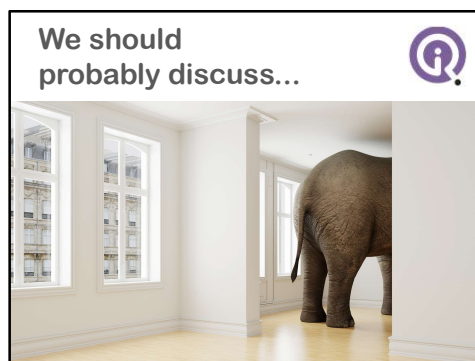




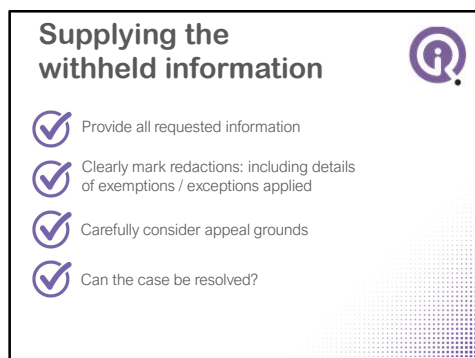
- Really pleased to see so many people registered to attend this session – sign-ups have far exceeded our initial expectations – shows that there is a strong appetite for this type of session generally – as well as a strong appetite to find out more about our new ‘Get it Right First time’ approach to appeal considerations specifically.
- Lots of suggestions for future content coming through - from introductory and refresher training, to deeper dives into the exemptions and exceptions. We’ll be taking these suggestions on board as we consider future training and event opportunities across the year.
- This session however, focusses on FOI and EIR appeals, and what you need to know in order to ensure that you respond effectively to our inquiries in the – hopefully rare – event that an appeal is made to the Commissioner.
- We’ve recently changed our approach to investigations, with the aim of speeding up the appeal process and making FOI work better everyone – but we’re well aware that this changed approach means some changes for FOI staff. We’ll be setting out the key things you need to be aware of during this the session.
- Before we kick off properly though, we’ll firstly set a little context...



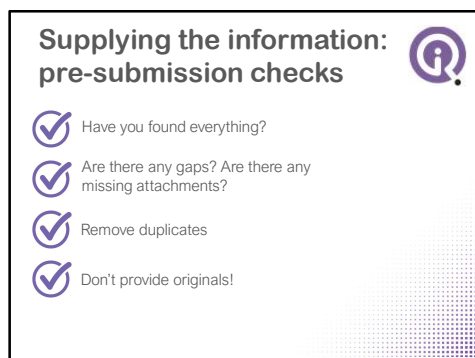
- We first want to discuss the **elephant in the room** ...that elephant being our backlog of cases.
- We do currently have a significant backlog of cases, which has arisen as a result of pressures on our service in the aftermath of the pandemic – both in terms of case volumes, and restrictions on the resource that we have had to process those cases.
- Under our pre-2024 system, new cases would join the end of the queue, which wasn't a great outcome for anyone – meaning that all cases would take a long time to deal with – reducing the currency and the value of the information for new requests as well as older requests – with cases considering information which may be out-of-date, or no longer relevant to the requester.
- Our new approach splits our caseload into two workstreams:
 - cases received from 1 January 2024 will be progressed in one workstream
 - while we work through our backlog of pre 2024 cases in the other
- The benefits of this new approach:
 - For applicants – appeals can be resolved in a timely manner, whether they receive the information or not.
 - For authorities – cases are handled more effectively and efficiently where it's a timely investigation. Staff move on – or just forget things! - and this can have an impact on your resources, or organisational memory to respond to our inquiries
 - For us – we want to use our resources in the most effective way possible – a faster resolution also means happier applicants, and less time spent explaining delays.
 - For FOI – it will protect the reputation of Scotland's FOI regime as a whole – showing that FOI works.
- So, while there is a backlog, this is being addressed.
- We're not only addressing our backlog in this way, we're also addressing it through other ways, including recruiting additional staff, reducing organisational bottlenecks, streamlining our procedures and taking a 'right first time' to appeal submissions.

