any specific information or comment required to produce the recommendations for SIC. This might include questions on whether the public authority has complied with the Section 60 or Section 61 Code.

141. Wherever possible the SL08 should also provide the PA with an opportunity to identify opportunities to resolve the application.

> **Care should be taken with the SL08. The IO must ensure that it is well drafted to allow the PA to provide all the information and submissions which are required to allow SIC to come to a determination without the need to seek additional submissions from the PA. A poorly drafted SL08 will result in a poor response, may be unduly burdensome on the PA and may mean that the investigation will take longer.**

142. Any questions posed in the SL08 must be **CLEAR** and **RELEVANT**. Wherever possible, open questions should be used, so that answers are not suggested to the PA.

143. IOs should refer to the Appendix 2 when preparing the SL08. However, this document is only a guide so the questions **MUST** be altered and supplemented to suit the particular circumstances of the case. In many cases, rather than providing the PA with a long list of questions, it will be appropriate to refer the PA to SIC's **briefings and guidance** and ask them to respond in line with the tests set out in the briefings.

144. Before posing questions in the SL08, the IO should consider whether these tests have been met in the PA's review response. Depending on the quality of the review response, it may be sufficient simply to issue a letter providing the PA with an opportunity to provide additional

comments and inviting it to rely on the reasoning provided to the applicant in its review outcome.

145. Unless obvious from the nature of the information requested, the searches undertaken to locate information and the information identified, the PA must also be asked to supply details/descriptions of the searches undertaken to locate the information falling within the scope of the request and to explain why it considered them to be sufficient.

146. In some cases, it may be appropriate to seek information on the internal handling of the request.

147. Where a PA has cited multiple exemptions/exceptions in relation to the same information, it may not always be necessary to fully consider each exemption/exception in reaching a decision. If it is clear that an absolute exemption should be upheld, there is normally no need to consider whether any other exemptions should also be upheld. IO should take this into account when drafting the SL08.

148. Where there are multiple documents, the IO should consider seeking submissions in a tabular form.

149. All questions in the SL08 must be numbered to ensure that a response is made to each point.

150. When referring to the documents/information, IOs must use the numbering/references of the documents/information used by the PA in the schedule of withheld information to identify the information. These references must remain consistent throughout the investigation.

151. Where SIC is investigating a number of connected cases involving the same PA, and submissions have already been provided in relation to a connected case, the PA should be provided with the opportunity to rely on submissions already made. Care must be taken to ensure, in all cases, that the PA is provided an opportunity to make submissions specific to each application.

152. If the application includes an allegation that a criminal offence may have been committed under section 65 of FOISA/regulation 19 of the EIRs, the SL08 should not normally ask about the allegation. (In most cases the allegation will have been redacted from the version of the application sent to the PA.) If in any doubt, seek advice from the HOE/DHOE.

153. The SL08 can sent by email.

The IO should consider contacting the PA on the day of issue by telephone to alert the PA to the requirements of the SL8 and highlighting any possible grounds for resolution.

154. The SL08 should give the PA 10 working days (15 working days if the IO considers the case to be complex) to provide formal submissions. Where an authority asks for additional time to respond beyond the time set in the SL08, the IO should discuss any extension with the HOE/DHOE. The PA should be asked why the delay is being sought and how long it considers it needs to provide the submissions before the extension is discussed with the HOE/DHOE.

155. In some instances, it may be more appropriate for IOs to seek submissions from the PA in the form of an information notice (see **SECTION 18: INFORMATION NOTICES**). These

cases will generally be identified by the DHOE prior to allocation. (If an Information Notice is issued, record this as a non-compliance issue in WorkPro.)

156. If the PA decides not to provide comments, it won't always be necessary to issue an information notice. Where the review response from the PA is insufficient to allow SIC to come to a determination (e.g. where we are dealing with "information not held" or excessive cost cases), additional submissions may be required. However, there may be cases where it is possible to find that the PA has failed to satisfy SIC and to issue a decision ordering it to take particular action. IO should alert such cases to their DHOE to discuss the way forward

157. If the PA fails to respond within the timescale set out in the SL08 the IO should, within two working days, contact the PA noting that no submissions have been received and advising the authority that unless comments are made within one week, SIC will move to a decision.

158. As soon as a substantive response is received to the SL08 (or the PA tells us that it does not wish to comment on the application), the case status should be updated to "Investigation ongoing," The case will remain at "Investigation ongoing" until the draft decision is submitted for first level approval, even if further submissions need to be sought from the PA.

Seeking comments from the applicant

159. During the investigation, it may be appropriate to give the applicant an opportunity to provide additional comments, particularly where the IO considers that it would help to determine, for example, the balance of the public interest. Paragraphs 182 to 184 below deal with notifying applicants where an authority changes its approach or applies new exemptions/exceptions during an investigation.)

160. When contacting the applicant, the IO must bear in mind section 45 of FOISA, which makes it a criminal office in some circumstances for information to be disclosed (in many cases it will be possible to seek additional comments from an applicant without providing a summary of the authority's submissions).

161. Generally, while complying with section 45, the IO should consider whether to seek comments from the applicant on any information which is received from the authority during the course of the investigation which appears to be material to the investigation and of which the applicant is not aware. It will not usually be necessary to summarise a public authority's comments for an applicant to comment on unless it is clear that the applicant has something to add to the investigation. If the IO has any doubt as to whether to ask the applicant for further comment, advice must be sought from DHOE.

Section 45

(1) A person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner must not disclose any information which-

(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of this Act; and

(b) is not at the time of disclosure, and has not previously been, available to the public from another source,

unless the disclosure is made with lawful authority.

162. IOs must indicate a timescale within which the applicant should reply to any request for comment or information (usually a maximum of 10 working days). An investigation should not be unnecessarily delayed simply because an applicant fails to reply. If the applicant fails to reply, the IO should consider whether the procedures relating to abandoned applications should be followed or whether it is appropriate to issue a decision.

163. While complying with section 45, for natural justice reasons (and in order to reduce the likelihood of a challenge against the decision), the IO should consider seeking comments from the PA on any information received from the applicant in the course of the investigation, which appears to be material to the investigation and of which the PA is not aware.

164. Additionally, if, as a result of research carried out by the IO, the IO comes to the view on a material matter which is not known by, or may not be known by the PA, the research should be shared with the PA and the PA must be given an opportunity to comment on the results of the research. In many cases, it will also be necessary to given the applicant the opportunity to comment.

Updates during the investigation

165. At the start of the investigation, we tell applicants that the IO should keep them up to date during the investigation. This will be at the discretion of the IO, but applicants should be advised when important steps are taken in the investigation (e.g. an information notice is issued or a meeting takes place with the authority) or if there have been significant delays. In general, applicants should never go more than two months without contact from the IO.

166. When answering a request from an applicant, it may be helpful to remind them that we publish a list of current applications on our website: **Current Applications (itspublicknowledge.info)**.

Meetings with PAs

167. Where there is continued difficulty in obtaining clear submissions from the PA (which may be due to the complexity or volume of information or history of communications between the PA and the applicant), the IO should consider arranging a meeting directly with the PA, to view systems and to achieve clarity on the context of the request or to gain an understanding of how information is stored and managed by the PA (e.g. section 12/17 or regulation 10(4)(a)/(b) cases).

Contact with a third party

168. On limited occasions it may be necessary to contact a third party e.g. to provide expert advice on a particular subject. An IO must obtain DHOE approval before contacting any third party for advice. The approval of the HOE must be sought where seeking advice would have cost implications.

169. In contacting third parties, IOs must take account of section 45 of FOISA.

170. Section 45 does not prohibit us passing information to SIC's solicitors or other legal representatives in order to obtain legal advice or in connection with an ongoing case. Any such contact will be made by HOE (or, in the HOE's absence, by SIC or a DHOE).

Abandoned applications

171. Under section 49(2) of FOISA, SIC has one month, or such other period as he considers reasonable, from receipt of the application to decide whether the application has been

withdrawn or abandoned. In practice, an application may be deemed to be abandoned at any time during the investigation if the applicant fails to reply to correspondence from SIC and there is no evidence that the applicant remains engaged with their application.

172. If an applicant fails to respond to a request for comments, etc. from SIC, this may indicate that they no longer wish to pursue their application for a decision from SIC. Where this appears to be the case, the IO should discuss the case with their DHOE. Where agreed, the IO should write to the applicant to ask them to reply within 10 working days, and to warn them that their application may be regarded as abandoned if they fail to do so. The IO should attempt to contact the applicant by telephone or email.

173. If no reply is received from the applicant, the IO should discuss the way forward with the DHOE. It may be possible to issue a decision without the comments from the applicant. However, if the DHOE agrees that the appropriate approach would be to treat the application as abandoned, the IO must send:

(i) SL05 to the applicant, advising the applicant that SIC has determined that no decision falls to be made as the application has been abandoned, and giving reasons for this determination. (This can be emailed and must be signed by DHOE/HOE.)

(ii) SL05b to the public authority, advising that the application has been treated as abandoned. (This is not a formal notice and does not need to be signed by the DHOE/HOE.)

SECTION 10: SUBMISSIONS

Records management

174. Once submissions have been received from the PA, these must saved into the WP file using the following naming convention (YYYY/MM/DD – SUBMISSIONS PA (followed by a brief description of content. For example: *2022 02 28 SUBMISSONS FROM PA: PUBLIC INTEREST TEST*).

175. Any additional withheld information supplied at this stage must be separated from the PA's submissions, renamed (with 'WITHHELD INFORMATION" using upper case in the title) and saved independently in the WP file for ease of destruction at a later point.

Assessing the submissions

176. As soon as possible after the receipt of submissions, the IO must:

    (i) check that the comments from the PA are relevant and specific to the information withheld

    (ii) identify any new matters or exemptions/exceptions that were not raised in the PA's correspondence with the applicant. Paragraphs 180 to 184 below deal with notifying applicants where an authority changes its approach or applies new exemptions/exceptions during an investigation.

    (iii) identify areas where further evidence or information is required in order to answer the questions raised by the application – this may involve further research or further comments being sought from the PA and/or applicant.

177. The IO must consider whether or not the PA has provided enough information to show whether or not the tests relevant to each exemption/exception have been satisfied. IO can refer, among other things, to the following resources to help them reach a recommendation:

    - SIC's briefings on any of the exemption/exception cited;
    - Precedent from previous decisions;
    - Legal Advice obtained by SIC (see VC106021)
    - Legal Information resources in SIC library and on LINETS (IOs without access to LINETS can ask colleagues with access to carry out research on their behalf)
    - Research in media and other external resources, particularly on potential harm and the public interest.
    - Information Tribunal (particularly Upper Tribunal) and other court decisions.

178. IOs should carry out a proportionate level of research into the broader issues relating to the case, to understand the context in which it sits, and to allow informed critical assessment of the submissions provided by the PA.

179. Where a PA has cited multiple exemptions/exceptions in relation to the same information, it may not always be necessary to fully consider each exemption/exception in reaching a decision. If it is clear that an absolute exemption should be upheld, there is normally no need to consider whether any other exemptions/exceptions cited should be upheld. Similarly, there may be no need to consider all the exemptions/exceptions cited by the PA if it

becomes clear that the information should be entirely withheld under a qualified exemption/exception and that the public interest lies in maintaining the exemption/exception.

Public interest

180. If relevant, the IO must consider whether the PA has:

    (i) provided enough information to consider both sides of the public interest test and

    (ii) weighed the public interest in disclosure against the public authority in maintaining the exemption.

181. If, when dealing with EIRs cases, more than one exception applies to the same information, the PA must have been given an opportunity to provide arguments on the cumulative public interest test (**see** **EIRs public interest test guidance**).

Where a PA changes its position during the investigation

182. The IO must consider what to do if the PA applies new exemptions or exceptions during an investigation or if it changes its approach to the request during an investigation (for example, a PA which originally notified an applicant it did not hold information, might locate the information during the investigation, but might want to apply exemptions).

Third party data: legitimate interests assessment (LIA)

172. Where the PA is withholding third party personal data under the first condition in section 38(1)(b) of FOISA or regulation 11(2) of the EIRs, the IO is likely to have to carry out a legitimate interests balancing exercise under Article 6(1)(f) of the UK GDPR.

173. An LIA template has been set up in WorkPro ("LIA (Investigations"). The guidance in the template must be taken into account when determining where the balance lies. The IO may also choose (or be asked) to complete an LIA where the case is finely balanced.

Change in approach – grounds for dissatisfaction no longer relevant

174. Where the PA change in approach means that the grounds for dissatisfaction in the application are no longer relevant to the case, the best approach is likely to be for the IO to draft a decision requiring the authority to issue a new review response in terms of section 21(4)(b) or regulation 16(3). The IO should notify the applicant of the approach being taken before the decision is issued to explain why this is being done.

New exemptions/exceptions applied

175. Where a PA applies a new exemption (or exception) during the investigation, the applicant must be informed and given an opportunity to comment wherever comments from the applicant could be material to the outcome.

176. Comments may not be "material" (meaning the applicant doesn't need to be consulted) where the IO is satisfied that an absolute exemption originally applied by the PA applies.

Example:
• at review, the PA applied the absolute exemption in section 25(1) (Information otherwise available) • when providing us with comments, the PA also applies the exemption in section 36(1) (Confidentiality)

- if the IO is satisfied that section 25(1) applies, there is no need to consult the applicant on section 36(1)

Significant amount of additional information located during the investigation

177. If the PA discovers a significant amount of additional information during the investigation, the best approach is likely to be for the IO to draft a decision requiring the PA to issue a new review response under section 21(4)(b) of FOISA or regulation 16(3) of the EIRs.

Uncooperative public authority

178. If, at any point during the investigation, the IO becomes concerned that the PA is not being open and honest about the information it holds, or is being uncooperative or obstructive, the IO should discuss the case with DHOE or HOE. (Note that this should be recorded as a non-compliance issue.)

Offences

179. If the IO has reason to believe a section 65/regulation 19 offence may have been committed, the matter must be referred immediately to HOE/DHOE. The IO must take no further action until instructed to do so.

SECTION 11: TRIAGE

When will triage be required?

180. When a case is allocated to an IO, the HOE/DHOE will notify the IO whether triage is required to be carried out. Generally, triage:

    (i) will not be required for cases weighted 1 SIC, 1 HOE, 1 DHOE OR 1 IO

    (ii) may be required for cases weighted 2 HOE

    (iii) will be required for cases weighted 2 SIC OR 3 SIC

181. The HOE/DHOE will update the WP case file (using the "case alert" tool in "case actions") to note whether triage is or is not required.

Action when triage is required

182. Once sufficient submissions have been received from the PA and considered by the IO, the IO must prepare a note for their DHOE (Triage), using the template in WP. This should only be prepared when the IO is satisfied that there are no obvious gaps in the PA's submissions.

183. The IO should submit a triage note to their DHOE as soon as possible or as agreed with their DHOE.

184. The purpose of triage is to alert the DHOE to any significant issues with the case, to confirm that the investigation is heading in the right direction and to ensure that appropriate advice and guidance is provided sooner rather than later. Triage will also allow the DHOE to identify applications which may require input from SIC/HOE at an early stage.

185. When drafting triage notes, IOs should:

    (i) reproduce full details of the request, response, etc. **only** where it is necessary for the DHOE's understanding of the case.

    (ii) provide a **brief** background or context to the request, including keys dates (e.g. date of award of a tender), website links and details of any overlapping/linked or similar cases.

    (iii) **summarise** or list the key points of the submissions by <u>both</u> parties.

    (iv) when referring to a specific document, make sure it can be easily located by the DHOE

    (v) highlight the key areas for consideration

    (vi) indicate areas where there are potential gaps in the arguments supplied

    (vii) provide a view on the proposed outcome and/or next steps.

    (viii) highlight any possible scope for resolution.

    (ix) set out, in numbered questions, the advice sought from the DHOE

    (x) alert the DHOE that the triage note is ready.

186. When completing triage notes, DHOEs will:

(i) aim to provide comments within one week (if the case is complicated, the DHOE and the IO will agree a timescale)

(ii) add their comments/advice to the note

(iii) seek comments/advice from HOE/SIC where required

187. Where the case is weighted 1 SIC, 2 SIC or 3 SIC, the DHOE will:

(i) advise SIC (cc'ing the HOE) that the triage note is ready. Where the triage note has been copied to SIC, or where SIC asks to seek the triage note, no further action should be taken on the case until SIC has commented on the note unless the case has been resolved in the meantime

(ii) at the same time, ask the IO to arrange a meeting with the SIC to discuss the case (if SIC decides a meeting is not necessary, the meeting can be cancelled)

Post-triage resolution

188. Where, following triage, it is clear that the SIC would not uphold the application of a particular exemption/exception/provision, IOs should (where considered appropriate) contact the PA to inform them of the likely outcome of the investigation (or part of investigation). This should be supplemented with examples of precedent and an explanation provided as to why this conclusion was reached. The investigation should continue, as required, but the PA should be provided with an early opportunity to disclose the information to the applicant.

189. Alternatively, where it is clear to the DHOE that the SIC would uphold the approach taken by the PA, the IO should contact the applicant to advise them of the likely outcome of the investigation and, where appropriate, ask them if they wish the Commissioner to issue a decision.

SECTION 12: DRAFTING A DECISION NOTICE

Records management

190. Where resolution has failed, or is not appropriate, the IO must draft a decision notice. All decision notices are prepared in VC and not in WP.

191. The appropriate decision template file must be used and

    (i) saved in the sub category “Investigation” in the “Enforcement” file and categorised as “Decision”

    (ii) named as follows “Draft Decision/Applicant and Public Authority (using full title to help with searches)/WP number” (e.g. Draft Decision John Smith and Scottish Public Services Ombudsman 201900132).

Submitting draft decisions for approval

192. When submitted for formal approval, the draft should be in a form which, if approved, could simply be signed and issued. IOs should not, unless directed to do so, submit drafts for approval that are incomplete. Guidance can be sought from DHOEs on sections of the drafts prior to formal submission.

193. Detailed guidance on drafting decision notices can be found in Appendix 3.

194. At the point of submission, IOs should ensure that:

    (i) the WP file is fully up to date

    (ii) the documents in the file are named in a way which makes it easy for the approver to follow the investigation and, in particular, to identify easily the main documents

    (iii) the withheld information under consideration is clearly labelled and any information which is recommended for disclosure is easily identifiable: where there is more than one version of the withheld information, it must be clear to the approver which is the up to date version.

195. Draft decision notices should be annotated using the “insert comment” facility in Word to provide approvers with a quick and direct access to the submissions, information or evidence investigators are referring to or relying on when drafting decision notices. See guidance in the box on the next page:

Annotating draft decision notices

Adopting the following practice allows approvers to quickly access the relevant information in the red file.

1. **Hard copy information in red file**

   Add tabs to all of the key documents you will be making reference to in the draft decision notice, particularly where it has been necessary to obtain additional submissions from either party. For example:

   - PA Subs1 19/08/16
   - PA Subs2 03/09/16
   - PA evidence of third party consultation
   - APP subs 12/08/16
   - PA Evidence of searches 19/08/16

2. **Draft decision notices – references to information (submissions, information, supporting evidence, etc.)**

   When drafting a decision and referring to or relying on any information obtained during the investigation, use the “new comment” function in the “review” tab to pinpoint exactly where the information you are referring to is recorded.

   The level of detail in the comments box will depend on the document you are referring to, for example:

   - PA Subs 1, Q3
   - PA SUBs 2, Page 1, Paras 3-4

SECTION 13: APPROVAL

196. All decisions are required to go through a two-stage case approval except for:

    (i) cases weighted 1

    (ii) any case where SIC carries out first level approval

    (iii) other cases where the SIC considers that one level of approval is sufficient.

First level approval

197. The draft decision notice is submitted to the first level approver (identified at case allocation) using the WorkPro approval system. The IO must:

    (i) complete the "summary" box by inserting a copy of the decision summary

    (ii) complete the "notes" section. The note must include:

        (a) the next relevant KPI target date. (The KPIs here are the Enforcement Team KPIs, not the KPIs set for individual officers – see VC102035.)

        (b) any issues to be brought to the attention of the approvers. Given the restrictions imposed by section 45 of FOISA, it is not always possible to explain in detail reasoning within the decision notice itself. This type of information should be included in the covering note.

        (c) any issues that might impact on when the decision notice is issued, with reference to relevant documents or other information (see **paragraph 217** for more information).

198. At the same time, the IO should change the case status to "Decision submitted for first level approval."

199. The first level approver will aim to carry out first level approval in a reasonable period, taking into account other work, the age of the case and any relevant KPIs. The first level approver will consider whether the draft decision is:

    (i) lawful,

    (ii) reflects an investigation carried out in accordance with these procedures and what has been agreed at triage/case management meetings,

    (iii) follows VI guidance in relation to spelling, grammar and equalities approach to writing (see VC78433) and is

    (iv) generally at the standard required by SIC.

200. Further work may be required by the IO at this stage, before the first level approver is satisfied that the draft decision is ready to be passed for second level approval.

201. Where the outcome of the decision has been altered, the case must be returned to the IO for review.

Second level approval

202. The first level approver will consider whether the case is "red" or "white" before passing the draft decision on for second level approval. "Red" cases are those where the second level

approver needs to read the casefile, documentary evidence and other background information, usually because the case is sensitive, complex or raises new issues of interpretation. "White" cases are ones where the approver only needs to review the decision.

203. On submission to SIC/HOE for second level, the first level approver must, via WorkPro:

    (i) notify the second level approver if the decision is likely to attract media attention

    (ii) state the next KPI target date.

    (iii) set out any issues that could have an impact on when the decision notice is issued and/or published (see **paragraph 217** for more information).

204. The approval email in WorkPro is automatically circulated to a number of people in the organisation. Consequently, it should not contain any negative commentary on the quality of the draft, etc.

205. At the same time, the first level approver should change the case status to "Decision submitted for first second approval."

206. In very sensitive or high profile cases, the first level approver should contact the P&I team in advance of the decision notice being issued to discuss whether a strategy needs to be put in place for responding to media enquiries.

207. The second level approver will aim to carry out second level approval in a reasonable period, taking account other work, the age of the case and any relevant KPIs. The second level approver will also check that the draft decision is:

    (i) lawful,

    (ii) reflects an investigation carried out in accordance with these procedures and what has been agreed at triage/case management meetings,

    (iii) follows VI guidance (VC46473) in relation to spelling, grammar and equalities approach to writing and is

    (iv) generally at the standard required by SIC.

208. Again, given that the approval email in WorkPro is automatically circulated to a number of people in the organisation, it should not contain any negative commentary on the quality of the draft, etc.

SECTION 14: ISSUE OF THE DECISION NOTICE

Issuing the decision

209. Decisions should be sent by email unless we do not have an email address. It is unlikely that an authority will not have an email address. If an applicant does not have an email address, the decision should be sent by recorded delivery to the applicant, but should be emailed to the authority. Where decisions are emailed, hard copies do not need to be sent.

Delaying the issue of decisions

210. The presumption is that decisions will be issued as soon as they are ready (or within two or three days to allow us to complete the necessary processes). Any additional delay should be exceptional and properly noted by the IO in a file note.

211. Reasons to delay might include (this is not exhaustive):

    (i) the applicant has requested it, and we agree. For example, the applicant may tell us that they are going to be on holiday and will be unable to receive the decision at the same time as the authority – this could affect their appeal rights.

    (ii) there are legal or other restrictions in force. For example, in the run-up to the Scottish Independence Referendum, the Scottish Independence Referendum Act 2013 made it unlawful for SIC to publish information which dealt with any of the issues raised by the referendum question.

    (iii) issuing immediately would create unreasonable operational challenges for us, due, for example, to the absence of key personnel.

212. The applicant and authority should be updated about any delay. The HOE will approve all communications in relation to delay or potential delay where the delay is as a result of legal or other restrictions in force.

Finalising the decision and covering letters: the approver

213. Once approved, the approver will:

    (i) Add the decision number to the decision (the 2022 list of decision numbers is in VC161596; the 2023 list in VC176775)

    (ii) Add their electronic signature to evidence that the decision has been approved

    (iii) Record, as part of the WP approval, which version of the draft decision is being approved – e.g. v4 of VC12345 (in most cases, this will be the last time the approver sees the decision before it is issued)

Finalising the decision and covering letters: the IO

214. The IO who investigated the case should usually be the person who carries out the following steps. (This may not be possible if the IO is absent from work for more than a couple of days or if delaying the issue of the decision would fail a KPI.)

215. Once the decision has been approved in WorkPro, the IO should:

    (i) Add the issue date to the decision and rectify any formatting errors before creating the final version (ask ETSA if you have any questions)

(ii) Prepare the covering letters (save in the "DN" folder in WP) – these are no longer signed by the approver

(iii) Where the decision requires the authority to take specific action, add the compliance date to the decision. Court rules require us to give public authorities at least six weeks (42 calendar days) to comply with a decision. In practice, we give at least 45 calendar days (it helps to calculate this as six weeks plus three days) from the date the decision is issued. If the 45th day falls on the weekend or on a public holiday, the authority should be given until the following working day to comply. Additional leeway may also be given over Christmas and Easter holidays or where the amount of information requiring to be compiled and disclosed means it may be difficult for the authority to comply within 45 days. (Authorities must not be given more than 50 days to comply with the agreement of the HOE.)

(iv) Save a final version of the decision in VC:

(a) Right click on the decision and choose the Duplicate\File again

(b) Save the new document using the following naming convention: 2022 10 16 Decision 123/2022 John Smith and Scottish Ministers 202100161

(v) Check that the public authority's details, including the name of the current Chief Executive (or equivalent) are correct.

Emailing the decision – notifying the ETSA

216. Once the decision and covering letters are ready, the IO should email ETSA (and, where a marked-up version of the withheld information to be disclosed is to be sent to the authority along with the decision, the HOE/DHOE) asking them to issue the decision. The IO must use the "Joint DIRF/website form" (WorkPro template) to give ETSA (and, where appropriate, the HOE/DHOE) the contact details of the applicant and public authority, date of issue, etc.

217. The ETSA (and, where appropriate, the HOE/DHOE) should be given as much notice as possible that a decision notice requires to be prepared. In some cases, particularly where there is a high volume of decisions being issued, the ETSA (and, where appropriate, the HOE/DHOE) may ask for the issue of decision to be delayed until the following working day.

ETSA

218. The process will depend on whether a decision will be issued by email or by recorded delivery. In practice, it is expected that most decisions will be issued by email.

219. The table below sets out what actions the ETSA will carry out when decisions are to be emailed:

Decision notice	• Check the decision for any obvious formatting issues. If in doubt, speak to the IO/DHOE. • Save a pdf of the final version of the decision on their desktop
Covering letters	• Check the covering letters for any obvious formatting issues. If in doubt, speak to the IO/DHOE.

	• Save pdfs of the covering letters on their desktop
Emailing the decision	• Email the pdf of the relevant covering letter along with a pdf of the decision to the applicant request read and delivery receipts). • Email the pdf of the relevant covering letter along with a pdf of the decision to the authority FOI contact and ask them to bring the letter to the attention of their chief executive (request read and delivery receipts) • **NOTE: if a marked up version of the information to be disclosed is to be sent to the authority along with the decision, it is the HOE's/DHOE's responsibility to send the email to the authority. Before sending the email, the HOE/DHOE must check that the version of the information to be sent is the correct version. In line with normal practice, the ETSA will send the decision to the applicant. It is important that the ETSA and HOE/DHOE coordinate the issue of the decision so that they are sent out around the same time. HOE/DHOE should forward the read/delivery receipts to ETSA.**
WorkPro	• Attach the emails with the decision and covering letter to the WorkPro file (to the "DN" folder), lock the emails and mark them as sent • Attach any read/delivery receipts to the WorkPro file (to the "DN" folder) • Destroy earlier versions of the covering letters in the WorkPro file • Add the VC reference of the final version of the decision to the WorkPro file
Desktop	• Delete the pdfs of the letters and decisions saved on their desktop
Updating the IO	• Notify the IO that the decision has been issued
Further correspondence	• If either party acknowledges receipt, file the acknowledgement in the "DN" folder • If ETSA receives correspondence from either party which more than a straightforward acknowledgement, forward the correspondence to the IO straight away.

Decisions issued by recorded delivery

220. Where we do not have an email address for the applicant, the ETSA (or a member of CST) will print off one copy of the signed decision and a copy of the letter to the applicant. (The decision will be emailed to the authority in the usual way.)

221. ETSA (or member of CST) will then:

(i) staple the decision

(ii) arrange for the decision notice to be sent recorded delivery

(iii) complete the mail out book and the RD book

(iv) lock the covering letters in the WorkPro file and mark them as sent

(v) notify the IO that the decision has been signed.

After the decision is issued

222. Once notified that the decision has been signed, the IO will:

(i) create an anonymised version for publication:

(a) open the decision as "Read only"

(b) use the "Save as" function to create a new document on their desktop

(c) select the "Add-Ins" tab and use the "Send to VC" function.

(d) use the "Index in VC" function and save the new document in the correct categorisation in VC, using the following naming convention: 2022 10 16 Decision 123/2022 ANON Applicant and Scottish Ministers 202100161.

Remember that other information, as well as the name of the applicant, will often have to be redacted in order to anonymise a decision and to prevent the identification of other individuals such as family members or neighbours. It is the responsibility of the IO to do this. Advice can be sought at any time from the HOE/DHOE.

(ii) complete the relevant fields in WorkPro and move the file onto the "Decision Notice" workflow

(iii) create tasks in WorkPro to:

(a) check compliance with decision notice (if relevant)

(b) close the case (subject to Appeal)

(iv) complete and send the DRU form using WorkPro

(v) mark the draft decision for destruction in VC

Publication of decisions

223. ETSA will aim to publish the anonymised version of the decision around a week after the date of issue (unless a separate timescale has been agreed).

224. The approver must consider whether to arrange for the decision to be published earlier. For example, if the decision is about a high-profile matter that is likely to receive media attention,

it may be in the public interest to publish the decision when it is issued or when we know the parties have received the decision.

225. The procedures for publishing decisions are set out in full in the Website Manual.

Identifying withheld information in the WorkPro file

226. It is the IO's responsibility to ensure that any withheld information contained in the WorkPro file is clearly marked as such – including withheld information contained with the body of submissions – and is saved in the "Withheld information" folder. This will allow the ETSA to clearly identify and destroy the withheld information at the appropriate time. ETSA will only destroy information in the "Withheld information" folder.

Concerns raised by applicants or public authorities

227. In some cases, the applicant or the public authority may seek further clarification of SIC's decision because they do not understand it or do not agree with it. The IO will seek to provide that clarification, but, given the possibility of an appeal to the Court of Session, must not enter into detailed discussions with either the applicant or public authority. IOs should use the standard template letter in responding to post-decision queries.

228. SIC's complaints procedure makes it clear that the Commissioner cannot accept complaints about the outcome of decisions.

SECTION 15: CHECKING COMPLIANCE AND CLOSING THE CASE

Compliance required

229. The IO will check compliance with the public authority and applicant on the first working day following the compliance date, unless confirmation of compliance has been received prior to this.

230. In most cases verification should be possible on the basis of a confirmation letter and document schedule sent to the applicant, combined with the applicant's confirmation that these have been received. There will be cases (e.g. partial disclosures) where the actual information disclosed to the applicant requires to be seen. Where the disclosed information has been posted on the authority's website, a link to the relevant pages will generally be sufficient.

231. If compliance is confirmed, the IO will issue compliance letters and record the date of compliance in the WorkPro file. Assuming the appeal period has passed, the IO should close the WorkPro file at this point.

232. If compliance is not confirmed and no appeal has been lodged, the IO must notify DHOE/HOE.

No compliance required

233. The IO should close the WorkPro case file on the expiry of the appeal period. The IO should ensure at this point that the withheld information is CLEARLY highlighted within the WorkPro file for ease of destruction by the ETSA. This also applies to cases closed during the course of the investigation.

234. If the information or documentary evidence is to be returned to the public authority/applicant this must be clearly marked on the front of the hard copy case file and a note in the WorkPro file – this includes any information received DURING THE COURSE OF THE INVESTIGATION.

No appeal

235. If no appeal is received within three months from decision issue date, the ETSA will destroy documentary evidence and the contents of the paper file, with the exception of:

    (i) any information either party has asked to be returned (which will include original documents)

    (ii) information provided on media including memory sticks, CDs and DVDs, which will be returned to the relevant party.

236. The ETSA will ensure the deletion of any documentary evidence/other information to be destroyed from the WorkPro file. The ETSA will add a note to the WorkPro file recording the destruction of the contents of the file/evidence.

Remember that, if the application identifies a potential failure on the part of the public authority, the IO must complete the "Issues/Non-compliance" section using the drop down list to indicate the relevant compliance issue. Comments can be added if necessary.

If an IO is carrying out a level 1 intervention (in line with the Commissioner's Intervention Procedures), this should be recorded in the relevant fields in the right hand side of the "Issues/non-compliance" page in WorkPro.

Appeal

237. If the IO is notified by the public authority or the applicant that an appeal is likely, the IO must notify HOE and add a note to the WorkPro file.

238. If an appeal is received, the IO must:

    (i) notify DHOE/HOE immediately

    (ii) transfer the case in WorkPro to the DHOE/HOE immediately (HOE to confirm)

    (iii) arrange for a hard copy of the file to be prepared (to be sent by HOE/DHOE to SIC's external solicitors).

239. See also **SECTION 16: APPEAL TO THE COURT OF SESSION**.

SECTION 16: APPEAL TO THE COURT OF SESSION

240. When an appeal has been received, HOE will (or the DHOE will, on the instructions of the HOE):

(i) notify SIC, the IO, both DHOEs and the P&I Team

(ii) ask CST to update the decisions database

(iii) contact our external solicitors immediately to check there is no conflict. If they are conflicted, HOE will discuss, with SIC, which solicitors to instruct.

(iv) send the solicitors to be instructed a copy of the file, including any withheld information (solicitors acting on our behalf are SIC's agents and so are subject to the criminal sanctions for the unlawful disclosure of information)

241. A meeting may be necessary to determine whether the appeal should be defended. In most cases, this will involve counsel or a solicitor-advocate (to be instructed by the external solicitors, with the agreement of HOE and SIC).

242. The IO is likely to be asked to accompany HOE and SIC to meetings with the external solicitors and to the hearing at the Court of Session and to provide other, general, assistance with the case.

243. Once the outcome of the court case is known, HOE will:

(i) note the outcome of the case on WorkPro

(ii) ask CST to update the note on the online version of the decision notice, where relevant, adding a link to the judgment

(iii) update the list of court appeals in VC35234

244. On the outcome of the case, HOE will consider whether procedures/guidance needs to be updated to take account of the judgment.

SECTION 17: ENFORCEMENT OF THE DECISION NOTICE

Checking compliance

245. If the public authority has not complied with the steps required in the decision notice, under section 53(1) the Commissioner has the right to refer the case to the Court of Session as soon as the time for compliance has passed. However, the following steps will normally be followed before a referral is made unless the public authority has advised us that it does not intend to comply with the decision notice or, if in the HOE's view, it is reasonable to refer the matter to the Court of Session straightaway.

246. The IO should prepare SL20. This reminds the public authority that they have a duty to comply with the decision of the SIC and that failure to do so is likely to lead to the matter being referred to the Court of Session. The letter must be emailed to the Chief Executive, or equivalent (and a copy sent to the authority FOI contact). The public authority will be given five working days to comply with the decision. The letter will be signed by HOE.

247. If, after 10 working days, the authority has still not complied, the IO must advise the HOE. Depending on the circumstances, HOE may ask the IO to prepare SL21 to the public authority, requiring them to comply with the decision notice within five working days. The letter must be emailed to the Chief Executive or equivalent and be signed by the SIC (and a copy sent to the authority FOI contact).

248. HOE will discuss the matter with SIC and, where appropriate, instruct our solicitors to begin proceedings and to refer the matter to the Court of Session.

249. Where the public authority only partially complies with the decision notice, the steps set out above should be taken, unless the public authority has advised us that it does not intend to comply with the remainder of the decision notice. However, the IO should also contact the applicant to find out their views on the partial disclosure of information as this will be taken into account in deciding whether to refer the matter to the Court of Session.

250. Once the case is complete, any decision issued by the Court will be published on the SIC decisions database.

Ministerial certificate

251. The above steps will not apply where the First Minister has issued a ministerial certificate.

252. Where a certificate is issued, HOE will:

    (i) alert SIC and the P&I team immediately

    (ii) advise SIC on whether the certificate is valid

SECTION 18: INFORMATION NOTICES

253. SIC can issue an information notice if information is required from a Scottish public authority (section 50). The notice can seek both recorded and unrecorded information.

254. If an Information Notice is issued, record this as a non-compliance issue in WorkPro.

255. The content of the information notice will depend on why the information is sought, so the correct templates must be used:

    (i) information sought as part of a section 47(1) application: SL27

    (ii) information sought to determine if an authority is complying with FOISA or the EIRs: SL28

    (iii) information sought to determine if an authority is complying with the Codes of Practice: SL29

256. A pdf of the information notice must be emailed to the authority FOI contact, with a request that it be brought to the attention of the Chief Executive (or equivalent) of the public authority.

Information required for investigation of an application

257. Where SIC has been asked for a decision under section 47(1), the VO/IO will almost always require information from the authority to assist with the investigation. Where the VO/IO has made more than one attempt to obtain the information from the authority, it is likely to be appropriate to initiate the information notice procedure. The VO/IO should discuss this with DHOE/HOE (who may, depending on the circumstances, discuss it with SIC before proceeding).

258. If the authority fails to respond within the set time limits without good reason, an information notice (SL27a if to be issued in the name of the HOE/DHOE and SL27b if to be issued in the name of the SIC) should then be issued.

259. Whenever an information notice is issued, the IO must use the relevant template in WorkPro to create SL27a/SL27b.

260. Section 50(4) of FOISA suggests that it is only where an information notice is issued under section 50(1)(b) (for the purpose of checking compliance, etc.) that a public authority must be given a minimum of six weeks to respond to an information notice. However, SIC has received legal advice that information notices issued under section 50(1)(a) (i.e. in response to an application) must also allow a public authority a minimum of six weeks to respond to a notice. Where information notices are used, this must be made clear to the public authority. However, at the same time, the public authority should be requested to respond within the six weeks if possible, in order to allow us to comply with the timescales expected by Parliament in section 49(3)(b).

261. An information notice can be cancelled at any time by sending SL25 see section 50(8) of FOISA. Where the authority complies with the information notice, it is not our normal practice to send formal notification that the notice has been cancelled, but SL25 can be sent if the public authority requests such confirmation.

262. Where the authority does not comply with the notice within the time specified, the IO should discuss the next steps with HOE/DHOE. Depending on the circumstances, a referral may

either be made to the Court of Session or a reminder will be sent to the public authority: SL24.

263. Where the authority does not comply with the notice and SIC decides to take the matter to the Court of Session the enforcement procedure should be followed by HOE.

Information required for enforcement or ensuring compliance

264. Refer to SIC's **Intervention Procedures** for more information about using information notices in these situations.

Notices and our Annual Report

265. Our Annual Report reports on the information notices issued each year. In order to help us identify notices at year end, ensure that all information notices issued are recorded in the non-compliance tab in WorkPro.

APPENDIX 1: VALIDATION GUIDANCE

Purpose of validation

266. The Commissioner must establish that an application is eligible to be investigated. The Commissioner does not have the power to investigate an invalid application. If an application is wrongly validated, any subsequent decision would be unenforceable. This guidance is designed to assist the VO in coming to a view as to whether the application is valid.