Supplying the
withheld information

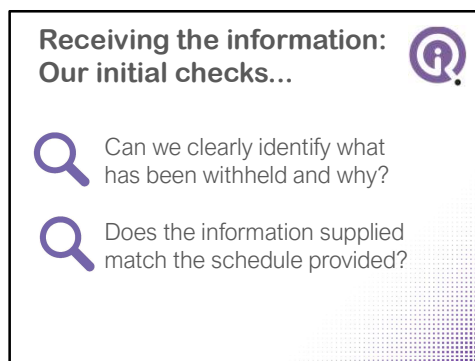




- On notification of a valid appeal, we require you to provide us with the information that's been requested – we need **one copy** with the redactions and **exemptions/exceptions you're relying on in relation to each redaction clearly marked up**.
- Where you are seeking to rely on multiple exemptions in relation to the same information – please make sure this is clear from the marked up withheld information. You can do this by assigning a particular colour to certain combinations of exemptions, or using the comment function of whatever software you are using to highlight additional exemptions .
- We can't start our investigation until we have certainty over what information has been withheld and under what exemption.
- You'll be given a copy of the appeal grounds at this stage – it's worth noting the scope of the appeal at this stage and also consider whether there is anything within the grounds of appeal that would suggest that there is a **route to resolve the appeal** – often applicants are more forthcoming with their reasoning for seeking the information when they appeal to us (they are made aware that their grounds are shared with you).
- Read our guidance for examples of how you can supply the information to us. [InvestigationsGuideforSPAs2023.pdf \(foi.scot\)](#)
- We are all security vetted, the information is subject to section 45 of FOISA and we have appropriate security measures in place to store the information.



- We generally provide **2 weeks** to provide the information.
- Before providing the information, we would strongly advise the following checks:
 - ❖ Are you satisfied that appropriate searches been conducted to identify all information falling within scope?
 - ❖ Review the information to identify obvious gaps/missing attachments
 - ❖ Removal of duplicates
 - ❖ Do not supply us with original documents



- On receipt, our Administrator will check:
 - That we can clearly identify the information that's been withheld and under what exemption/exception or out of scope (Don't apply any exemptions/exceptions if you cannot evidence that the information doesn't exist i.e ensure it was in fact held at the time of the request & review)
 - That the information supplied matches with the schedule provided and that you have completed the schedule properly in the format requested.
- If you fail to provide the information in a suitable format, or in the time period requested, we will
 - i. return the information to you to resupply
 - ii. note the failure in our case handling system as a non-compliance issue.
- Repeated failures to provide the information in a suitable format and/or within the time period specified will result in an Information Notice being issued as a matter of course:
 - We will report publicly on all Information Notices issued and failure to comply with an Information Notice can result in the Commissioner referring your authority to the Court of Session.
 - Extensions are going to be exceptional moving forwards (e.g. lack of staff cover due to annual leave or sickness absence will not be grounds for extension. We expect authority's to have appropriate resilience in place as per page 9 of section 60 code.
- If the appeal does not consider the withholding of information e.g. section 17 / section 12 / section 14 or the circumstances are such that we do not require sight of the information e.g. section 38(1)(a), then we will go to seeking submissions straight away.
- Once we're satisfied that we have obtained the withheld information, the case will be passed to one of our investigating officers for consideration.

Making submissions



Making submissions


- No requirement to comment... but **strongly** recommended!
- One opportunity to comment – make it count
- Ensure you fully address the legal tests – read the guidance!
- Ensure submissions are specific to the information withheld
- Answer **all** the questions

- On allocation, an investigating officer will write to you and give you the opportunity to comment on the application. You are not required to provide comments, but we would strongly recommend it. The Commissioner can come to a decision on the basis of your review response alone if no further comments are provided.
- You will be provided with either **10 or 15 working days** to provide comments depending on the complexity of the case.
- **You will be provided with one opportunity to make comments. Additional submissions will be sought in exceptional circumstances only. Extension requests will be the exception to the rule and will often require the Commissioner or the Head of Enforcement’s approval.**
- Where applying exemptions/exceptions to withhold information, you will be asked to address each of the legal tests associated with the application of that exemption/exception. The questions we ask will be tailored to each case and the information withheld, but template questions that you are likely to be asked are set out in Appendix 2 of our Investigations Handbook:
 - [Investigations Handbook.pdf \(foi.scot\)](#) and also read our briefings:
 - [Briefings and guidance](#) for more explanations with examples.
- We strongly encourage public authorities to read the briefings for each of the exemptions being relied on before responding to our queries – we’d also suggest reading through some of our recent decisions which have considered these exemptions to see how the tests are applied in practice and the level of evidence we require to come to a view.
- Investigators will carefully craft their letters seeking submissions on the basis of the stated position to date and on careful consideration of the information that has been supplied, often following advice from our Deputy Heads of Enforcement/Head of Enforcement and on occasion the Commissioner – its therefore vital that you address the questions that have been posed – this likely to flag up to you where the evidence/submissions to date are lacking or omitted.

- **On that basis, please answer each of the numbered questions posed, aligning your responses with the numbering used by the investigating officer. If you consider your response to an earlier question also covers latter questions, feel free to signpost us to your earlier reply under the latter questions .**



So, to summarise, some of the 'top tips' we'd give when responding to appeal correspondence:

Top tips... 