267. Occasionally, an applicant will make a repeat application to us on a matter on which we have already issued a decision (e.g. a failure to comply with the same request for review). It is good practice to check recent applications made to us by the same applicant. The DHOE can be contacted for advice in these situations.

Validation of cases

268. The applicant must have gone through these two basic steps before they can make a valid application to the Commissioner:

    Step 1: They must have made a valid information request to a Scottish public authority AND

    Step 2: They must have asked that public authority to review its decision.

269. The application document itself must also meet the format requirements as set out in section 47(2) of FOISA.

Resolution and validation

270. The VO may identify cases suitable for attempted resolution at validation, for example

    (i) if the public authority has, following, the application, responded to the request or

    (ii) where the applicant seeks what is clearly their own personal data (e.g. medical records). In cases like this, the VO should contact the applicant and explain why their application will be unsuccessful, with reference to section 38(1)(a) of FOISA/regulation 11(1) of the EIRs, and advise them to contact the (UK) Information Commissioner's Office for more information on how to access their personal data.

271. Where the VO is at all unsure about attempting resolution, they must ask the HOE/DHOE for a view before proceeding.

272. Where resolution is not successful, the case should be assessed as to its validity in the normal way.

Is the body a public authority for the purposes of FOISA or the EIRs?

273. In most cases, it will be easy to tell if a body is a public authority for the purposes of FOISA or the EIRs – e.g. if it is listed in Schedule 1 to FOISA. However, matters can be more complex if, for example:

    (i) we need to consider whether a body which isn't subject to FOISA is subject to the EIRs

    (ii) we are considering whether a body falls into the definition of public authority by virtue of an order made under section 5 of FOISA – for example, a subsidiary of a registered social landlord.

274. Those cases will, in general, be passed to an IO for validation.

275. Given that the records in WorkPro are deleted automatically after a set period of years, it is important that we save a copy of any research and findings on whether a particular body is a public authority for the purposes of FOISA and/or the EIRs in Virtual Cabinet. Research should be saved in Enforcement\Management of Enforcement Function\Strategy & Planning and the relevant VC number of the search added to the "Summary of research" in **VC125747**.

Excluded applications- section 48 of FOISA

276. The Commissioner cannot consider an application concerning a request for information made to:

(i) the Commissioner;

(ii) a procurator fiscal;

(iii) the Lord Advocate, to the extent that the information requested is held by the Lord Advocate as head of systems of criminal prosecution and the investigation of deaths in Scotland.

277. Applications concerning the above are likely to be INVALID. If section 48 applies, SL02 should be sent to the applicant indicating that the Commissioner is unable to consider the application and explaining why and the case closed in WP.

278. Where applications are excluded because they involved a procurator fiscal or the Lord Advocate, the Commissioner may use other enforcement powers to seek information from the authority to determine whether the exclusion in section 48 applies. Where there is evidence of an unacceptable level of failure to comply with timescales, the Commissioner may issue an enforcement notice under section 51 of FOISA. (See SIC's **Enforcement Policy**.)

Format of the application- section 47 of FOISA

279. The VO must consider whether the format of the application meets the requirements of section 47(2) of FOISA:

(i) Has the application been made in a permanent form? (Although see paragraph **331** for guidance on verbal requests made under the EIRs.)

(ii) Does the application state the name (see SIC's guidance: **Name of requester or applicant**) and an address for correspondence?

(iii) Does the application either directly or with reference to attached documents specify the request for information to which the requirement for review relates?

(iv) Does the application (or attached documents) specify the reasons why the applicant sought a review?

(v) Does the application provide the reasons why the applicant is dissatisfied with the outcome of the review?

280. It should not be necessary for the VO to obtain copies of the initial request/initial response/requirement for review/review outcome (the key application documents) prior to reaching the conclusion about the *format* of the application to the Commissioner.

The information request

281. For an information request to be valid under FOISA, it must be in writing or in another form which is capable of being used for subsequent reference. (See paragraph **331** below re. verbal requests made under the EIRs.)

Is it a request for recorded information?

282. FOISA and the EIRs give a right to recorded information. A request for an unrecorded opinion or for advice is not a valid information request.

283. A question can be a valid request, if it is conceivable that the authority might hold an answer to the question in a recorded form. (E.g. "How many staff do you employ?" "Did you survey Property X?")

284. Questions of a more argumentative kind, or where the applicant appears to have prejudged certain matters, should be treated carefully as they are less likely to be requests for recorded information. (E.g. "Did you not think that it would be a good idea to do X?").

The name and address of the applicant

285. As with applications, the request must state the name of the applicant and an address for correspondence: see SIC's guidance: **Name of requester or applicant**. Where an information request is made by email, an email address can be treated as an address for correspondence.

286. The person making the application must also clearly set out their name in the email or letter, e.g. by "signing" the email/letter at the end or using an auto signature i.e. the name must be stated independently of the email address, within the body of the email itself. A name in the first email of a continuous chain may suffice, provided there is enough of a link between the subject matter of the initial email and that of the request.

Anonymous/pseudonymous requests

287. Anonymous requests are invalid, as are requests made using a pseudonym.

288. If the VO suspects that a pseudonym has been used, check whether the same name has been used to make a previous application which has been deemed to be invalid because a pseudonym was used. It may be appropriate to seek proof of identity from the applicant.

True applicant

289. The application must name the "true applicant" or the application will not be valid: see SIC's guidance: **Name of requester or applicant**.[1]

290. If, for example, an information request from a firm of solicitors states the firm is making an information request on behalf of a client, but does not name the client, the request will be invalid.

291. Where a third party claims to be acting on behalf of an individual, it will be necessary to ask the individual to confirm that they have authorised the third party to act on their behalf unless:

    (i) the position is already clear from the application; or

[1] The rules about naming true applicants may not apply for applications made under the EIRs. If in doubt, seek advice.

(ii) the application has been made by a solicitor and they have advised us they are acting on behalf of a named client.

292. If a third party has had some involvement in a case, but does not themselves claim to be acting on behalf of the applicant, it may be appropriate to contact the third party to check what their relationship with the applicant is, unless the position is already clear from the application. If a third party is not acting on behalf of the applicant, emails from the third party may need to be redacted before being sent to the public authority.

293. If there is any doubt, advice should be sought from the HOE/DHOE.

The request for review

294. For a request for review to be valid, it must be in writing or in another form capable of being used for subsequent reference.

295. A request for review must state the name of the applicant and an address for correspondence: see SIC's guidance: **Name of requester or applicant**. The person asking for the review must be the same person who made the initial request (or must be represented by someone acting on their behalf).

296. The request for review must:

(i) Specify the request for information to which the requirement for review relates (i.e. it must make reference to the initial request in some way AND

(ii) Specify why the requester is unhappy with the way in which the Scottish public authority dealt with the information requested – simply stating they are seeking a review is not sufficient, there must be some basis for the public authority to undertake a review set out. This may be as straightforward as saying, "I am not happy that the information has not been disclosed."

Timescales

297. There are number of different timescales, all of which must be complied with before an application can be validated. See paragraph **Error! Reference source not found.** onwards regarding requests affected by the Coronavirus (Scotland) Act 2020.

298. Reference to days in FOISA, means "working days". There is a definition of "working days" in section 73 of FOISA. This excludes weekends and statutory bank holidays.

299. Any reference to "months" means *calendar* months as opposed to, say, four weeks.

Responding to the request

300. A public authority has a maximum of 20 working days to reply to a request for information. This period can be extended in limited cases under the EIRs (see below).

301. There are two sets of circumstances where the 20 day period is effectively extended. These are:

(i) Where the public authority reasonable requires further information in order to identify and locate the requested information. In these cases, the public authority is entitled to ask the applicant for clarification. If the public authority does this, the 20 working days clock does not start until the applicant provides the clarification.

(ii) Where the public authority issues the applicant with a fees notice. Here, the 20 working days clock will stop when the fees notice is issued to the applicant. The clock will restart when the applicant pays the fee. So, if the public authority issues a fees notice on day 8 and the applicant pays the required fee two weeks later, the public authority will have a further 12 working days in which to deal with the request, starting from the day after payment is received.

302. The 20 working days starts on the first working day after the authority receives the request. So, if a request is emailed on a Saturday, the first working day will be Monday (unless the Monday is a bank holiday, in which case the first working day will be Tuesday).

303. The public authority has up to 20 working days to respond to the applicant. This means that a public authority can post a response out to an applicant on the 20th working day and still be on time.

Making a request for review

304. The basic rule is that an applicant has 40 working days after receiving a response from the public authority to ask the public authority to carry out a review. This is regardless of whether the public authority responded within the 20 working days.

305. In some cases, the public authority will not have responded to the information request at all. Where this happens, the applicant can ask for a review to be carried out up to 60 working days after making the initial request.

306. If the request for review is made outwith these timescales:

(i) under FOISA, the public authority can opt to carry out the review. The SIC cannot require the authority to carry out a late review.

(ii) under the EIRs, the authority has no power to carry out a late review, so any application made following a late review will be invalid.

Carrying out a review

307. A public authority has a maximum of 20 working days to reply to carry out a review. (Although public authorities can extend the time for responding to EIRs requests, they cannot extend the period for carrying out a review.)

308. See **APPENDIX 2: KEY QUESTIONS FOR PUBLIC AUTHORITIES** for questions for public authorities who wish to argue that a failure to comply with the timescales should not be treated as a failure to comply with FOISA.

Making an application to the Commissioner

309. Applicants have six months to make an application to the Commissioner after:

(i) They have received a notice advising them of the outcome of the review from the public authority; or

(ii) The 20 working days for the public authority to respond to the request for review have passed and the authority has not responded to the request for review.

310. The Commissioner can choose to accept a late application if it is appropriate to do so, for example if:

(i) the authority misled the applicant, or

(ii) the authority failed to advise the applicant of their right to refer the matter to the Commissioner, or

(iii) reasons why the applicant might be dissatisfied with the authority's response to the request for information have only just become apparent, or

(iv) where the public authority has previously promised to provide the applicant with information but fails to do so, and as a result the six-month deadline has passed

(v) the reason the applicant has been unable to make the application within six months is related to, or has been caused by, COVID-19.

311. Approval to accept a late application must be sought from a DHOE, HOE or SIC.

312. Where the application has been made after the six-month time limit and SIC does not exercise discretion to accept the application, the case is INVALID and must be closed in WP.

Legal "presumptions"

313. FOISA contains some "presumptions" about when requests, applications, etc. are deemed to have been received. These are "rebuttable presumptions" which means that they can be overturned if it can be shown that something else happened.

314. The presumptions are set out in section 74 of FOISA.

315. If a request etc. is sent by email, it is presumed to have been received by the public authority on the day it was sent (regardless of the time it was sent). That means that the 20 working days for responding will start the day after it was sent. However, if there was a problem with the sender's network and the public authority did not receive the email until the following day – or did not receive the email at all – then the presumption can be set aside and a different timescale applied.

316. A request, etc. which is posted is deemed not have received by the public authority until the third day after the day of positing. This is clearly designed to allow for second class post. However, if it is clear from the records of a public authority (e.g. a date stamp) that the authority received the letter the day after it was sent, the 20 days for responding will run from the day after the actual day of receipt.

Matters giving rise to dissatisfaction

317. The reasons for applying for a decision ("the matter(s) giving rise to dissatisfaction") set the scope of the subsequent investigation and so form an important part of the validation process.

318. Check that the request has remained consistent throughout the processing of the request, request for review and application. Any issues raised in the application which were not raised by the applicant in their request for review (unless it relates to an issue raised in the review outcome) cannot be considered by the Commissioner. If the applicant has narrowed the scope of their request at review stage, we can only investigate the narrowed request.

319. The matters raised in the application, must be within the Commissioner's jurisdiction (Part 1 of FOISA or the EIRs). If the grounds of the application do not fall within the Commissioner's jurisdiction, the case will be INVALID. The applicant should be informed and advice provided on how to make a new application should they wish to do so.

320. If the application does not provide reasons for dissatisfaction (see Format of the application above), the application is INVALID and the applicant should be invited to make a new application setting out why they are dissatisfied with the authority's handling of their request.

The key documents

321. If the format of the application is valid (i.e. it complies with section 47(2)), but the VO is unable to determine whether the application is otherwise valid, the VO should contact the applicant seeking further information. Give the applicant two weeks to respond. If the applicant fails to respond, consider whether the application has been abandoned or withdrawn.

322. It will not always be necessary to obtain copies of all four key documents before validating an application – although, generally, we will usually need the see the authority's response to the request and request for review (if a response has been made). The test is whether we have enough information, on balance, to be satisfied that the application is valid. For example, if the applicant has not provided us with:

    (i) the initial request, but the response sets out the date of the request and the request in full, we do not need to obtain a copy of the request

    (ii) a copy of the request for review, but we have a copy of the review outcome, which sets out the reasons for dissatisfaction, etc., then we do not need to obtain a copy of the request for review

323. If the applicant does not have copies of the key documents, and we have concluded that we need to see some/all of them, they should be asked to contact the public authority direct to ask for copies of the documents to send to us.

It is not always necessary to obtain all key documents before an application can be validated

Verbal requests and the EIRs

324. Where an application involves a verbal request for environmental information, the applicant will not be able to provide a copy of their request, unless it has been recorded in some way. The terms of the request may have been recorded in the correspondence between the applicant and the public authority, but if it is unclear what the request was for, or when it was made, the VO should contact the public authority for assistance. The public authority may have retained notes about when/how the request was received.

325. Any information received from the public authority should be confirmed with the applicant. In all cases, we will need to be satisfied that a valid request was received and be clear on the terms of the request.

APPENDIX 2: KEY QUESTIONS FOR PUBLIC AUTHORITIES

Introduction

- These key questions have been drawn up for IOs to consider when asking a public authority for submissions on particular exemptions or provisions in FOISA or the EIRs. They will therefore mostly be used at the time when composing the SL08, although they will also be useful when assessing whether the submissions from the public authority addresses key issues adequately.
- Clearly, the questions do not contain an exhaustive list of questions and not all of the questions will be appropriate in every case, particularly where, e.g., the notice issued by the public authority at review stage is detailed and addresses all of the questions which we would be likely to put to the authority. However, the questions surrounding the exemptions have, in particular, been prepared with the aim of ensuring that IOs receive submissions on all of the necessary tests for each exemption. The questions are currently all aimed at FOISA exemptions. Care should therefore be taken when dealing with exceptions under the EIRs to ensure that the correct questions and tests are applied as it will not usually be possible simply to copy the questions for the FOISA exemptions.
- Please number questions in SL08s.
- Remember that SIC's briefings on the exemptions also contain a lot of guidance on the types of information IOs need to be thinking about when asking questions about particular exemptions.

Freedom of Information (Scotland) Act 2002

Excessive cost of compliance (section 12)

Remember that it might be necessary to ask questions to ensure that the request has been interpreted appropriately and to ensure that we understand how the information is held by the public authority.

- Provide detailed calculations estimating the projected cost of responding to the request. In these calculations, include a breakdown of the cost of staff time, the type of work that would require to be undertaken (e.g. the number of files or documents considered relevant; the amount of staff hours) to satisfy the request and the number of hours that compliance with the request is likely to take.
- In this calculation of costs, identify the role of the member of staff who would be tasked with this duty and what their grade and hourly rate is. Also provide an explanation as to why this particular grade of staff is required to carry out the tasks in question.
- Advise of any other costs which are incorporated in the £15 an hour rate that the authority is quoting?
- You have intimated that it would take x minutes per record to provide an answer to [applicant]'s request. How was this cost calculated? Could you provide us with a small worked example to support your calculation?
- Section 15 of FOISA requires a public authority to provide reasonable advice and assistance to someone making an information request. The public authority should

consider how best to provide the information requested in the most cost-effective way. Describe any steps taken by public authority to try to help the applicant reduce the costs involved in providing the information that they have asked for.

- Has the public authority provided a detailed breakdown associated with this request to the applicant? If so, please supply a copy.

- (Where it suspected that the authority has aggregated the costs) At present there is no provision under FOISA for public authorities to aggregate the costs in responding to two or more requests from an applicant. The applicant could have sent separate letters or emails, or even separate letters in the same envelope. The fact that more than one request is contained in the same letter or email should not affect how an authority deals with them. Likewise, where an authority receives a request (or a number of requests) for information that specifies different time periods, each question relating to each time period should be considered as a separate request. In light of the above, provide a cost breakdown which deals with each of the applicant's requests separately [provide details of how the request should be broken down and tackled by the authority].

Remember, however, that some requests might be so interconnected that they should be treated as one request.

- (Where it is suspected that the charge imposed is for establishing whether the information is held, rather than locating and retrieving it) The Fees Regulations allow a public authority to charge for direct and/or indirect costs incurred in locating and retrieving the information requested, but not for any costs incurred in determining whether an authority actually holds the information or for any costs incurred in deliberating whether or not to provide the information (see Annex 3 of the Section 60 Code of Practice for further guidance on the Fees Regulations). In light of the above, confirm that the charges applied to the request relate to the costs of locating and retrieving the information, and provide a breakdown showing how the costs were calculated.

Vexatious or repeated requests (section 14)

Section 14(1)

- With reference to the Commissioner's briefing on section 14(1) of FOISA (copy enclosed), please explain, in detail, why [public authority] is relying on section 14(1) of FOISA in responding to this request. Please provide any documentary evidence which would support [public authority]'s position.

Section 14(2)

- Your authority argues that this request is identical/substantially similar with an earlier request from [applicant]. Please provide a copy of his earlier request and evidence of your authority's compliance.

- [IF RELEVANT] An authority is not obliged to comply with a subsequent request from the requester if identical or substantially similar UNLESS there has been a reasonable period of time between the requests. In this instance, please explain why your authority does not consider there to have been a reasonable time period between these requests. In doing so, please provide context to the nature of the information captured by this request. Please state whether there have been any

additions/amendments or changes to the information captured by this request, in this time frame.

Information not held (section 17)

- What steps did the public authority take to establish that the information is not held? Provide as much detail as possible. If the public authority has provided its staff with any guidance on collating responses to information requests, a copy should be provided.
- What searches were carried out for information relating to the request? To support the contention that the information is not held, explain the extent of any search carried out, and why this would have been likely to retrieve any information covered by the request. Provide screen shots of the searches which have been carried out, making it clear what the search parameters were and what the timeframe for the search, etc., was.
- If other members of staff were consulted, please list them and (if not obvious) explain why they would be likely to know whether relevant information was held.
- If a search was not thought to be necessary, please explain why.
- If searches were carried out, please make it clear which sets of records or data resources were included. Were relevant diaries and notebooks included? Did they include personal mobiles and applications such as WhatsApp?
- If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.
- If searches included electronic data, which search terms were used. Would the public authority be expected to hold this information? Does it have a legal duty to hold it? Does internal or external guidance create an expectation that the public authority will hold the information?
- Has the public authority ever held this information? If so:
    - Has the information been mislaid?
    - Is it known whether the information has been destroyed or deleted, and if so, is there any audit trail? For instance, was the information destroyed in line with an established records retention schedule?
- If the information is electronic data which has been deleted, is retrieval possible from (for instance) back-up server tapes? Might copies have been made and held in other locations?
- If the public authority has access to the information but believes it does not “hold” it, in terms of section 3(2) of FOISA, is there evidence available to show that it was provided in confidence by a Minister of the Crown of by a department of the Government of the United Kingdom? Or is held on behalf of another person (if so, which other person)?
- Can the information be obtained or collated from other related pieces of information? Although public authorities are not required to create new information

in order to respond to requests, the Commissioner has previously commented that he does not consider the extraction of information from existing data to involve the authority in the creation of new information (Decision 066/2005).

- (*Where the request is for numbers and the public authority takes the view that it does not hold the information*) Although public authorities are not required to create new information in order to respond to requests, the Commissioner takes the view that if a public authority has the building blocks to generate the information and no complex judgement is required to produce it, the authority does hold the information (Decision 210/2013). How easy would it be for the public authority to count the numbers? What skill is needed to determine whether a particular case falls within the scope of the request?

- The IO may want to carry out their own search (web-based usually) for this information and share any positive results with the public authority.

- N.b. – in some cases, it may be necessary for the IO to visit the public authority to see their records management system in practice and to oversee the searches being carried out for the information. This may be an appropriate way forward where the public authority has a history of non-cooperation with SIC investigations.

Section 18 (Neither confirm or deny)

- Your authority is seeking to rely on section 18 of FOISA. As you are aware, section 18 of FOISA gives public authorities the right to refuse to reveal whether information exists or is held by them in certain limited circumstances. If the information were held it must be the case that the information could be withheld under any of the exemptions contained in sections 28 to 35, 38, 39(1) or 41 of FOISA.

- Please confirm which exemption, read in conjunction with section 18, the public authority considers would be applicable in this case. Please also provide succinct reasoning as to why the exemption would apply. Where the exemption is subject to the public interest test in section 2(1)(b) of FOISA, this will include an explanation of why the public interest in withholding the information outweighs that in disclosing the information.

- Please detail why your authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.

- Please confirm whether the information exists. If it does, please provide me with a copy of the information.

Information otherwise accessible (section 25)

- In relation to the section 25(1) exemption, provide an overview of how the requested information would be accessed by the applicant and why the information is considered to be reasonably accessible to him/her. If the information is available via a public scheme, please provide a link to the publication scheme and highlight the relevant part of the scheme?

- Detail the charges (if any) applied by the authority to the applicant to access this information.

- If the information in question is available online, please provide the relevant URLs. Confirm when this information was uploaded onto [public authority]'s website.

- For information considered exempt under section 25 of FOISA, detail any assistance given to the applicant in accessing this information.
- A detailed description of all work undertaken by the authority to ensure that it holds no additional information falling within the scope of the request, which is not accessible in the means described.
- Has the public authority taken the particular circumstances of [the applicant] into account when deciding whether access to the information is reasonable?
- Where the public authority has applied section 25(2)(b)(i) of FOISA, please provide details of the enactment which the public authority is relying upon.
- Where section 25(2)(b)(ii) applies, provide evidence that the information is held by the Keeper of the Records of Scotland and that he makes it available for inspection and (in so far as practicable) copying
- Where the information is not held by the public authority but the public authority considers that it is reasonably accessible elsewhere, what steps have the public authority taken to confirm that this is the case? Where can the information be accessed (please provide as detailed a response as possible).

Prohibitions on disclosure (section 26)

Section 26(a)

- Specify the enactment and the provision(s) of that enactment containing the prohibition in question. Explain in detail why the provision(s) in question would prohibit disclosure

Section 26(b)

- Specify the Community obligation which would prohibit disclosure or with which disclosure would otherwise be incompatible. Explain in detail why this would be the case

Section 26(c)

- Describe in detail why disclosure would constitute or be punishable as a contempt of court. Provide evidence of this.

Information intended for future publication (section 27)

Section 27(1) – future publication

- What was the publication date (if the publication date is very close to the date of the initial request then it may be likely that the exemption is upheld)?
- Can the authority provide proof that the information actually has been published? (Consider whether publication on the internet enough, especially if the applicant has no computer access, and whether the information is published solely on an internal website – see Decision 030/2008 Mark Nixon and Glasgow City Council.)
- Settled intention to publish – does the authority have any documented proof that the information was going to be published at the time of the initial request? (Future publication cannot be used as a delaying tactic. See *Decision 098/2006 Scottish Executive*, the Commissioner considered that the decision to publish was taken after the request was received.)

- Is the published information exactly what the applicant had asked for? (See *Decision 051/2005 Scottish Prison Complaints Commission*)
- If the information has not been published, then the authority should provide a detailed explanation as to why it has not been published. Has the applicant been informed of this delay when it was realised that a delay was likely to occur and been given a revised date of publication?
- Can the authority provide justification that the delay in publication is reasonable in all circumstances? (Is the delay in publication so time-sensitive that to disclose the information prior to publication date would result in a critical event?)
- Remember to ask questions about the public interest test – see below.

Section 27(2) – programme of research

- Can the authority provide proof that the information is part of a programme of research?
- Is there an intention to publish the results of this research at a future date? If so, can any date be given? Is there any proof of this intention to publish?
- Ask the authority to submit arguments to prove that the programme of research or the interests of the participants of the authority holding the information would, or would be likely to be, prejudiced substantially if the information were to be disclosed early.
- Remember to ask questions about the public interest test – see below.

Relations within the United Kingdom (section 28)

- Was the information supplied by a department of the UK Government or by a Minister of the Crown, and was it supplied to the authority in confidence? Provide evidence to support that. Include details of any information that supports your view that the information was supplied in confidence (see also questions for section 36 for assistance).
- Provide details of the administrations whose relations would, or would be likely to, be substantially prejudiced by disclosure, and outline the type of harm that would occur by disclosure of the information.
- If the information is subject to the Memorandum of Understanding, please provide details of the restrictions (if any) that were placed upon the information by the administration who supplied it to you.
- Remember to ask questions about the public interest test – see below.

Formulation of Scottish Administration policy etc. (section 29)

Section 29(1)(a)

- Describe in detail the policy formulation or development exercise to which the information relates; in particular, explain why the matter(s) under consideration should be considered policy, why what is being done should be considered the formulation or (as the case may be) development of that policy, and how the information relates to that process.

- Is the process still ongoing and, if not, when was it completed?
- Does a change of administration have any effect to the arguments?
- Has statistical information been used to provide an informed background to the taking of the decision?
- Remember to ask questions about the public interest test – see below.

Section 29(1)(b)

- Identify which Ministers the communications involve, or which Cabinet/committee discussions the information relates to; describe (in adequate detail) how the information relates to the communications in question.
- Has statistical information been used to provide an informed background to the taking of the decision?
- Taking section 29(3) into account, what regard has been given to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of the decision.
- Remember to ask questions about the public interest test – see below.

Section 29(1)(c)

- Identify the Law Officers asked to provide the advice and what advice was being sought.
- Clarify that the advice was provided in their role as Law Officer.
- Remember to ask questions about the public interest test – see below.

Section 29(1)(d)

- Which private office(s) does the information relate to? How does it relate to its/their operation?
- Remember to ask questions about the public interest test – see below.

Prejudice to effective conduct of public affairs (section 30)

Section 30(a) - the maintenance of the convention of collective responsibility

- Note: The main point of investigation is likely to be whether disclosure of Minister's personal views would, or would be likely to, "substantially" prejudice the maintenance of the convention of collective responsibility. Points to consider will be whether the Ministerial views expressed are significant, and whether the Minister already has made their views publicly known (e.g. media interviews). This will require a judgement call based on understanding of the circumstances surrounding the case.
- Please explain why disclosure of the views expressed by the Minister(s) in the information withheld would, or would be likely to prejudice substantially the maintenance of the convention of collective responsibility.
- Please make it clear why the views expressed are significant, in the context of the convention of collective responsibility.

- The Ministerial views contained in the information withheld seem similar to those expressed in [details of article etc.] Please explain why disclosure of the information in question would now be likely to pose a significant threat to the maintenance of the convention of collective responsibility.
- Remember to ask questions about the public interest test – see below.

Section 30(b) – inhibition of advice/exchange of views

- Why would disclosure of the advice/views in the information withheld cause or be likely to cause substantial inhibition. Outline the situations in which such inhibition would be likely to occur. If there are particular factors to take into account, you should make sure the Commissioner is aware of them. These might include factors affecting the sensitivity of the information, such as the timing of the request; the parties involved in the exchange; or the manner in which the advice or opinion is expressed.
- Explain who is likely to be substantially inhibited from providing advice or views if the information requested were to be disclosed, and explain why this would happen.
- Describe the relationship between the person(s) providing the advice/views in the information withheld, and those who would be likely to find themselves inhibited substantially by its disclosure. For example, would similar advice or views be communicated and received as part of the individuals' expected day-to-day professional duties?
- (If the public authority appears to have treated section 30(b) as a class exemption) In her decisions on section 30(b)(i) and (ii), the Commissioner has made it clear that these exemptions do not apply automatically to all advice or views, and that public authorities should assess the effects of disclosing the contents of documents before applying either of the exemptions in section 30(b). At present I have not seen evidence that the public authority considered the effects of disclosing each piece of information before withholding the information under section 30(b). Please make clear the relationship between the contents of the information withheld, and the inhibition that would be likely to result from disclosure.
- Remember to ask questions about the public interest test – see below.

Section 30(c) – otherwise cause substantial inhibition

- How and why disclosure of the information requested would limit [name of public authority]'s ability to conduct its business effectively. Please provide as much detail as possible: for example, explain what activities would be affected, and in what way, and show why this outcome would result from disclosure of the information.
- Nb use of word "otherwise" here – if it appears that the public authority has conflated section 30(c) with 30(a) or (b) ask for information as to why disclosure would otherwise cause substantial prejudice.
- Remember to ask questions about the public interest test – see below.

National security and defence (section 31)

- In relation to section 31(1), provide me with full details of the public authority's consideration as to why exemption from section 1(1) is required for the purpose of safeguarding national security.
- If a Ministerial Certificate has been issued under section 31(2), provide a copy and confirm that the certificate is still extant. Provide evidence that the information in question is covered by the certificate.
- In relation to section 34(4), provide full details as to why disclosure of the information would, or would be likely to, prejudice substantially the defence of the British Islands or any colony; or the capability, effectiveness or security of any relevant forces.
- Remember to ask questions about the public interest test – see below – this includes situations where a certificate has been issued under section 31(2).
- In this type of case, it is likely that special arrangements will need to be put in place for viewing the information or for holding onto the information and/or submissions.

International relations (section 32)

- Provide details as to why the disclosure would, or would be likely to, prejudice substantially: the relations between the UK and any other State (s32(1)(a)(i), between the UK and any international organisation or international court (s32(1)(a)(ii)); the interests of the UK abroad (s32(1)(a)(iii) or the promotion or protection by the UK of its interests abroad (s32(1)(a)(iv).
- Confirm that the disclosure would prejudice relations or the interests of the UK as a whole.
- Confirm that the "international court", "international organisation" or "State" falls within the definitions given in s32(3).
- If relying on s32(1)(b), provide evidence as to the fact that the terms on which the information was obtained require it to be held in confidence or that the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be held in confidence. For example, is there a formal agreement between parties or a statement by the information supplier that indicates that confidentiality is required.
- Remember to ask questions about the public interest test – see below.

Commercial interests and the economy (section 33)

<u>Section 33(1)(a) – trade secrets</u>

- Provide evidence that the information is a trade secret. Is it the case that the information is generally used in trade or business but is not generally known in that trade or business? Does the information have economic value from not being generally known and are steps taken to keep the information secret? Is the information only known to a limited number of individuals? What evidence is there to show that this is the case?
- Remember to ask questions about the public interest test – see below.

Section 33(1)(b) – commercial interests

- Clearly identify the party or parties whose interests are of concern to your authority, whether it is the authority itself or a third party.
- In what respect are these commercial interests? Where it is your own authority's commercial interests that are of concern, please provide a detailed explanation of those interests and how they relate to the information withheld.
- Describe the substantial prejudice that would or would be likely to follow disclosure of the information requested, and when and how this would be likely to happen.
- (Where the information concerns a tendering process) Provide a copy of the Invitation to Tender (ITT) (where appropriate), details of when the tendering process was complete or details of what stage the tendering process had reached when the request for information was made. Please also provide details of when the tendering process is likely to be complete.
- In the information withheld, please identify the material that your authority considers particularly sensitive.
- Please provide copies of correspondence your authority has had with the third parties in relation to this request, having particular regard to the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/).
- Remember to ask questions about the public interest test – see below.

Section 33(2) – financial or economic interests of the UK

- Confirm whether it is the financial or economic interests of the whole of part of the UK which would or would be likely to be prejudiced substantially by the disclosure of this information.
- If it is a part of the UK, confirm which part you consider will be prejudiced. Provide evidence as to why this prejudice will occur, or is likely to occur.
- Explain why you consider the interests in question to be economic (s33(2)(a)) or financial (s33(2)(b)). When considering s33(2)(b), check that the administration in question falls within the definition provided by section 28(2).
- Remember to ask questions about the public interest test – see below.

Investigations by Scottish public authorities etc. (section 34)

Section 34(1)(a) – criminal investigations

- Confirm that the investigation was one which the public authority had a duty to conduct and, where applicable, under which legislation the duty is conferred (please quote the relevant sections of the legislation).
- Confirm that this relates to a duty to ascertain:
    - whether a person should be prosecuted for an offence (section 34(1)(a)(i));
    - whether someone prosecuted for an offence is guilty of it (section 34(1)(a)(ii)).

- Confirm that the information was held specifically as a result of an investigation into whether a person should be prosecuted for an offence or whether someone prosecuted for an offence is guilty of it.
- Confirm that the information was gathered to ascertain whether a person should be prosecuted for an offence.
- Remember to ask questions about the public interest test – see below.

Section 34(1)(b) – report to PF

- Confirm that the information is held as a result of an investigation carried out, or in the process of being carried out, by your public authority, which may lead to a decision by the authority to make a report to the PF to enable it to be determined whether criminal proceedings should be instituted (i.e. was such a decision an option).
- Remember to ask questions about the public interest test – see below.

Section 34(1)(c) – criminal proceedings following report to PF

- Confirm that the information was or is held for the purpose of criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.
- Remember to ask questions about the public interest test – see below.

Section 34(2) – fatal accident inquiries and cause of death

- Provide confirmation and proof that the information was held for the purposes of an inquiry under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (i.e. a fatal accident inquiry), which has not yet concluded. Once a FAI has been concluded, the information does not fall under the exemption (section 34(2)(a)).
- Provide confirmation and evidence that the information is held as the result of an investigation into the cause of death of an individual and that the investigation is not connected to a fatal accident inquiry.
- Confirm that the public authority had a duty to ascertain the cause of death of a person and if applicable under which legislation such a duty is conferred (s34(2)(b)(i)) or that the information is held for the purpose of making a report to the procurator fiscal as respects the cause of death of a person (s34(2)(b)(ii)).
- Remember to ask questions about the public interest test – see below.

Section 34(3) – confidential sources

- Provide confirmation and proof that the information was obtained or recorded by the authority for the purposes of an investigation, other than the type of investigations mentioned in section 34(1), but which is by virtue either of (1) Her Majesty's prerogative conducted for any purpose specified in section 35(2) or (2) by or under any enactment for any purpose specified in section 35(2).
- In the case of either (1) or (2), confirm which purpose listed in section 35(2) of FOISA the investigation was carried out in relation to.
- If (2), confirm which statutory powers the investigation was carried out under.

- Confirm that the information relates to the obtaining of information from confidential sources – please note that the exemption in section 34(3)(b) is not a stand-alone exemption.
- Remember to ask questions about the public interest test – see below.

Section 34(4) – civil proceedings

- Confirm that the information is obtained or recorded by a Scottish public authority for the purpose of civil proceedings
- Confirm that civil proceedings were brought by or on behalf of the authority
- In order for section 34(4) to apply, the civil proceedings must have arisen out of an investigation mentioned in either section 34(1) or section 34(3). Provide details of the type of investigation carried out and why it relates to either a section 34(1) or 34(3) investigation.
- Remember to ask questions about the public interest test – see below.

Law enforcement (section 35)

- Confirm which of the subsections in section 35(1) has been applied (if not already clear).
- Why would disclosure of the information prejudice substantially, or be likely to prejudice substantially, that action? (Where the disclosure would prejudice the actions of another person or body, confirm who or which body would be prejudiced.)
- Where the authority has relied on the exemption in section 35(1)(g), confirm which public authority's (either under FOISA or under the Freedom of Information Act 2000) exercise of a function in relation to one of the purposes in section 35(2) would, or would be likely to be, prejudiced substantially by disclosure of the requested information. Provide evidence that the authority has this function (citing statute wherever possible) and how this function would, or would be likely to be, prejudiced substantially.
- Remember to ask questions about the public interest test – see below.

Confidentiality (section 36)

Section 36(1)

- If the public authority is not claiming that the information is subject to legal professional privilege, confirm which type of information it is and ask them to evidence why it is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
- If the public authority is claiming that the information is subject to legal professional privilege, confirm whether it is legal advice privilege or litigation privilege.
- Where the information is subject to legal advice privilege, check that the communications in question relate to legal advice being sought or given and that the advice came from a solicitor (or other legal representative, such as an advocate) acting in his/her professional capacity.

- Where the information is subject to litigation privilege (communications post litem motam), provide evidence that the documents in question were prepared in contemplation of litigation.
- In either case, check that legal professional privilege has not been waived (an Internet search may show e.g. that the information is in the public domain).
- Remember to ask questions about the public interest test – see below.

Section 36(2)

- Clarify how the documents/information came to be in the possession of the public authority, and identify the originating author(s) of the documents in question and the context in which it was/they were created.
- Is the public authority relying on an explicit or implied obligation of confidentiality? Provide evidence as to the obligation of confidentiality.
- Explain how the disclosure of the information would lead to an actionable breach of confidence. Confirm whether: the information has the necessary quality of confidence (i.e. it is not generally accessible to the public already); the information was communicated in circumstances importing an obligation of confidence; unauthorised disclosure would cause detriment (to be specified) to the party which provided it.
- Is there a public interest defence which would permit disclosure of the information? (It may be appropriate to refer public authorities to SIC's guidance on section 36(2) in posing these questions.)

Court records (section 37)

- Confirm which of the five exemptions set out in section 37(1) are being applied and, in the case of each, that the information in question is contained within a document as defined in the particular exemption(s). Provide evidence that this is the case.
- In addition, confirm that the public authority holds the information solely because it is contained in such a document and, where possible, provide evidence that this is the case.
- Check that "court" or "inquiry" in question falls within the definitions given in section 37(2).
- Check that the information in question is not held by the authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976
- Remember to ask questions about the public interest test – see below.

Personal information (section 38)

Section 38(1)(a)

- Explain why the information is personal data as defined by section 3(2) of the DPA 2018 (if unclear, refer to guidance by the ICO, What is personal data?).
- Confirm that the applicant is the data subject (or that the applicant is acting on behalf of the applicant - in which case, ask for evidence of this).

Section 38(1)(b)

- Explain why the information in question is personal data as defined by section 3(2) of the DPA 2018 (if unclear, refer to ICO guidance, What is personal data?).
- Does any of the data fall into one or more of the special categories of personal data in terms of Article 9 of the UK GDPR, or is it data relating to criminal convictions, offences or related security measures? If so, please confirm which of the data comprises special category (or criminal conviction/offence) data and why.
- (If the request is for numbers, statistics, etc.) Explain why there is a realistic prospect of individuals being identified by third parties in the event that the information is disclosed. Would it be possible to disclose the information in a way which would not lead to individuals being identified? (It may be necessary to refer the authority to the ICO's Anonymisation Code of Practice.)

Section 38(1)(b) and 38(2)(A): breach of data protection principles

- Which of the data protection principles in Article 5(1) of the UK GDPR would be contravened by disclosure of the personal data and why?
- If, as is likely, the public authority is relying on the first data protection principle, why does it consider that disclosure of the information would be unfair and/or unlawful?
- In considering lawfulness, has the public authority considered whether any of the conditions in Article 6 to the UK GDPR would allow the data to be disclosed? In particular:
    - does the authority consider that the person making the request has a legitimate interest in obtaining the information?
    - has the authority asked the requester what their legitimate interests are?
    - is the disclosure of the data necessary to achieve those legitimate interests?
    - if it is necessary, why does the authority consider that this is overridden by the interests or fundamental rights and freedoms of the data subject(s)? (NB the need to take particular care where the data subject is a child.)
- Are you aware of any matter in relation to your compliance with the other data protection principles which could affect a decision on whether disclosure would be fair and lawful?
- Where the data falls into one or more of the categories of special category data, has the public authority considered whether there are any conditions in Article 9 of the UK GDPR which would allow the data to be disclosed? In particular:
    - has the personal data manifestly been made public by the data subject?
- Where the data relates to criminal convictions, offences or related security measure, are there any conditions in Schedule 1 to 3 of the Data Protection Act 2018 which allow the data to be disclosed?