- ✓ State your case as clearly and precisely as possible
- ✓ Separate out your arguments if both a harm and public interest test apply...and apply the public interest test for each exemption / exception
- ✓ Don't take a 'cut and paste' approach – be specific!
- ✓ Refer to your earlier submissions, where appropriate – supplementing if necessary
- ✓ Provide further context where necessary... but highlight if sensitive!

Top tips

Firstly – make sure you state your case as clearly and precisely as possible.

- Be precise in the language you use – put yourself in the shoes of the investigator considering the case - ask yourself - is your case clearly expressed?
- Ambiguous or unclear language can result in a request for further, potentially unnecessary, submissions, or might even lead to our moving to decision notice on the basis of the quality of the submissions made.
- So make sure you take the time to get it right, explaining your case as clearly as you can. In doing so...

Separate out your arguments, so it's clear which arguments are being made in relation to which elements of the test.

- Where an exemption or exception has both a harm test and public interest test for example, make clear and distinct arguments in relation to each element. Don't just jumble them up. You might also want to think about using separate sections or clear headings to help structure your response.
- Where exemptions are subject to the public interest test, you must show us that you've considered the public interest test in relation to each exemption applied. The public interest considerations that may apply to different exemptions – or in relation to different information - can be very different, so make a specific case in relation to each exemption.
- Where you are relying on more than one exception in the EIRs for the same piece of withheld information, remember that there is a two-stage public interest test – firstly, the individual elements, then weighing all grounds for non-disclosure against the public interest in disclosure - and apply that test accordingly. Our guidance on the public interest tests under the EIRs has more information.

Don't just copy and paste from submissions made in relation to previous cases

- Avoid copying and paste from previous submissions – we notice this! Your submissions should be relate directly to the specific circumstances of your case.

However, If you have set out your arguments succinctly in your initial response or review outcome, then you can direct us to those


- Supplement them where necessary or appropriate

Finally, remember that this is your opportunity to provide further context

- Remember that our investigating officers are often coming to this fresh – they don't have the in-depth knowledge of circumstances shared by you and the requester – remember that they may require further context to understand the subject matter or circumstances of the request – so provide this where appropriate.
- Remember also that we may sometimes quote or paraphrase comments or content that you provide in our decision notice. We would, therefore, strongly recommend that, if any of the information you provide to us is sensitive, you should highlight this when you provide it.

Searches



Searches 

-  Evidence of searches is **critical** in almost all cases – not just 'info not held'
-  Keep evidence of **all** searches
-  Make sure they're thorough, relevant and detailed
-  Good practice to use a search template
-  Think about investigation 'triggers' – and try to plug those gaps proactively

Searches

- Evidence of searches is critical in almost all cases.
- It's not just appeals where you've claimed that information is not held where we'll seek further details of the searches to locate the information.
- In most cases we'll be interested in assessing whether the search you've carried out to identify information was thorough, relevant, reasonable and proportionate.
- It's amazing how much additional information can be uncovered when a case is appealed to us!
- Keep a record of your searches right through the process – both at initial request and review stage.
- Store them as a corporate record – remember that staff who conducted the original searches may have moved on before an appeal is lodged.
- For any electronic searches conducted – record the search terms used, take screen shots of the search returns – let us see how effective and proportionate the actual searches were
- We're very unlikely to accept a simple affirmation email from Steve or Bob telling you that there's no information held – we'll be looking for evidence of the searches carried out.
- And, in cases where there are concerns, we won't just ask for evidence of the search, we might also ask you to set out why these searches were considered to be appropriate.

It's good practice to use a search template record

This helps keep an accurate record of:

- the systems searched
- keywords used
- who carried out the search
- Search results
- and any further in-depth checks, comments, etc.

When you're searching for info, think about things that might trigger us to ask more questions, and try and plug those gaps proactively

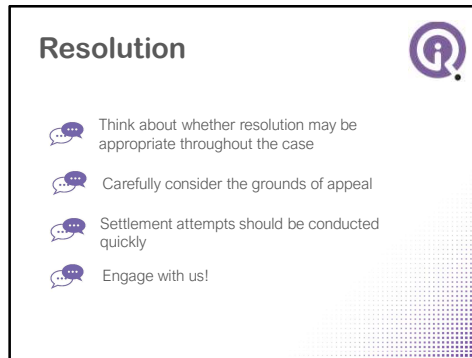
- Look for:
 - Obvious gaps in the chronology of the information
 - Missing attachments
 - Circumstances where a disproportionately small volume of information is located in relation to a issue of significant importance.

If you spot something like this, interrogate it yourself, and plug any gaps before it comes to us on appeal.

Think about resolution...



- When we receive a valid appeal – there are only two routes out:
 - A Decision Notice
 - Resolution / settlement



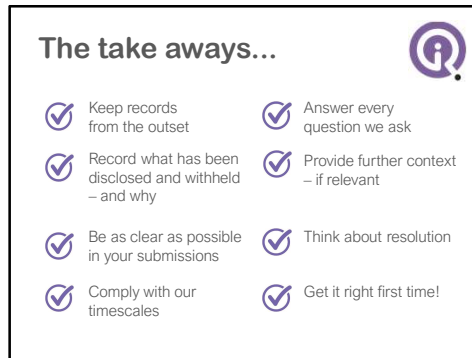
Resolving appeals

- Resolving or settling a case can sometimes reduce the resource requirement for you, support better relations with requesters, and lead to a faster outcome for all. It won't be appropriate in every case, but think about whether it might be appropriate in yours.
- During the investigation, we might suggest ways the case could be settled without formal decision, through disclosing some or all of the information.
- You may also decide to disclose some information during the investigation, narrowing the focus of the case on key information for the remainder of the investigation.
- There are various points during our investigation where resolution could be considered:
- **At Validation** – our validation officers are very experienced – they will alert you to anything significant in the handling of the request that may warrant resolution e.g.
 - you perhaps have missed part of the request
 - you've handled it under the wrong regime
 - there are technical failings
- They will also alert the applicant if its apparent that their appeal is going to unsuccessful e.g. its their own personal information.
- **Grounds for appeal** – on receipt of a case we provide you with details of the grounds of appeal – the reasons for the applicant's dissatisfaction with the response.
- the grounds of appeal can often highlight the key concerns of the applicant and sometimes explain (although not required) why they want/need access to the information.

- Sometimes they will directly state what would resolve the appeal for them.
 - Think about the the grounds of appeal, and whether there is any scope of resolution.
- **Providing submissions**
 - You might:
 - locate additional information during the course of the investigation, or
 - decide that exemptions/exceptions have been inappropriately applied.
 - If at any time you think settlement might be possible – fully or partially – let us know.
- **Attempts at settlement should be conducted quickly**
 - if you are willing to disclose information to the applicant, please do so as soon as possible - copying us into the correspondence
 - You should note, however, that attempts at settlement will not override our requirement that you provide submissions
 - we will continue to progress to a decision within the normal timeframes, until such time as the case is fully closed.
 - Where settlement is appropriate, we can attempt this on your behalf (although any information must be disclosed by you).
 - Ultimately, however, the legislation allows the applicant to require a Decision on any valid appeal.
 - They have the right to a Decision on the basis of how their request was originally handled by your authority.
- **Engage with us!**
 - Engage with the investigating officer – we're happy to discuss cases over the phone.
 - Where possible, we'll provide you and the applicants an early indication as to whether the appeal is likely to succeed .

The take aways...







Summary – the take aways

- Sum up some of the key things we want you to take away from the session
- **Keep records from the outset**
 - Be aware that any submissions you provide to us in the event of an appeal will start at the initial handling of the request – so keep records from the outset.
 - Take notes of decision-making process, searches, etc. It will all help you in making robust and effective submissions.
 - A review is strong indication that an appeal is coming – so review your records then. Look at our briefings, and start thinking about the questions we might ask then.
- **Make sure you fully understand the case**
 - We have had cases where authorities have tried to withhold information they don't actually hold
 - Make sure you have a copy of the information that you're applying exemptions or exceptions to!
- **Retain a copy of what has been disclosed and withheld** and make sure it has been clearly marked up clearly marked up
- **Comply with our timescales**
 - Remember only have two weeks to supply us with the information – but if you've done a robust review that should be quite a quick process. Extensions will be rare, and will be the exception to the rule.
- **Failure to supply us with information or submissions within the required timeframe is likely to result in Information Notices being issued** – these are sent to Chief Executives and reported on publicly.
- **Pay particular attention to the questions that we ask**
 - they can often highlight deficits in the request handling to date, or any omissions in terms of the legal tests

- answer each of the numbered questions, it will relate to a legal test that we are required to consider (appendix 2 of our Investigations Handbook sets out the template questions we're likely to ask).
- **Provide further context and background wherever possible.**
- We can't make assumptions about the information you provide us with – you have to set it out in black and white.
- Our investigators will usually be coming to the subject matter cold – help them understand the context.
- **We will, from now, for the majority of cases, move to decision notice based on the quality of the first set of submissions received – authorities should prepare their submissions with this in mind.**
- **Engage with us and consider resolution/settlement at every stage**
- Feel free to pick up the phone



Resources...



Investigations handbook:
www.foi.scot/investigations-handbook

Decisions database:
www.foi.scot/decisions

Briefings and guidance:
www.foi.scot/briefings-and-guidance

Open update email newsletter:
www.foi.scot/newsletter

Talk to us:
enquiries@itspublicknowledge.info
01334 464610
@FOIScotland

Lots of resources available online – or through contacting us.