Section 38(1)(b) and 38(2B): breach of Article 21 of the UK GDPR

- Provide evidence that the data subject has exercised their rights under Article 21 of the UK GDPR (right to object to data controller processing their data).

- What consideration did the authority give to whether there are compelling legitimate grounds which override the interests, rights and freedoms of the data subject?
- Remember to ask questions about the public interest test – see below.

Section 38(1)(b) and 38(3A): non-disclosable under subject access request

- Explain why the information is exempt from disclosure under Article 15(1) of the UK GDPR (or, where it involves law enforcement processing, section 45(1)(b) of the Data Protection Act 2018), with specific reference to the exemptions in the UK GDPR (or DPA 2018 where relevant).
- Remember to ask questions about the public interest test – see below.

Section 38(1)(c): census information

- Provide evidence that the information is personal census information as defined by section 8(7) of the Census Act 1920 or acquired or derived by virtue of section 1 to 9 of the Census (Great Britain) Act 1910 which relates to an identifiable person or household.

Section 38(1)(d): deceased person's health record

- Provide evidence that the information constitutes a deceased person's health record as defined in section 1(1) of the Access to Health Records Act 1990

Health, safety and the environment (section 39)

Section 39(1): health and safety

- Specify the individual(s) whose physical or mental health or safety would, or would be likely to, be endangered by the disclosure of the information.
- For this exemption to apply there should be evidence of a risk to the health or the safety of an individual, rather than a hypothetical risk. In light of this, please provide details and evidence of why you consider the risk cited is real and not merely hypothetical. Can the public authority substantiate this claim?
- Explain how the endangerment to the physical or mental health or the safety of an individual would manifest itself.
- Clarify the nature of the endangerment to physical or mental health or safety which would result from disclosure of the information.
- Remember to ask questions about the public interest test – see below.

Section 39(2): environmental information

- Some of the withheld information appears to comprise environmental information (as defined in regulation 2(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs)). Such information should properly be dealt with under the EIRs. Do you agree that the request (insofar as it relates to environmental information) should be more appropriately dealt with under the EIRs as opposed to FOISA?
- If you consider that the information is not environmental as defined in regulation 2(1) of the EIRs, please explain why. You might find it useful to consider guidance the

Commissioner has issued on the definition of environmental information: http://www.itspublicknowledge.info/Law/EIRs/WhatIsEnvironmentalInformation.aspx

- Do you now wish to rely upon the exemption contained in section 39(2) of FOISA with respect to all of the requested information that comprises environmental information?
- If you consider the information to be excepted from disclosure under any of the exceptions in regulation 10(4) and 10(5) of the EIRs, please clarify which exception(s) you consider to be applicable.
- Remember to ask questions about the public interest test – see below.

Audit functions (section 40)

- Which authority's functions are, or are likely to be, prejudiced substantially by the disclosure of the information?
- Provide evidence that the public authority has a function either in relation to the audit of accounts of other Scottish public authorities or in relation to the examination of the economy, efficiency and effectiveness with which such authorities use their resources in discharging their functions.
- Demonstrate that such substantial prejudice would, or would be likely to, occur.
- Remember to ask questions about the public interest test – see below.

Communications with Her Majesty etc. and honours (section 41)

Section 41(1): communications

- Demonstrate that the information relates to communications with the Queen, with other members of the Royal Family or the Royal Household (SIC's briefing on this exemption contains definitions of these terms although it will probably be necessary to check that the list of members of the Royal Family or the Royal Household has not changed over time).
- Remember to ask questions about the public interest test – see below.

Section 41(2): honours

- Demonstrate that the information relates to the award of honours by the Queen.
- Remember to ask questions about the public interest test – see below.

Public interest test

- When dealing with cases which involve more than one exemption which is subject to the public interest test, public authorities are expected to make separate arguments in relation to each exemption. However, it is suggested that, when seeking submissions on the public interest test, the following questions should only be set out in full once in the letter.
- With regards to the public interest test required by section 2(1)(b) of FOISA, state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
- Specify the issues which are in favour of disclosing the information.

- Specify the issues which are in favour of maintaining the exemption
- Specify why you consider, on balance, that the public interest in maintaining the exemption outweighs that in disclosure of the information.

Environmental Information (Scotland) Regulations 2004

Definition of environmental information (regulation 2)

If unclear why the authority has responded under the EIRs, as opposed to under FOISA:

- Please explain why your authority considers this information to fall within the definition of "environmental information" in regulation 2 of the EIRs), specifying which part(s) of the definition you consider applies/apply.

If you think the authority should have responded under the EIRs, but didn't:

- [Some of] the withheld information (describe) appears to be environmental information (as defined in regulation 2(1)(a) – (f) of the EIRs). Such information should properly be dealt with under the EIRs.
- If you believe that the information is not environmental, explain why, with reference to the definition in regulation 2 of the EIRs.
- If you believe the information is environmental, please let me know if you want to rely on the exemption in section 39(2) of FOISA and, if so, explain why you consider the public interest in section 2(1)(b) of FOISA lies in applying that exemption. (Note that, given the separate statutory right of access to environmental information available, the Commissioner is generally of the view that the public interest in maintaining the exemption in section 39(2) and in dealing with a request for environmental information in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.)

Duty to advise and assist (regulation 9)

- Regulation 9 of the EIRs requires authorities to provide reasonable advice and assistance to a requester.
- Given the circumstances of this case, specifically [*detail circumstances*], please detail what advice and assistance has been provided to the requester to satisfy the requirements of regulation 9. (Refer authority, where possible, to the relevant sections of the Section 60 Code.)

Information not held (regulation 10(4)(a))

- Remind the authority that all exceptions must be interpreted in a restrictive way and that an assumption in favour of release must be applied (regulation 10(2))
- See the questions suggested for section 17 of FOISA (above)

- Remember to ask questions about the public interest test (including, where relevant, the cumulative public interest test) – see below. Refer authority to SIC's decisions on this point – for example paragraph 20 of *Decision 022/2020* – which makes it clear that, where the Commissioner is satisfied that an authority does not hold environmental information, he does not consider there to be any conceivable public interest in requiring that the information be made available.

Manifestly unreasonable (regulation 10(4)(b))

- Remind the authority that all exceptions must be interpreted in a restrictive way and that an assumption in favour of release must be applied (regulation 10(2))
- Questions:
    - Explain in detail why your authority considers this request to be manifestly unreasonable – see the questions suggested for section 14 of FOISA above
    - [Where the authority argues that responding would impose a significant burden on it]: Although the £600 cost limit imposed in FOISA might be a useful starting point when considering regulation 10(4)(b), the fact that a request could be rejected under section 12 does not, of itself, make a request for environmental information manifestly unreasonable. Why did the authority not to make a charge for the information instead?
- Remember to ask questions about the public interest test (including, where relevant, the cumulative public interest test) – see below.

Formulated in too general a manner, etc. (regulation 10(4)(c))

- Remind the authority that all exceptions must be interpreted in a restrictive way and that an assumption in favour of release must be applied (regulation 10(2))
- Questions:
    - Can you evidence that, within 20 working days of receiving the request, you asked the requester to provide more particulars in relation to the request and assisted the requester to provide those particulars?
    - Explain why you consider this request to be formulated in too general a manner. What prevents you from identifying the information?
    - Even if it's not possible to respond within 20 working days, would it have been possible for you to apply regulation 7 and respond within 40 working days?
- Remember to ask questions about the public interest test (including, where relevant, the cumulative public interest test) – see below.

Material in the course of completion, etc. (regulation 10(4)(d))

- Remind the authority that all exceptions must be interpreted in a restrictive way and that an assumption in favour of release must be applied (regulation 10(2))
- Note the Aarhus Convention: An Implementation Guide2 states (at page 85) that "in the course of completion" relates to the process of preparation of the information or document and not to any decision-making process for the purpose of which the information or document has been prepared. The Guide also suggests that the term refers to individual documents that are actively being worked on by the public authority, and which will have more work done on them within some reasonable timeframe.
- Note Commissioner's view that data which is part of routine monitoring should not be regarded as part of an ongoing unfinished set
- Questions:
    - What factors would signify the completion of the material (or whether the data is finished or complete)?
    - Provide evidence (regulation 13(d)) that you told the requester when the information will be finished or completed – and if not, why not.
    - When will the information be regarded as complete?

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[2] http://www.unece.org/env/pp/implementation_guide.html

- Remember to ask questions about the public interest test (including, where relevant, the cumulative public interest test) – see below.

Internal communications (regulation 10(4)(e))

- Remind the authority that all exceptions must be interpreted in a restrictive way and that an assumption in favour of release must be applied (regulation 10(2))
- Questions:
    - For information to fall within the scope of this exception, it need only be established that the information is an internal communication. The information must be internal to the authority and not have been shared outwith the authority or publicly available. I note that documents [xxxxxxxx] contain correspondence between your authority and third parties, namely [xxxxx and xxxxx] . Please confirm whether your authority wishes to continue to rely on regulation 10(4)(e) in relation to these documents/this information.
    - If your authority wishes to continue its reliance on this exception, please explain why this communication should be considered as an "internal" communication.
- Remember to ask questions about the public interest test (including, where relevant, the cumulative public interest test) – see below.

International relations, defence, etc. (regulation 10(5)(a))

- Remind the authority that all exceptions must be interpreted in a restrictive way and that an assumption in favour of release must be applied (regulation 10(2))
- Remind the authority that, for disclosure to cause substantial prejudice, the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility. Any submissions must take account of these points.
- Question:
    - Which of the factors in regulation 10(5)(a) would, or would be likely to be, substantially prejudiced by disclosure?
- NB the Scottish Ministers are allowed to *certify* that disclosing environmental information would, or would be likely to, prejudice substantially national security (regulation 12(1)). If such a certificate has been issued, the exception will be deemed to apply. (A copy of the certificate must be obtained.) However, the Commissioner can still go on to consider whether the public interest favours disclosure.
- Remember to ask questions about the public interest test (including, where relevant, the cumulative public interest test) – see below.

<u>Neither confirm nor deny</u>

- See questions above for regulation 10(5)(a) – including re public interest test in regulation 10(1)(a)
- Ask, in addition, why it would not be in the public interest for the authority to reveal whether it holds the information.

Course of justice, etc. (regulation 10(5)(b))

- Remind the authority that all exceptions must be interpreted in a restrictive way and that an assumption in favour of release must be applied (regulation 10(2))
- Remind the authority that, for disclosure to cause substantial prejudice, the authority would have to identify harm of real and demonstrable significance. The harm would also have to

be at least likely, and therefore more than simply a remote possibility. Any submissions must take account of these points.

- Question:
    - Explain why disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial, or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
- "Course of justice": nb Aarhus Convention Guide states (page 87) that "the course of" implies that an ***active*** judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case.
- Legal privilege: where this is claimed, see relevant questions for section 36(1) of FOISA
- Inquiry of criminal or disciplinary nature: Aarhus Convention limits this to criminal and disciplinary investigations. (NB SIC has accepted the application of regulation 10(5)(b) in relation to planning enforcement cases where criminal proceedings were a genuine potential consequence of the action being taken by the authority.)
- Remember to ask questions about the public interest test (including, where relevant, the cumulative public interest test) – see below.

Intellectual property rights (regulation 10(5)(c))

- Remind the authority that all exceptions must be interpreted in a restrictive way and that an assumption in favour of release must be applied (regulation 10(2))
- Remind the authority that, for disclosure to cause substantial prejudice, the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility. Any submissions must take account of these points.
- Questions:
    - Which type of intellectual property (IP) right is involved?
    - Describe the legal protection provided to this IP– for example, the Copyright Design and Patents Act 1988 or Copyright and Rights in Databases Regulations 1997
    - Describe the harm that the IP rights holder would suffer as a result of disclosure, remembering that a technical infringement of IP rights is not sufficient to create substantial prejudice - there must be some real loss suffered by the owner of the IP rights directly linked to disclosure of this information.
    - Why could this harm not be prevented by enforcing the IP rights?
- NB Disclosing information in response to a request under FOISAS/the EIRs will not infringe copyright.
- Remember to ask questions about the public interest test (including, where relevant, the cumulative public interest test) – see below.

Confidentiality of proceedings (regulation 10(5)(d))

- Remember that this exception cannot be used if the information relates to emissions. Where there is any doubt as to whether the information relates to emissions, seeks submissions from the authority.
- Remind the authority that all exceptions must be interpreted in a restrictive way and that an assumption in favour of release must be applied (regulation 10(2))
- Remind the authority that, for disclosure to cause substantial prejudice, the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility. Any submissions must take account of these points.

- Questions:
    - Specify the proceedings in question: “proceedings” implies a degree of formality. While it will not cover everything done by an authority, it will generally apply where an authority is exercising its statutory decision making powers and legal proceedings.
    - Why is confidentiality considered to be provided for by law (nb may be statutory or common law of confidence)?
    - Why would disclosure of the information prejudice substantially, or be likely to prejudice substantially, that confidentiality?
- Where an authority relies on this exception in respect of legal professional privilege, see the relevant questions at section 36(1) of FOISA above – but remember to ask questions re substantial prejudice.
- Remember to ask questions about the public interest test (including, where relevant, the cumulative public interest test) – see below.

Confidentiality of commercial or industrial information (regulation 10(5)(e))

- Remember that this exception cannot be used if the information relates to emissions. Where there is any doubt as to whether the information relates to emissions, seeks submissions from the authority.
- Remind the authority that all exceptions must be interpreted in a restrictive way and that an assumption in favour of release must be applied (regulation 10(2))
- Remind the authority that, for disclosure to cause substantial prejudice, the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility. Any submissions must take account of these points.
- Question:
    - Explain why this information is commercial or industrial in nature.
    - Demonstrate/explain why a legally binding duty of confidence exists.
    - Is this information publicly available?
    - Describe the legitimate economic interest this exception is being applied to protect.
    - Whose legitimate economic interest would be substantially harmed if the information was disclosed? (If this is a third party, what are the views of the third party? If the third party has not been consulted, why was consultation not considered to be necessary?)
    - Why would disclosure cause, or be likely to cause, substantial harm to this legitimate economic interest?
- Remember to ask questions about the public interest test (including, where relevant, the cumulative public interest test) – see below.

Third party interests (regulation 10(5)(f))

- Remember that this exception cannot be used if the information relates to emissions. Where there is any doubt as to whether the information relates to emissions, seeks submissions from the authority.
- Remind the authority that all exceptions must be interpreted in a restrictive way and that an assumption in favour of release must be applied (regulation 10(2))
- Remind the authority that, for disclosure to cause substantial prejudice, the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility. Any submissions must take account of these points.

- Questions:
    - Confirm whether this information was provided by a third party? If so, explain the circumstances and context under which this information came into the possession of the authority? Provide copies of any accompanying covering emails/letter supplied alongside this information.
    - Was the provider, or could the provider be, required by law to provide the information? If so, what is the relevant legal provision?
    - Has the provider of the information specifically refused to consent to the information being disclosed? (Without this, the exception cannot apply.)
    - Explain how disclosure of information would, or would be likely to, cause substantial harm to the interest of the provider.
    - Have you considered whether any of the information is already publicly available? [IO should check that the information is not already publicly available]
- Remember to ask questions about the public interest test (including, where relevant, the cumulative public interest test) – see below.

Protection of the environment (regulation 10(5)(g))

- Remember that this exception cannot be used if the information relates to emissions. Where there is any doubt as to whether the information relates to emissions, seeks submissions from the authority.
- Remind the authority that all exceptions must be interpreted in a restrictive way and that an assumption in favour of release must be applied (regulation 10(2))
- Remind the authority that, for disclosure to cause substantial prejudice, the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility. Any submissions must take account of these points.
- Questions:
    - How would disclosure of this specific information harm the protection of the environment?
    - Have you considered whether any of the information is already publicly available? [IO should check that the information is not already publicly available]
- Remember to ask questions about the public interest test (including, where relevant, the cumulative public interest test) – see below.

Public interest test - regulation 2(1)(b)

- Questions:
    - Please let me have your public interest submissions and, in doing so, specify the issues which are in favour of maintaining the exception; the issues taken into account which are in favour of making the information available and why you consider, on balance, that the public interest in maintaining the exception outweighs that in making the information available.

Cumulative public interest test

- Questions:
    - Given that you have applied more than one exception in the EIRs, you can, if you wish, provide cumulative public interest arguments (see the judgment of the European Court of Justice in *Office of Communications v Information Commissioner (*http://www.bailii.org/eu/cases/EUECJ/2011/C7110.html).

- This means that, having considered the public interest in relation to each exception separately, you can go on to weigh all of the grounds for maintaining the exceptions against all of the grounds for making the information available.
- If you wish to do this, please set out why, having carried out this cumulative test, how you came to the conclusion that, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

Personal data (regulation 11)

Regulation 11(1)

- Explain why the information is personal data as defined by section 3(2) of the DPA 2018 (if unclear, refer to guidance by the ICO, What is personal data?).
- Confirm that the applicant is the data subject (or that the applicant is acting on behalf of the applicant - in which case, ask for evidence of this).

Regulation 11(2)

- Explain why the information in question is personal data as defined by section 3(2) of the DPA 2018 (if unclear, refer to ICO guidance, What is personal data?).
- Does any of the data fall into one or more of the special categories of personal data in terms of Article 9 of the UK GDPR, or is it data relating to criminal convictions, offences or related security measures? If so, please confirm which of the data comprises special category (or criminal conviction/offence) data and why.
- (If the request is for numbers, statistics, etc.) Explain why there is a realistic prospect of individuals being identified by third parties in the event that the information is disclosed. Would it be possible to disclose the information in a way which would not lead to individuals being identified? (It may be necessary to refer the authority to the ICO's Anonymisation Code of Practice.)

Regulation 11(2) and (3A): breach of data protection principles

- Which of the data protection principles in Article 5(1) of the UK GDPR would be contravened by disclosure of the personal data and why?
- If, as is likely, the public authority is relying on the first data protection principle, why does it consider that disclosure of the information would be unfair and/or unlawful?
- In considering lawfulness, has the public authority considered whether any of the conditions in Article 6 to the UK GDPR would allow the data to be disclosed? In particular:
    - Does the authority consider that the person making the request has a legitimate interest in obtaining the information?
    - Has the authority asked the requester what their legitimate interests are?
    - Is the disclosure of the data necessary to achieve those legitimate interests?
    - If it is necessary, why does the authority consider that this is overridden by the interests or fundamental rights and freedoms of the data subject(s)? (NB the need to take particular care where the data subject is a child.)

- Are you aware of any matter in relation to your compliance with the other data protection principles which could affect a decision on whether disclosure would be fair and lawful?
- Where the data falls into one or more of the categories of special category data, has the public authority considered whether there are any conditions in Article 9 of the UK GDPR which would allow the data to be disclosed? In particular:
    - Has the personal data manifestly been made public by the data subject?
- Where the data relates to criminal convictions, offences or related security measure, are there any conditions in Schedule 1 to 3 of the DPA 2018 which allow the data to be disclosed?

Regulation 11(2) and (3B): breach of Article 21 of the UK GDPR

- Provide evidence that the data subject has exercised their rights under Article 21 of the UK GDPR (right to object to data controller processing their data).
- What consideration did the authority give to whether there are compelling legitimate grounds which override the interests, rights and freedoms of the data subject?
- Why are you satisfied, in all the circumstances of the case, that the public interest in making the information available is outweighed by that in not making the information available. (See also public interest questions above.)

Regulation 11(2) and (4A): non-disclosable under subject access request

- Explain why the information is exempt from disclosure under Article 15(1) of the UK GDPR (or, where it involves law enforcement processing, section 45(1)(b) of the DPA 2018), with specific reference to the exemptions in the UK GDPR (or DPA 2018 where relevant).
- Why are you satisfied, in all the circumstances of the case, that the public interest in making the information available is outweighed by that in not making the information available. (See also public interest questions above.)

Neither confirm nor deny – regulation 11(6)

- An authority may respond to a request for personal data by not revealing whether the information exists or is held by it, whether or not it holds the information, if to do so would involve making information available in contravention of regulation 11 (regulation 11(6)).
- Questions will depend on the regulation being relied on. Where an authority has applied regulation 11(2) as read with regulation 11(3B) or (4A), we need to be satisfied both that, in all the circumstances of the case, the public interest in making the information available is outweighed by that in not making the information available AND that it would not be in the public interest for the authority not to reveal whether it holds the information.

Scottish Ministers' Code of Practice on records management

Introduction

- It may be appropriate to check a public authority has complied with the Section 61 code where:
    - the authority doesn't hold information which we might expect it to, i.e. relating to its functions and decisions
    - the authority has found it difficult to establish whether it holds information
    - the authority cannot say whether/how/when information was destroyed
    - there are general concerns about the records management arrangements the public authority has in place
    - the authority cannot produce information held on its behalf, for example by a contractor.

The authority doesn't hold information we would expect it to

- The Section 61 Code says:
    - authorities should ensure they keep the records they will need for business, regulatory, legal and accountability purposes (Part 1, pages 13 and 14)
    - authorities must have in place a records management plan (RMP), and keep it under review (required by the Public Records (Scotland) Act 2011 and referred to on page 7 of the Code)
- Questions:
    - has the authority identified what decisions or actions should be recorded, how these records should be stored, and how long they should be kept?
    - does the authority control amendments or access to the records, which would demonstrate that the records can be relied upon?
    - does the RMP show whether the authority keeps certain type of records and how long the records are kept, and are disposals recorded?

The authority finds it difficult to be sure whether it holds information

- The Section 61 Code says:
    - authorities should know what records they hold and where they are, and should ensure that they remain usable for as long as they are required (Part 1, pages 17 and 18)
    - authorities should keep their records in systems that enable records to be stored and retrieved as necessary (Part 1, pages 15 and 16)
- Question: does the system for holding records meet the following criteria?
    - it is easy to use and to understand
    - it allows information to be retrieved quickly and easily (including searches carried out under FOI)

- it creates an audit trail showing when records were viewed, used, amended and deleted.

The authority can't say how/when/whether records were destroyed

- The Section 61 Code says:
  - authorities should define how long they need to keep particular records, should dispose of them when they are no longer needed and should be able to explain why records are no longer held (Part 1, pages 20 – 22)
  - disposal should be in accordance with clearly established policies which reflect the authority's continuing need to access the information, or the potential value of the records for historical or other research. This should be in the form of an overall policy, stating the types of records likely to be selected for permanent preservation, and disposal schedules which identify records which can be destroyed or transferred to archives after a set period.
- Questions:
  - does the disposal schedule contain sufficient detail to identify the records and the period for which they will be retained?
  - has the disposal schedule been kept up to date?
  - for records which are not covered by the disposal schedule, does the authority record disposal decisions and keep evidence of records identified for destruction (if not apparent from its overall policy)?
  - can the authority evidence that, as part of routine records management processes, destruction of a specified type of record or a specified age took place in accordance with the disposal schedule?

There are general concerns about the records management arrangements

- The Section 61 Code says:
  - authorities *should have in place organisational arrangements that support records management (Part 1, pages 10 and 11)*
  - authorities *should have in place a records management policy, either as a separate policy or as part of a wider information or knowledge management policy (Part 1, page 12)*
  - *authorities must have in place an RMP, and keep it under review (required by the Public Records (Scotland) Act 2011 and referred to on page 7 of the Code)*
- Questions:
  - is there evidence that records management is a core corporate function (i.e. is there evidence that records are managed at all stages from planning and creation to disposal?
  - is responsibility for records management identified?
  - do staff have clearly defined instructions on creating, keeping and managing records?

- are staff trained in records management policies and procedures?

The authority can't produce information held on its behalf, e.g. by a contractor

- The Section 61 Code says:
  - authorities should ensure that records shared with other bodies or held on their behalf by other bodies are managed in accordance with the Code (Part 1, page 23)
- Questions:
  - has the authority ensured that all parties agree on what information should be kept, and by whom, for how long, and what the disposal arrangements are?
  - which body holds the information for the purposes of FOI?
  - is the contractor responsible for ensuring records are covered by its records management plan and properly managed?
  - are details of records management responsibilities and processes recorded in the contract?

APPENDIX 3: CONSTRUCTION OF THE DECISION NOTICE

Introduction

1. An investigation should be pursued in such a fashion that not only can the Commissioner come to a decision but, in reaching that decision, it is clear that SIC has taken into account all relevant information, including the following:

   (i) the documents or information in dispute

   (ii) the relevant views and material provided by the public authority

   (iii) the relevant views and material provided by the applicant

   (iv) the relevant views and material provided by third parties, where appropriate

2. Not all of this information will be found in the decision itself, but the SIC's reasoning in coming to a particular decision must be clear from the decision, so that any competent person with no prior knowledge of the parties involved, the information in dispute or FOISA/the EIRs, is able to understand it. All material on which that reasoning is based must be retained in the relevant case file for as long as it is required in accordance with this Handbook, in the form of documentary evidence, correspondence, or notes recording meetings, discussions, actions, research or analysis.

3. The decision should also indicate any references which SIC has called upon in coming to that decision and in interpreting FOISA/EIRs. These will include sources as diverse as:

   (i) legal precedent

   (ii) comparable decisions of the SIC

   (iii) dictionary definitions

   (iv) relevant information in the public domain

   (v) technical advice

4. This must be done without revealing the detail of the information in dispute. Disclosing the information may be an offence under:

   (i) section 45 of FOISA and

   (ii) if it is personal data, section 170 of the Data Protection Act 2018: remember the wide definition of personal data; individuals may be identifiable from contextual information).

Naming applicants in decisions

5. In line with our decision notice templates in VC, applicants are only be named on the first page of the notice. Thereafter, the applicant will simply be referred to as "the Applicant" or "the Applicants", as appropriate. This is to make anonymising decisions for publication on our decisions database easier.

6. As noted elsewhere, applicants will **not** be named in the versions of the decisions published on our website.

Guidance on naming public authorities in decisions

5. In line with our decision notice templates, public authorities are only to be named on the first page of the decision notice. Thereafter, the authority will simply be referred to as "the Authority" throughout the rest of the decision.

6. Subject to any modifications detailed below, the name of the authority on the first page should be as it appears in WorkPro.

7. Follow these rules when naming authorities in decisions:

   (i) with the exception of conjunctions and prepositions, each word in the name should start with a capital letter

   (ii) "The" should be omitted from the beginning of the name

   (iii) use "and" instead of "&".

8. "Scottish Ministers" should be used in respect of all central departments of the Scottish Government, including Ministerial offices.

9. Executive agencies (see below) and Rent Service Scotland should be given the name of the agency (as in WorkPro), i.e.

   (i) Accountant in Bankruptcy

   (ii) Disclosure Scotland

   (iii) Education Scotland

   (iv) Forestry and Land Scotland

   (v) Historic Environment Scotland

   (vi) Scottish Prison Service

   (vii) Scottish Public Pensions Agency

   (viii) Social Security Scotland

   (ix) Student Awards Agency for Scotland and

   (x) Transport Scotland

10. As a general rule (there may be exceptions – to be discussed with HOE/DHOE), decisions in respect of the Scottish Parliament should be in the name of "Scottish Parliamentary Corporate Body".

11. As a general rule, the non-Ministerial office holders listed in Part 2 of Schedule 1 (type [ ]/002 in WorkPro) should be used only where the request has been addressed to the individual office holder in question. Applications relating to departments or agencies associated with these office holders should generally be dealt with as such.

12. The General Register Office for Scotland, however, as a non-Ministerial department of the Scottish Government, should be dealt with as the Registrar General of Births, Deaths and Marriages for Scotland (i.e. under Part 2).

13. A decision in respect of an individual inspector of schools should be in the name of "[name], HM Inspector of Schools".

14. A decision in respect of an individual rent officer should be in the name of "[name], Rent Officer".

15. A decision in respect of a regional health board should be in the name of "[region, as in WorkPro] Health Board" (abbreviated after the initial reference to "NHS [region]".

16. A decision in respect of a college of further education (type 047/005 in WorkPro) should be in the name of "Board of Management of [name of college, as in WorkPro]".

17. A decision in respect of the Police should be in the name of "Chief Constable of the Police Service of Scotland' [as in WorkPro]".

18. The name of a publicly-owned company should be as it appears in the Companies Register see "WebCHeck" on Companies House website: http://wck2.companieshouse.gov.uk//wcframe?name=accessCompanyInfo

19. For the decisions database, it may be useful to add keywords to help users find authorities which are more commonly known by names other than their official ones.

General presentation

20. The relevant VC template **must** be used and the style and layout must follow the formatting instructions in the template.

21. Within this overall framework, clear, concise and logical presentation of facts and arguments is of particular importance, as is consistent use of language and tense. Particular care is required when "cutting and pasting" text from elsewhere, to ensure that the inserted text is accurate and makes sense in the context of the decision being drafted.

22. The decision will be written in the third person, referring to "the Commissioner", "the Commissioner's Office" and "the investigating officer", as appropriate.

23. For accessibility reasons, keep the use of italics and bold text to a minimum.

24. Do not use underlining in a decision as this may cause difficulties when the decision is being published.

25. Hyperlinks and footnotes: where a footnote is used, include the hyperlink in the text of the decision and include the full url as a footnote. (Further guidance available in **VC170619**.)

Heading

26. Number of decision, e.g. Decision Notice 138/2020 (decision number won't be given until approved)

27. Brief (maximum two-line) summary of subject matter of application (this should focus on the subject matter and should not usually begin with, e.g., the words 'request for')

28. Applicant(s): First name + surname + MP/MSP where appropriate (Mr, Ms etc not normally included here; Dr or Prof, etc. may be used)

29. Public authority: (in accordance with the guidance above on naming public authorities in decisions)

30. Case ref: WorkPro reference

Summary

31. Brief, user-friendly, summary of the decision. The aim here is to give a summary of the main points of the decision, rather than simply noting that a request, followed by a request for review etc. was made. Abbreviation of names of parties, statutes, etc. should start here.

32. This should be brief (should not normally exceed 200 words) and should:

    (i) be in layman's language, avoiding jargon

    (ii) say what happened and what the outcome was

    (iii) not refer to the fact that a request/review was made (unless this is relevant to the finding, e.g. "The Authority did not respond to the request for review.") or to the fact that we carried out an investigation

    (iv) not refer in detail to relevant sections of FOISA, etc. (e.g. "The Authority argued that disclosure would harm the effective conduct of public affairs" and not "The Authority argued that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs in terms of section 30(c) of FOISA").

Relevant statutory provisions

33. Accurate list of the provisions of FOISA/the EIRs/other relevant primary and secondary legislation (including EU directives/regulations, where relevant) considered in the decision (including headings), with reference to the Appendix (where the relevant provisions will be set out in full). Please double check before submitting decision for approval.

Background

34. Concise details of what the application to the Commissioner is about, from the applicant's initial request to the authority for information to validation of the application and allocation to an investigating officer. This will not usually be an exhaustive narrative of everything that has happened along the way, but should include brief details of the following:

    (i) The applicant's request for information (sufficient to identify the information requested, the authority and when the request was made). It is clearly a good idea to stick as closely as possible to the actual wording of the request, but there may be circumstances where this is not appropriate, e.g. if the information request contains bad grammar or bad language, unless this is relevant to the case at hand. In cases where the information request is very long, it may be necessary to add an appendix to the decision, setting out the terms of the information request in full. (If the applicant has made a multi-part information request, but the application focusses only on some of those requests, it is not necessary to set out details of the other requests – or how the public authority responded – unless it aids comprehension of the case overall.)

    (ii) The authority's response to the request (i.e. if, how and when it responded, including any exemptions (section and heading) cited)

    (iii) The applicant's request for review (sufficient to identify the basis of the request and when it was made)

    (iv) The authority's response to the request for review (i.e. if, how and when it responded, including any changes made to its original decision on review)

(v) The application to the Commissioner (in particular, when it was made) and how we determined we had the power to investigate (standard paragraph). (Note: in the RSL template, this has a standalone section.)

Investigation

35. This section should confirm that

(i) comments on the application were invited from the authority as required by section 49(3)(a) of FOISA (and, as appropriate, from the applicant and any relevant third parties) and

(ii) the information in dispute has been obtained from the authority and inspected (or, as appropriate, the steps taken by the authority to confirm that it is not held)

36. It should bring out the key points made in the submissions received, without setting those submissions out in detail. It should also identify any relevant developments prior to the decision being reached (e.g. partial disclosure of information/partial settlement). If not readily apparent from the "Background" section, the scope of the investigation should also be made clear (and, where appropriate, explained) here.

Commissioner's analysis and findings

37. This is the core of the decision. It is broken down into consideration of the key questions which the Commissioner requires to address in coming to a conclusion, and should confirm that all relevant issues have been given due consideration by the Commissioner in reaching a decision. The starting point in identifying the relevant issues should be the respects in which the applicant is dissatisfied with the authority's handling of the case. In complex cases this may be done for several issues or exemptions and there may be a finding for each one. Where a number of different issues are to be considered, a paragraph early on in the section should confirm that matters that will be addressed and the order in which they will be considered in the following text.

38. The analysis will consider the matters in dispute, expand upon the key submissions made by the public authority and the applicant (and any relevant third parties) and then comment upon the merits of them. In doing so at this point, the Commissioner may employ the references which have informed her decision (see "Introduction" and "Relevant statutory provisions and other sources" above – accurate citation of these references is important). All of this should be done as succinctly as is possible without losing meaning: unless issues new to the Commissioner are under consideration, reference to earlier relevant decisions is likely to be more appropriate than repeating analysis carried out already.

39. The purpose of this section is to set out clearly (but not at unnecessary length) how the Commissioner has arrived at a determination and the reasons for doing so. This is important if the applicant and the public authority are to understand and accept the decision. Similarly, it will be important for wider consideration in media reporting and (where necessary) in establishing precedent. Finally, should the case be judicially challenged it will help demonstrate whether the Commissioner's determination and the factors informing it have been reasonable.

40. While it is important that this section sets out the Commissioner's position clearly, it is equally important that it does so in a detached and impartial (and generally reasonable) manner and does not "preach" or take either party to task unnecessarily. From time to time, we may want to highlight wider points of principle in the decision, for example to express concern at a

particular approach taken by an authority. However, it may be appropriate to include more pointed comments on individual practice issues in the covering letter to the relevant party and not in the (published) decision notice.

41. Where it is not considered necessary for any reason to consider certain of the exemptions cited by the authority, this should be stated clearly following the conclusions on those exemptions which have been considered.

42. Findings on individual documents should be presented in a way which is appropriate and proportionate to the information under consideration and the outcome(s) in respect of those documents. Detailed schedules of documents may be helpful in certain cases but should not be used indiscriminately.

Decision

43. This should name the parties in full and should set out:

    (i) whether or not the authority has been found to have complied with Part 1 of FOISA/ the EIRs in dealing with the applicant's request for information

    (ii) any provisions of FOISA or the EIRs (cited accurately) with which the authority has not complied

    (iii) the steps (if any) which the authority is required to take to comply.

    (iv) the period within which the authority is required to take those steps (generally 45 calendar days from intimation of the decision, unless there are particular reasons for allowing longer), with the date by which those steps are to be taken – see paragraph 222 .

Appeal

44. Standard paragraph setting out the parties' rights of appeal to the Court of Session. In line with the rest of the decision, the parties should simply be referred to as "the Applicant(s)" and "the Authority".

Enforcement

45. A standard paragraph to be used where compliance is required. Again, the public authority should be referred to as "the Authority".

Appendix

46. Full and accurate text of any statutory provisions considered in the decision. Ensure that this is wholly consistent with the provisions listed in the "Relevant Statutory Provisions" section at the start of the decision.

47. When setting out a section or regulation in part only, use the format in the template, but insert "…" to show where paragraphs have been deleted, e.g.:

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

(a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;

…

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

48. If you need to add a list of documents to the decision notice, or decide to include the full information request in an appendix, this should follow Appendix 1. (Note: the section on "Relevant statutory provisions" states "The Appendix forms part of this decision." Where an additional appendix is included, this text will have to be updated.)

APPENDIX 4: THE INSPIRE (SCOTLAND) REGULATIONS

Background

1. The INSPIRE (Scotland) Regulations 2009 (INSPIRE) came into force on 31 December 2009. They are based on an EU Directive – the INSPIRE Directive 2007/2/EC – which aims to make available consistent spatial data sets about the environment and create services for accessing these databases so that they can be more easily shared or combined to benefit the development and monitoring of environmental policy and practice in all Member States across the European Community.

2. INSPIRE applies to all Scottish public authorities subject to FOISA and the EIRs. INSPIRE also applies to "third parties", usually a body which holds spatial data sets or operates a spatial data service on behalf of a Scottish public authority.

The role of the Commissioner

3. The role of the Commissioner in relation to INSPIRE is relatively limited. Anyone can make an application to the Commissioner for a decision whether, in any respect specified in the application, a Scottish public authority or third party has acted or is acting in a way which is not compatible with:

   (i) regulation 8(4)(c) (services must be available to the public and accessible via the internet or any other appropriate means of telecommunication or

   (ii) regulation 10 (this permits certain limitations on the right of public access)

4. Any applications received under INSPIRE will be investigated (and any decisions enforced) in line with Part 4 of FOISA. However, when dealing with these types of application, FOISA is modified – see the Schedule to INSPIRE.

The basis of the application

5. As mentioned above, an application can be made to the Commissioner in relation to the following a failure by a public authority or third party to comply with regulations 8(4)(c) and 10.

6. Under regulation 8, a Scottish public authority or third party must establish and operate the following services in relation to any spatial data set or spatial data service for which it is responsible:

   (i) discovery services, enabling users to search and display the contents of metadata for spatial data sets and services by means of keywords, classification, quality and validity, geographical location, access or use conditions and identification of who is responsible for creating, managing, maintaining and distributing them;

   (ii) view services, enabling users to display, navigate, zoom in and out, pan or overlay viewable spatial data sets and to display legend information and any relevant content of metadata;

   (iii) download services, enabling users to download copies of whole datasets or parts of datasets and, where practicable, accessed directly;

   (iv) transform services, enabling users to transform INSPIRE compliant spatial datasets to achieve interoperability and

(v) invoke services enabling spatial datasets to be invoked.

7. In terms of regulation 8(4)(c), these services must be available to the public and accessible via the internet or any other appropriate means of telecommunication.

8. However, this right of access is subject to the "limitations" specified in regulation 10(2), (3) and (4). These are very similar to the exceptions set out in the EIRs.

9. There are some important differences between INSPIRE and FOISA which it is important to be aware of. For example:

   (i) INSPIRE does not specify timescales for responding to a request for access.

   (ii) As with FOISA and the EIRs, an applicant must go through the Scottish public authority's or third party's internal complaints procedures before making an application to the Commissioner. There are no timescales which regulate how quickly a public authority or third party should carry out a review or for making an application to the Commissioner.

   (iii) A Scottish public authority or third party may make a charge for a view service where that charge secures the maintenance of spatial data sets and spatial data services, especially in cases involving very large volumes of frequently updated data. Such a charge must be reasonable. The Commissioner may be asked to consider whether a charge has been applied appropriately.

   (iv) The limitations are not subject to the "prejudice substantially" test as are the exemptions and exceptions in FOISA and the EIRs – they are instead subject to the lower test of "adversely affect". While this means that we are more likely to find that limitations apply, the limitations are all (except for the limitation involving the disclosure of personal data which would breach one or more data protection principles) subject to the public interest test, so the outcome may well be the same.

10. The Scottish Government's current version of the guidance on INSPIRE can be downloaded from here: http://www.scotland.gov.uk/Topics/Government/PublicServiceReform/efficientgovernment/OneScotland/Guidance

11. We are likely to receive only a small number of applications under INSPIRE, but we must be able to recognise them when they come in, and be aware that it may not automatically be clear that the request is in fact being made under INSPIRE. In many cases, even if an applicant makes a request under INSPIRE, it may be that they will be more successful by making an application under the EIRs – where this is the case, advice on this point should be given to the applicant.

APPENDIX 5: CORRESPONDENCE WITH PRISONERS

1. It is not possible for us to correspond directly with prisoners by email. All direct correspondence will therefore have to be by letter.

2. Correspondence between SIC and prisoners is treated as "privileged". This means that correspondence from SIC will not be opened by the Scottish Prison Service (SPS), but instead will be opened by the prisoner.

3. When sending a letter to a prisoner, the following procedure must be followed:

   (i) All letters must be "double enveloped"

   (ii) The inner envelope must be marked with the word "**Privileged**". It must also bear the Commissioner's logo and address and have the following information recorded on it, where known:

      (a) Full name of prisoner, prisoner number, date of birth and hall location;

      (b) Name, address and telephone number of sender;

      (c) The case reference number

   (iii) The outer envelope must contain a covering letter addressed to the Governor, asking that the mail be passed to the prisoner unopened. The letters to the Governors will be prepared by ETSA or CST (the letters to be completed are next to the mail trays).

   (iv) All prisoner letters going out on a particular day must be in the outgoing mail tray by 3pm, to allow ETSA/CST to prepare the covering letter to the Governor. Please alert ETSA/CST when a letter needs to be sent to a prisoner.

APPENDIX 6: LIST OF STANDARD LETTERS

The standard letters which have been prepared in line with these procedures are contained in WorkPro. However, for ease of reference, here is a list of the letters which have been prepared, together with the purpose of the letter etc.

Title	Purpose	Process
SL01 Acknowledgement to Applicant	Acknowledge receipt of application	Validation
SL01a Request for comments from PA – s8	Seeking comments from public authority where the authority have argued that the information request is invalid	Validation
SL02 Not valid (S48)	Advise applicant can't accept application because it involves a request to SIC, Procurator Fiscal, or Lord Advocate (s.48)	Validation
SL02a Not valid (incomplete)	Advise applicant further information required to validate application – info to be provided within 2 weeks	Validation
SL02b – Not valid (timescales/other issues)	Advise applicant not valid - failure to complete required steps or meet timescales	Validation
SL02c – Out of time	Application made later than 6 months	Validation
SL02d – Personal data	Application relates to request for applicant's personal data – explains unlikely to be provided under FOI	Validation
SL03 – Request for info (App)	Asks applicant to provide copies of missing correspondence	Validation
SL04 – Final reminder (Applicant)	Giving applicant a final 10 days in which to provide missing info for validation	Validation
SL05 - Abandoned	Advising that case has been closed, because no response to request for further information.	Validation / Investigation
SL05a - Withdrawn	Confirming case closed after applicant withdraws	Validation / Investigation
SL05b - Withdrawn/Abandoned Public Authority	Advising PA that application withdrawn/abandoned and case closed	Validation / Investigation
SL06 – Valid application – Public Authority	Asking PA to supply copies of all information withheld (sent by VO)	Validation / Investigation
SL07 – Valid application - Applicant	Advising applicant that application accepted and enclosing guidance	Validation
SL07a– Valid application (FTR)	Advising applicant that application accepted and explaining investigation/decision will focus on FTR aspects only.	Validation
SL08 – Seeking PA	Notifying PA of name of IO and asking	Investigation

Title	Purpose	Process
Submissions	questions, if needed	
SL08a – Seeking PA Submissions FTR	Advising PA that investigation will be carried out and asking for submissions on FTR case	Investigation
SL09 – Confirm IO	Introducing IO to applicant	Investigation
SL10a – No decision – Applicant	Advising applicant no decision will be made, as application is frivolous/vexatious or withdrawn/abandoned.	Investigation
SL10b – No decision – Public Authority	Advising PA case closed as no decision falls to be made	Investigation
SL11c – Early resolution - Applicant	Proposing early resolution following response to SL06	Investigation
SL12 – Decision to PA	Decision letter for PA covering all outcomes – to be “signed” by investigator	Decision
SL15 – Decision to APP	Decision letter for APP covering all outcomes – to be “signed” by investigator	Decision
SL16 – No change to decision - Applicant	Advising applicant no review of SIC decision is possible/warranted	Decision
SL17a - Confirm Compliance to Applicant	Asking applicant if PA has complied with decision	Compliance
SL17b - Confirm Compliance to PA	Asking PA to confirm compliance within 5 days	Compliance
SL18a - Complied - Inform Applicant	Advising applicant that PA has complied with decision	Compliance
SL18b - Complied - Inform PA	This letter to be addressed to the Chief Executive (copy sent to the person who dealt with the investigation within the public authority) – confirming compliance	Compliance
SL19 – Document Return to PA	Returning documents to PA / confirming documents destroyed	Compliance
SL20 – Non-compliance (10 days’ notice)	Giving PA 10 days to show it has complied with decision	Compliance
SL21 – Non-compliance (5 days’ notice)	Giving PA a final 5 days to show it has complied with decision	Compliance
SL24 – No response to information notice	Gives PA 5 days to respond before Court proceedings initiated	Investigation
SL25 – Cancel Information Notice	Used where PA requires formal notification that information notice has been cancelled	Investigation
SL26a - Decision FTR to PA	FTR decision letter to PA	Decision
SL26b - Decision FTR to	FTR decision letter to applicant	Decision

Title	Purpose	Process
Applicant		
SL27a – Information Notice – HOE/DHOE	Information notice requiring information for the purposes of an investigation: HOE/DHOE	Investigation
SL27b – Information Notice – Commissioner	Information notice requiring information for the purposes of an investigation: SIC	Investigation
SL28a - Information Notice - S50(1)(b)(i) FOISA EIRs (D)HOE	Information notice: failure to comply with FOISA or EIRs: HOE/DHOE	Enforcement
SL28b - Information Notice - S50(1)(b)(i) FOISA EIRs SIC	Information notice: failure to comply with FOISA or EIRs: SIC	Enforcement
SL29a - Information Notice - S50(1)(b)(ii) FOISA EIRs (D)HOE	Information notice: failure to comply with codes of practice: HOE/DHOE	Enforcement
SL29b - Information Notice - S50(1)(b)(ii) FOISA EIRs SIC	Information notice: failure to comply with codes of practice: SIC	Enforcement

APPENDIX 7: RECORDS MANAGEMENT

General

1. Staff must comply with the Commissioner's Information and Records Management Handbook (VC153684) and Data Protection Policy and Handbook (VC149083). The following points give some additional information specific to investigations.

2. Failure to follow this procedure may be considered a breach of security, in which case the disciplinary procedures set out in the Employee Handbook will apply.

3. Information relating to an investigation must be kept safely and securely. It is a criminal offence under section 45 of FOISA to disclose information obtained in relation to an investigation without lawful authority. Unlawful disclosure of personal data is also an offence under section 170 of the Data Protection Act 2018.

4. All correspondence received (or prepared) in connection with an investigation must be saved in the relevant WorkPro file (and folder) – and deleted from other systems, such as Outlook – as soon as possible. The description of documents used should be designed to help others not familiar with the case to follow the correspondence. The following naming convention must be used:

   YEAR_MONTH_DATE (Description)

   (For example: 2019 06 21 Applicant asked for comments on PIT)

5. Accurate records of all telephone conversations and notes from meetings (bearing in mind our duties under data protection legislation) must also be added to the WorkPro file at the earliest opportunity, so that an accurate, up-to-date record of the case is maintained.

6. All drafts of letters or emails which are not used should be deleted as soon as possible.

7. The general rule is that hard copy files will not be prepared for investigation files.

Removing case files/hard copy information from the building

8. Ideally, case files, or parts of case files, should not be taken out of the office, but if there is a genuine need to do this, it must be cleared with HOE, DHOE, or HOCS first.

9. A record of this permission, stating the period that the file (or part of file) has been allowed out for, must be saved in the casefile in WP.

10. When hard copies of files (or parts of files) are taken out of the office, the "Register of outgoing files/withheld information" (2023/24 - VC184688) must be updated by the person taking the information out of the office. The register must also be updated when the file/information is returned.

11. HOE will check the file regularly to ensure that it is up to date.

File security when outside the building

12. In the event of a file (or part of file) being taken out of the building, it is the officer's responsibility to ensure that the information is not put at risk. The following guidance should be followed by all staff:

13. The file (or part of file) must be returned to the office as soon as possible. The file (or part of file) should be taken straight home, or straight to the meeting with the public authority involved. If this is not possible, they must be locked out of sight in the boot of the car only until such time they can be returned to the office or, failing which, kept securely and temporarily in the officer's home.

14. When carrying the file (or part of file) in public, officers must ensure that it is concealed and well protected from the elements. The file (or part of file) must never be left unattended in public.

15. Officers must not work with files (or parts of files) on public transport or in public areas, e.g. cafés. They may contain exempt information or personal data and so should not be put at risk of being accessed by the general public. This applies especially to original evidence files being taken to a meeting with a public authority.

Procedure for lost or stolen files

16. The Commissioner's Information and Records Management Handbook (see paragraph 1) sets out the procedures for data security breaches. Staff must familiarise themselves with the Handbook.

17. In the event of the loss of a file or any papers from a file or the disclosure of information contained in a file or other security breach (or a near-miss), the event must be reported immediately to the FAM (in whose absence, the HOCS, whom failing another member of the SMT).

18. HOE should also be notified immediately.

19. In the event of a file going missing while it is out of the building:

    - If it is lost, the responsible officer must check all places where it might have been left/stored.

    - If it cannot be found after extensive searching, the officer must inform FAM (in whose absence, the HOCS) and HOE immediately, who will then assess whether the file is at risk of unauthorised access, what information has been lost and what information is recoverable from scanned versions.

    - If the file has been stolen, FAM (in whose absence, the HOCS) and HOE must be informed immediately and will inform the local police in the area where it was stolen, if they have not been informed already. Again, FAM (in whose absence, the HOCS) and HOE should also determine with the member of staff what information has been lost and what is recoverable from scanned documents.

    - If original evidence has been lost in transit every effort must be made to locate it. If this fails, the responsible officer must then inform FAM (in whose absence, the HOCS) and HOE, who will determine if the police should be informed.

    - If an original file has been stolen in transit, HOE, DHOE or HOCS should be informed and will contact the police in the area where it was stolen, if they have not already been informed.

    - It is the responsibility of the HOE to inform the public authority, as soon as possible, that the information has been lost or stolen.

Emails – avoiding data incidents

17. Take extra care to make sure that emails are sent to the correct address – follow guidance on this from CST. It is usually safer to send emails direct from WP as this limits the email addresses which the email can be sent to those of the parties involved.

18. However, when we are issuing a notice which could lead to an appeal to the Court of Session, we should, in order to evidence that the notice has been served, seek both a read receipt and delivery receipt. It is not possible to obtain these receipts when emailing direct from WP, so the emails need to be sent from Outlook. For the purposes of this Handbook, the relevant notices are:

    (i) Section 49(2) of FOISA: application frivolous, vexatious, withdrawn or abandoned

    (ii) Section 49(6): decision notice

    (iii) Section 50(1): information notice

APPENDIX 8: QUALITY ASSURANCE

Introduction

1. The Commissioner recognises the importance of good performance and quality in the delivery of statutory duties and responsibilities. The service delivered must be to a defined standard which meets the needs of and, where practicable, the expectations of the public authorities which are subject to FOI and people in Scotland seeking information.

2. The Commissioner carries out quality assurance in relation to the quality of investigations work, in particular, in relation to compliance with the policies and procedures. The purpose of the quality assurance is to:

   - help us achieve greater consistency across the Enforcement Team
   - ensure that investigations procedures are being followed
   - identify and evidence good practice that we can share and learn from
   - assess the effectiveness of policy and procedures
   - reduce the risk of appeal as a result of procedural mistakes or oversights

3. The purpose of quality assurance is **not** to consider whether the correct decision was made or to re-open an investigation.

Criteria

4. Investigations are assessed against a number of set criteria (see the **QA Form** below) which are used to assess the quality of an investigation, from start to end. Each criterion refers to a particular procedure which gives additional background about what is expected during an investigation.

5. Investigations which deal only with FTR cases will not go through the quality assurance process.

Choosing files for assessment

6. At the start of each quarter (April, July, October and January)[3], ETSA will select 15 (non-FTR) cases closed during the previous quarter (whether during the investigation or with decision). Although the cases will, as far as possible, be selected at random, the cases should be split, as far as possible, equally between the two teams. The HOE will be able to give ETSA guidance on selection if needed.

7. The ETSA will provide the HOE with a list of the cases to be assessed. The HOE will then allocate the cases between the HOE and the DHOEs to assess. (As far as possible, the assessor will not have had direct involvement with the case being assessed.)

8. ETSA will open the **QA Form** template in VC (see “Naming conventions” below) and let HOE and the DHOEs know when the files have been opened.

[3] SMT agreed on 23 February 2022 that QA work will not be carried out in 2022/23 – see **VC162782**.

Carrying out the assessment

9. The assessors must complete the **QA Form** template in VC. (The **QA Form** below contains an additional column highlighting the relevant paragraph of the Handbook, etc., to which the quality criterion relates.)

10. Assessments are carried out in line with the requirements of the Investigations Handbook, etc. For example, one of the matters to be considered is to what extent the triage note was prepared in line with procedures. In considering whether procedures were followed, assessors must refer to the guidance in the Handbook.

11. It is essential that assessments are carried out carefully and objectively. Assessors should highlight areas of good practice, so that we can all learn from them, not just practices which do not comply with the Handbook or with other internal procedures. Where an assessor believes that a particular criterion has not been met, they will, wherever possible, suggest ways in which the work could have been improved.

12. Assessors must carry out the assessment and complete the relevant form by the end of the calendar month. DHOEs must notify HOE when the forms have been saved in VC.

Naming conventions

13. ETSA will save QA Forms for each of the files to be assessed in VC, as follows:

    Enforcement\Management of Enforcement Function\Quality & Performance Management.

14. The naming convention for the forms is as follows:

    [Date] [Assessor] [QA] [WorkPro reference]

    so, for example:

    2019 10 01 MK QA 201900099

15. When working on the forms, HOE and DHOE must change the security profile to “Management and DHOE”.

Monitoring and review

16. It is the responsibility of the HOE to ensure that assessments are being carried out in line with the timescales and processes set down in these procedures.

17. The HOE will review all of the forms. In the event that a form raises issues about the practice of an individual, HOE will discuss the matter with their line manager.

18. The HOE reports to the Quarterly Senior Management Team twice a year on the outcomes of the assessments carried out. The report is anonymous, but highlights particular areas of good practice or of concern.

19. The HOE’s report is also shared with the Enforcement Team.

QA Form

WorkPro reference:	
Applicant:	
Public authority:	
Assessor:	

	Subject	Criterion	Ref.
1.1	**Receipt and validation**	Application acknowledged within two working days?	13
1.2		Was view of HOE/DHOE sought appropriately?	0
1.3		Where view sought, was it given within one week?	35
1.4		Where case invalid, was reasonable advice given to applicant on how to make a valid application?	4
1.5		Where case is valid, has the correct validation date been recorded in WP?	32
2.1	**Weighting and allocation**	Was case weighted and allocated to DHOE within one week of being passed to HOE (or DHOE in the absence of the HOE)?	73
3.1	**Resolution**	Was informal resolution considered/attempted appropriately (throughout the case)?	Section 5
4.1	**Seeking formal submissions/ comments**	Was the SL08 in line with the requirements of the Handbook?	Section 9
4.2		Did the SL09 accurately reflect the scope of the investigation?	120
5.1	**Investigation**	Was the triage note (where required) prepared/updated in line with procedures?	192
5.2		In line with natural justice (and taking account of s45 of FOISA), were appropriate additional comments sought from the applicant during the investigation?	157/174(i)
5.3		Is there evidence of submissions from public authorities being challenged, where appropriate?	174
5.4		Was the applicant kept up to date during the investigation?	163
6.1	**Approval**	Did the draft decision have to be returned to the IO for further investigation/following significant alteration (not just to review changes)?	199
6.2		Was the first level approval carried out in a reasonable period (taking account of other workload and KPIs)?	206
6.3		Was the second level approval carried out in a reasonable period (taking account of other workload and KPIs)?	214
7.1	**Good practice**	Does the correspondence with the public authority, decision, etc. comment appropriately on practice?	Op Plan (VC119559 – 2019/20)
7.2		Has the non-compliance section in WorkPro been appropriately completed?	Intervention Procedures (VC104657)
8.1	**Compliance**	Where compliance was required, was this followed	236

	Subject	Criterion	Ref.
		up by the IO?	
9.1	**Quality of communications**	Were the communications with the parties clear and courteous?	6
10.1	**Records management**	Have naming conventions been followed in the WP file?	25, Appendix 8
10.2		Was correspondence added to WorkPro as soon as possible?	4, Appendix 7
10.3		Is any withheld information in the file clearly marked in WP?	173
10.4		Was the joint DIRF/website form WorkPro form accurately completed?	223
10.5		Are the decision notices (anonymised and non-anonymised) named properly in VC?	198(ii) 229

APPENDIX 9: CRIMINAL ALLEGATIONS

Introduction

1. Under section 65 of FOISA and regulation 19 of the EIRs, it is a criminal offence for a public authority, or a member of its staff, to delete, redact, conceal, etc. a record with the intention of preventing information being disclosed. An offence will only be committed if the record is deleted, etc. after an information request has been made for it.

2. Allegations may come to us in a number of ways. For example, an allegation may be made as part of an application, mid-investigation or as a standalone allegation (e.g. from a whistle blower). Advice on allegations must always be sought from HOE/DHOE.

3. It is also possible that, during an investigation, a VO/IO might come across something which suggests that an offence may have been committed by a public authority. Where that happens, the VO/IO should immediately refer the matter to the HOE/DHOE. They must not contact the applicant or public authority until guidance on the next steps has been obtained from the HOE/DHOE.

Memorandum of Understanding with Police Scotland and COPFS

4. The Commissioner has a Memorandum of Understanding (MoU) with Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS) regarding the investigation and reporting of criminal offences under section 65 and regulation 19.

5. The current version of the MoU is published on our website here.[4] The MoU covers a number of issues but, for the purposes of this guidance, it is helpful to note that it states (para 4.3):

   Where an allegation is made to the SIC, or evidence of criminality is uncovered during an investigation undertaken by the SIC (under section 43(3) or 47 of FOISA) *the allegation must, unless the SIC reasonably believes that there is no evidence to suggest that an offence may have taken place, be shared with Police Scotland at the earliest opportunity and prior to the commencement of any formal investigation by the SIC.*[5]

Recognising an allegation

6. It's not always obvious when someone is making an allegation. Some applicants may not be aware that the offences exist, but might use particular key words in their application (e.g. "information intentionally withheld") which suggest to us that they are alleging that an offence has been committed. Other applicants might not understand our role and might not be aware that public authorities are entitled to refuse to comply with requests for a number of different reasons and that, even if information had been withheld wrongly, this does not automatically mean that a criminal offence has been committed. (We have published guidance on our

[4] At the time of writing (9 August 2023), a new version of the MoU is close to being finalised. The most up to date version of the draft can be found in VC191940. This guidance will be updated when the new MoU is finalised.

[5] The test has been simplified in the latest draft of the MoU: *Where an allegation is made to the SIC, or evidence of criminality is uncovered during an investigation undertaken by the SIC … the allegation must, where SIC reasonably believes that there is evidence to suggest that an offence may have taken place, be shared with Police Scotland as soon as reasonably practical and prior to the commencement of any formal investigation by the SIC.*

website (scroll down to “Criminal offences”) which gives some information about offences, but also explains why public authorities may lawfully refuse to disclose information.)

7. This guidance must be followed if correspondence:

    - specifically refers to section 65 of FOISA or to regulation 19 of the EIRs
    - alleges that an authority committed a crime in responding to an information request; or
    - refers to information intentionally being concealed, etc. from them in response to an information request.

Allegations as part of an application

8. Most of the allegations we receive are made as part of an application for decision under section 47 of FOISA. In those cases, an application file should be set up in the usual way and guidance sought from the HOE/DHOE as to whether what has been alleged is an offence under FOI law. (Applications occasionally contain references to offences having been committed by an authority, but the allegation relates to wider issues behind their information request, and not to the response to the request itself.)

9. When the HOE/DHOE is satisfied that an allegation has been made under FOI law, they will ask the VO/IO to write to the Applicant to:

    - explain the difference in process, standard of proof, etc.
    - explaining that, due to the possibility of prejudicing any criminal investigation, proceeding with the allegation will delay the investigation and won’t necessarily lead to information being disclosed and
    - ask the Applicant to confirm how they wish to proceed.

10. If the Applicant confirms they want us to consider their allegation, the HOE/DHOE will be set up a case in WorkPro for the allegation (see more on records management below). The HOE/DHOE will remain the case owner.

11. If the application is valid, the application should be validated in WorkPro (and acknowledged), but the SL06/SL08a and SL07/SL07a must not be sent to the Applicant or public authority at this stage.

Allegations which aren’t part of an application

12. It is possible that we will receive allegations which aren’t accompanied by an application. We may, for example, be told by a whistle-blower that they have concerns that an offence may have been committed. Alternatively, the person making the allegation may make it clear that they do not want us to carry out an investigation under section 49 (even if, for example, they have made sought a review from the authority), but want us to focus on their allegation.

13. Advice should be sought from the HOE/DHOE as soon as possible to determine how the allegation should be dealt with. For example, if satisfied that an application is not being made, no application file needs to be opened. (This may only come to light after an application file has been opened, in which case the file should be voided and all relevant correspondence moved to VC.)

Setting up the WorkPro file for allegations

14. All correspondence relating to offences is saved in VC.[6] However, for reporting purposes, a case file must be opened in WP to record the fact that the allegation has been made.

15. Setting up the case file:

    - Case type: Intervention
    - Public authority: select name of PA (if not on the list, select "Not a Scottish Public Authority")
    - Complainant: add the name of the person who made the allegation
    - Complete the "Section 65" tab[7] (**not** the "Intervention" tab): keep the "summary of complaint" short and make sure it does not contain any personal data – for example, "Allegation: information concealed under s65"

16. Add a note to the file to record the fact that all of the correspondence, etc. about the case is saved in VC. For example: "All correspondence in restricted area in VC – search 202300990."

Saving correspondence, etc. in VC

17. All correspondence relating to criminal allegations must be moved to VC as quickly as possible. Where an allegation has been made in conjunction with an application, it is likely that there will be some reference to the allegation which will need to remain in the application file, for example the application containing the allegation and procedural guidance from the HOE/DHOE on what to do about the application while the allegation is being considered. However, this must be kept to a minimum.

18. Follow these rules:

    - Save the correspondence, etc. in Enforcement\Offences
    - Document type: Allegation
    - Subject: Criminal allegation/investigation (using this subject matter will automatically restrict access to the document)
    - Naming conventions: until we are able to use WP for correspondence about allegations, it is really important that we name the correspondence in a way that it can be easily found. The WP case reference must always be included. Example: *2023 01 03 Email from Police Scotland (Smith and Anywhere Council) 202300990*".[8]

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[6] At the time of writing (4 August 2023), all correspondence relating to allegations is saved in a restricted area in VC. Plans are in place to allow all correspondence to be saved in WorkPro, using a facility which restricts access to the files to the officer dealing with the investigation, their line manager, HOE, etc. This guidance focusses on the current procedures but will be updated once the necessary steps are in place to allow WorkPro to be used.

[7] WorkPro doesn't have a separate tab for offences under regulation 19 of the EIRs – just use the section 65 tab.

[8] We have a Privacy Notice which deals purely with investigations for law enforcement purposes. This states that we will hold electronic copies of case files for five years from the date of closure of the case. WorkPro files will therefore be destroyed at the end of the five years but the information in VC will need to be deleted manually. When files are deleted from WP at the start of the year, CST will provide HOE with a list of any

Referring the case to SIC for consideration

19. A template has been set up in VC ("Criminal allegation: SIC referral checklist") for referring allegations to SIC for consideration. This contains a set of questions to assist the Commissioner decide what approach to take.

Preparing the referral form

20. At the time of writing, all information relating to criminal allegations is saved in a restricted area of VC. The HOE/DHOE may ask a VO/IO to prepare the form. VOs/IOs do not have access to the restricted area in VC. Although they can save the form in VC to the restricted area, they cannot access the form once it has been saved. The VO/IO should therefore save the form to their desktop and work on it there before saving the form in VC (using the rules set out in paragraph 18 above). As soon as the form has been saved to VC, the VO/IO must let the HOE/DHOE know that the form has been draft and delete the copy saved on their desktop.

21. Once the template has been prepared, it should be reviewed by HOE/DHOE. HOE/DHOE will then email the Commissioner to notify him that the referral form is ready for his comments. (A copy of the form must not be emailed to the Commissioner – instead, he must be given the VC reference of the document.)

22. The Commissioner will complete the form to confirm what, if any, action is needed, and will notify the HOE/DHOE when the form has been completed.

Allegation to be referred to Police Scotland

23. Where the Commissioner is satisfied that the allegation should be referred to Police Scotland, the officer must compile a file and, along with the referral form and a covering email, send it to the Assistant Chief Constable (Professionalism and Assurance).[9]

24. If the allegation was accompanied by an application, we cannot proceed with the application until, for example, we know that Police Scotland do not intend to refer the allegation to COOPFS or COPFS notify us that they do not intend to raise criminal proceedings.

Allegation not to be referred to Police Scotland

25. The investigator will notify the person who made the allegation that the Commissioner does not consider there to be sufficient evidence to refer the matter to Police Scotland. He/she must be reminded that they have the right to refer the matter direct to Police Scotland.[10]

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intervention files which have been destroyed. We currently have around 1,000 documents saved in Enforcement\Offences. Provided the WP case reference has been used in the name of the document, it will be relatively simple to locate – and mark for deletion – any relevant records in VC.

9 This is different from what is in the current version of the MoU, but Police Scotland confirmed (4 August 2023) that this is the correct contact.

[10] Section 65A of FOISA and regulation 19A of the EIRs make it clear that no criminal offences may be commenced more than three years after the commissioner of an offence or, in the case of a continuous contravention, three years after the last date on which an offence was committed. When advising the person who made the allegation of their right to refer the matter direct to Police Scotland, they should be told of the time limits involved.

26. If the allegation was accompanied by an application, we should now proceed with the application in the usual way - the SL06/SL08a and SL07/SL07a can now be sent to applicant and public authority.

Reporting on allegations

27. HOE will submit a report to the Quarterly Intervention Management meeting (QIM) on the status of open intervention files which deal with allegations. Any personal data in the report should be kept to a minimum.[11]

28. The list of open cases can be searched using – see CAS-003 (not CAS-001) (Workpro Reports/Applications Performance/CAS-003 Tracking – Other Case Types). At the time of writing, it is not possible to edit this report by open "section 65" cases, so each case will have to be reviewed in order to determine whether it is a relevant case.

[11] See VC192170 for an example of a report prepared for the QIM.

DOCUMENT CONTROL SHEET

Document Information	
Full name of current version: Class, Title, Version No and Status. *E.g. C5 Key Documents Handbook v01 CURRENT ISSUE*	C2 Investigations Handbook v02 CURRENT ISSUE
VC File Id	VC123335
Type	Procedure
Approver	SMT
Responsible Manager	HOE
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Corrections / Unplanned or Ad hoc reviews (see Summary of changes below for details)	
Date of last update	20 December 2023

Summary of changes to document				
Date	**Action by** *(initials)*	**Version updated** *(e.g. 01.25-36)*	**New version number** *(e.g. 01.27, or 02.03)*	**Brief description** (*e.g. updated paras 1-8, updated HOPI to HOCS, reviewed whole section on PI test, whole document updated, corrected typos, reformatted to new branding*)
30/08/2019	BOW	02.00	02.01	New document created following approval of draft
30/08/2019	BOW	02.01	02.02	DCS updated, published on website
17/01/2020	PK	02.02	02.03	QA Form updated
23/01/2020	PK	02.03	02.04	DCS updated
23/01/2020	MK	02.04	02.05	Changes to QA form approved
05/02/2020	PK	02.05	02.06	Table of Contents: File Opening by ETSA added Section 1: Receipt and Validation of Applications updated Section 5: Failure to respond (para 104) updated Appendix 1: Resolution and validation Section 7: Understanding the Application (para 126) added
07/02/20	MK	02.06	02.07	Changes (see v02.06 above) accepted. Change to paras 23-25 re. recording of research
12/02/20	PK	02.07	02.08	Additional sentence added to Para 73 (Weighting and Allocation)
17/02/20	BOW	02.08	02.09	Document extracted from VC on take and return basis
19/02/20	MK	02.09	02.10	Para 73: change accepted and comment removed Para 225: guidance re 45-day period added Appendix 2: text added re searching personal phones, WhatsApp, etc.; EIRs questions added; Section 61 Code of Practice questions reformatted Error messages at paragraphs 206, 214 and 218 corrected DCS updated
20/02/20	BOW	02.10	02.11	DCS updated, published on website
10/06/20	MK	02.11	02.12	Changes (tracked) relating to the Coronavirus (Scotland) Act 2020, including ability to issue formal notices by email; validation guidance and standard questions for public authorities when dealing with timescale issues as a result of the 2020 Act; updating records management procedures as a result of home working; removal of section on printing decisions and uploading decisions (procedures for the latter moved to the Website Manual). A number of typos sorted and minor changes made – tracked

Summary of changes to document				
				on v11.
10/06/20	MK	02.12	02.13	Further changes tracked to take account of EM comments
11/06/20	MK	02.13	02.14	Further changes tracked to take account of CMS comments
11/06/20	MK	02.14	02.15	All tracked changes accepted.
12/06/20	BOW	02.15	02.16	DCS updated, published on website
25/06/20	PK	02.16	02.17	Para 65 added: transferring cases (Section 2: Seeking withheld information)
14/08/20	MK	02.17	02.18	• Change to para 65 (see v02.17) accepted • Para 158 amended to allow SL08s to be issued by email • Para 204: point at which confirmation of email address to be obtained move from submission of decision to finalisation of triage note – see para 200.
17/08/20	BOW	02.18	02.19	DCS updated, published on website
21/10/20	MK	02.19	02.20	• Section 14 updated to reflect new procedures for ETSA issuing decisions • Appendix 3 updated to reflect new decision notice template and revised procedures for referring to earlier decisions • Appendix 7 updated to include revised procedures for taking hard copies of parts of files (e.g. withheld information) out of the office.
21/10/20	MK	02.20	02.21	Changes tracked in v21 accepted. DCS and table of contents updated.
21/10/20	BOW	02.21	02.22	DCS updated, published on website
18/11/20	MK	02.22	02.23	Additional guidance on applications including allegations re s65 of FOISA/reg19 of the EIRs: • Para 38: no action to be taken until guidance from HOE/DHOE • Para 51: redaction of allegation from application • Para 158: dealing with allegations in the SL08
26/11/20	BOW	02.23	02.24	DCS updated, published on website
01/12/20	MK	02.24	02.25	Paras 230(i) and 235 amended to reflect changes to remove blank pages from decision notice templates.
02/12/20	BOW	02.25	02.26	DCS updated, published on website
08/01/21	MK	02.26	02.27	Opened in edit mode in error – no changes made.
15/01/21	MK	02.27	02.28	Updated to take account of Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019; references to consent as a basis for disclosure under FOISA edited.
19/01/21	BOW	02.28	02.30	DCS updated, published on website
16/02/21	MK	02.30	02.31	Minor changes to Appendix 8 (QA).
18/02/21	BOW	02.31	02.32	DCS updated, published on website
26/02/21	MK	02.32	02.34	Minor changes to Section 3: weighting and allocation
04/03/21	BOW	02.34	02.35	DCS updated, published on website
09/03/21	MK	02.35	02.36	Forestry and Land Scotland added to list of Executive Agencies
11/03/21	BOW	02.36	02.37	DCS updated, published on website
17/03/21	MK	02.37	02.38	• VC reference for list of decision numbers updated (para 230(i) • Checklist in Appendix 3 updated: no underlined text to appear in decision notices.
18/03/21	BOW	02.38	02.39	DCS updated, published on website
26/03/21	MK	02.39	02.40	• Para 101 amended to cover position where Coronavirus Act arguments come to light during an FTR investigation. • Missing link to reference in para 315 added
13/04/21	BOW	02.40	02.41	DCS updated, published on website
14/04/21	MK	02.41	02.42	Reference to allocation spreadsheet (paras 75 and 76) updated for 2021/22.
14/04/21	BOW	02.42	02.43	DCS updated, published on website
22/04/21	MK	02.43	02.44	Changes tracked to Section 14 to clarify actions when HOE/DHOE issues DN to PA

Summary of changes to document				
22/04/21	WSS	02.44	02.45	Changes tracked to Section 14 (Para 243) to clarify actions when HOE/DHOE issues DN to PA
23/04/21	MK	02.45	02.46	Changes accepted.
05/05/21	BOW	02.46	02.47	DCS updated, published on website
05/08/21	MK	02.47	02.48	Changes (particularly to Section 11: Triage) to reflect the extension of cases to which triage no longer required
11/08/21	MK	02.48	02.49	• Section 14 (Issue of decision notice) updated to take account of joint DIRF/decisions database form; para 242 reflects fact that decision will be published in around a week • Appendix 7 (Records Management) updated to clarify that documents uploaded to WorkPro must, at the same time, be deleted from the original source • Appendix 8 (Quality Assurance) updated to reflect new joint DIRF/website form; incorrect hyperlinks updated
18/08/21	AMc	02.49	02.50	• Changes tracked to Section 14 (paragraph 238) to clarify ETSA no longer gets draft decision number on the new joint form.
18/08/21	MK	02.50	02.51	• Changes (see v2.50) accepted and paras re publication of decisions conjoined. • Reference to appeal portal taken out.
03/09/21	BOW	02.51	02.52	DCS updated, published on website
17/12/21	MK	02.52	02.53	Changes tracked to reflect proposed changes to Scheme of Delegation re.: • DHOE rights to accept late application/refuse an application on the basis it is frivolous/vexatious • VO and IO right to notify applicants application withdrawn
03/02/22	MK	02.53	02.54	Changes set out immediately above accepted following approval by QSMTM
04/02/22	BOW	02.54	02.55	DCS updated, published on website
11/02/22	MK	02.55	02.56	Multiple (minor) changes tracked throughout the document for consultation, including: • Guidance added at what stage case status updates ot be made (for monthly report on website) • "DHOE.HOE" view now to be carried out • Recognition that hard copy files will not generally be opened for investigations (guidance still to be finalised) • Deleting obsolete references to extended timescales introduced by Coronavirus legislation • Guidance on transferring cases to HOE for weighting and allocation in absence of hard copy files • Extended guidance on calculating date for compliance with decisions • Clarifying when delivery receipts needed (and emails to be sent from Outlook)
15/02/22	PK	02.56	0.57	Further minor changes tracked for consultation: • Para 12 Changed from ETSA to VO • Para 21 Return of application to Applicant • Para 22(i) Delete word ("been") • Para 27 Delete sentence – stapling of summary – no hard copy files now • Para 48 Change from "an IO" to "VO" • Para 48 Withheld information - suggest inclusion of EIR equivalent to s12 • Para 58 No need to email HOE for weighting
21/02/22	SJ	02.57	02.58	Comment on para 60
23/02/22	MK	02.58	02.59	Changes (02.56 to 02.57) accepted. Other minor changes made.
24/02/22	BOW	02.59	02.60	DCS updated, published on website

Summary of changes to document				
09/03/22	MK	02.60	02.61	Section 13: addition re contents of approval emails
10/03/22	BOW	02.61	02.62	DCS updated, published on website
10/03/22	MK	02.62	02.63	Para 214 – requirement to confirm email address before issuing decision taken out.
11/03/22	BOW	02.63	02.64	DCS updated, published on website
29/04/22	KK	02.64	02.65	Checked out in edit mode in error – no changes made
02/05/22	AMcE	02.65	02.66	Checked out in edit mode in error – no changes made
02/05/22	AMcE	02.66	02.67	Checked out in edit mode in error – no changes made
25/05/22	MK	02.67	02.68	• Para 61 – clarified guidance on weighting of cases • Para 195 – change to reflect IOs signing decisions • Reference to Data Protection Handbook added to Schedule 7
27/07/2022	MK	02.68	02.69	Checked out in edit more in error – no changes made
24/08/2022	MK	02.69	02.70	• Section 1: VC references updated; guidance on synopsis • Section 2: title of section changed. Multiple changes to reflect new procedures to be introduced on 1 September 2022. • Section 3: on allocation, DHOEs to give advice on whether additional comments needed • Section 9: guidance inserted to reflect (interim) parallel approach to investigations • Appendix 3: recent changes to DN formatting (e.g. naming parties, footnotes) made • Appendices 5 and 7: reference to office premises being closed (due to pandemic) taken out • Appendix 8: footnote explaining no QA 22/23
25/08/2022	LB	02.70	02.71	DCS updated, published on website
26/10/2022	MK	02.71	02.72	VC number for 2023 list of decisions added (para 212)
07/11/2022	LB	02.72	02.74	DCS updated, published on website
31/01/2023	KK	02.74	02.75	Checked out in edit mode in error – no changes made
02/02/2023	MK	02.75	02.76	Changes to paras 51 to 61 re. response to SL06
09/02/2023	BOW	02.76	02.77	DCS updated, published on website
14/03/2023	MK	02.77	02.78	Paragraph 146 updated
14/03/2023	BOW	02.78	02.79	DCS updated, published on website
29/03/2023	KK	02.79	02.80	Checked out in error – no changes made
31/03/2023	MK	02.80	02.81	VC reference in Appendix 7 (Register outgoing files) updated
17/04/2023	MK	02.81	02.82	VC reference on page 12 (Allocation of cases) updated
01/06/2023	EM	02.82	02.83	Checked out in edit mode in error – no changes made
30/06/2023	MK	02.83	02.84	Early resolution guidance added: • Section 2: Inviting comments and obtaining withheld information updated • Section 6: Resolution updated • Reference to new standard letter added to Appendix 6 Para 160 updated to reflect changed VC number
30/06/2023	SL	02.84	02.85	DCS Updated
11/07/2023	MK	02.85	02.86	Name of standard letter in para 65(ii) updated
11/07/2023	BOW	02.86	02.87	DCS updated, published on website
18/07/2023	CR	02.87	02.88	Checked out in edit mode in error – no changes made
26/07/2023	MK	02.88	02.89	Guidance on obtaining additional comments from APP updated • Para 157 • Section 10
03/08/2023	BOW	02.89	02.90	DCS updated, published on website
03/08/2023	LB	02.91	02.92	Name of document in website file library updated
09/08/2023	MK	02.92	02.93	Section 10 updated to include reference to the LIA (Investigations)
09/08/2023	MK	02.93	02.94	Appendix 9: Criminal allegations added
10/08/2023	BOW	02.94	02.95	DCS updated, published on website
20/12/2023	EM	02.95	02.96	Section 9 updated to reflect “right first time” approach fully
20/21/2023	EM	02.96	02.97	DCS updated
20/12/2023	EM	02.97	02.98	DCS updated

Summary of changes to document				
21/12/2023	CR	02.98	02.99	Section 2 updated to accord with updates to Section 9 (02.95 – 02.96)
04/01/2023	SL	104	105	DCS updated, published on website

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