SCOTLAND OFFICE FOI PROCEDURE NOTE

Contents **Page**

Introduction 3

Background

Freedom of Information Act 2000 3

Publication Scheme 4

Freedom of Information (Scotland) Act 2002 4-5

Handling a Request for Information

Flowchart 6-7

1. Establish as a FOI request 8
2. Log correspondence 9
3. Estimate cost of complying with request 10
4. Search for record 11
5. Assess content of record 11
6. Releasing or withholding information 12
7. Respond and log request as having being dealt with 14

Annex A: Internal Review 15

Annex B: Investigation by the Information Commissioner 16

Annex C: Interaction with Central Clearance Unit 17

Annex D: Standard Responses to FOI Requests 20

Annex E: Decision Notice under S17 of FOI Act 25

Annex F: Differences between FOI Act 2000 and FOI (Scotland) Act 2002 26

Annex G: Handling requests involving Pre-devolution Records 28

Annex H: Processing an FOI request checklist 29

Annex I: The Duty to neither confirm nor deny 31

Annex J: FOI requests and access to papers of previous administration 34

Annex K: Guidance note on the extension of time 37

Annex L: Pseudonyms 38

Annex M: Official Salaries 40

Annex N: Officials' names 42

Annex O: Travel Costs 45

Annex P:	Ministerial Diaries/Who they met with	46
Annex Q:	Section 36: Authorising a ‘Qualified Person’	48
Annex R:	Attacks on Department IT System	52
Annex S:	Held & Raw data	53

Introduction

From 1 January 2005, there have been three main statutory rights of public access to information:

- The Freedom of Information Act 2000
- The Data Protection Act 1998
- The Environmental Information Regulations 2004

The focus of this guidance is on requests for information which must be dealt with in accordance with the provisions of the Freedom of Information Act 2000. This is the UK version of the Act. The guidance is a work in progress and will be amended to reflect good practice as it develops following implementation of the legislation. In July 2008, the Ministry of Justice (in partnership with Whitehall colleagues) began a programme of work to improve the delivery of the Freedom of Information Act (FOIA). Building on the wealth of experience and expertise across Whitehall, this manual aims to pull together some practical guidance to supplement the more detailed guidance which is available on the Ministry of Justice website at: **http://www.justice.gov.uk/guidance/guidancefoi.htm**.

What are the provisions of the FOI Act?

1. The Act creates a general right of access to information held by public authorities. Any person making a request is entitled (subject to the exceptions and exemptions set out in the Act):

   (a) to be informed in writing or by email by the public authority whether it holds the information described in the request; and

   (b) if that is the case, to have that information communicated to him/her.

2. The main features of the Act to note are:

   - We must maintain a publication scheme.

- A request for information does not need to mention the Freedom of Information Act.
- Anyone, anywhere in the world can make a request.
- The request must be in writing (letter/email) and must include a name and address (or email address) to which to respond.
- We have a duty to 'provide advice and assistance' to the applicant
- The Act is fully retrospective. It applies to all recorded information, in any format, we hold at the time of the request
- We are required to reply within *a maximum* of 20 working days
- There are a range of exemptions from the duty to release, where it is genuinely essential to withhold information.
- Any decision not to disclose, is subject to an appeal to the Information Commissioner.

What is the Publication Scheme?

3. The publication scheme sets out classes of information which we intend to make available to the public as a matter of course, the manner in which the information is to be made available, and whether the information will be provided free of charge or for a charge. Requests for information which are available through the scheme are not considered to be FOI requests, because the information is readily accessible.

4. It is therefore good practice to consider on a regular basis, what material held by individual branches could proactively be placed on the publication scheme. The publication scheme is available at: http://www.justice.gov.uk/information/publication-scheme.htm

Is there a different Scottish Act?

5. Yes. The Freedom of Information (Scotland) Act 2002 introduced a general statutory right of access to all types of 'recorded' information of any age held by Scottish public authorities. The Act promotes and

enforces a fully independent Scottish Information Commissioner. Annex F provides an outline of the differences between the two Acts.

6. As part of the devolution settlement, UK Government departments operating in Scotland and cross-border public authorities (e.g. the MoD and the Forestry Commission) are not covered by Scottish FOI legislation, but instead by the UK Freedom of Information Act 2000.

The guidance enclosed is by no means exhaustive. The MoJ FoI Policy and Strategy Unit in the Ministry of Justice will continue to work with Departments in the production of further guidance covering additional areas.

FOI FLOWCHART

ADMINISTRATOR

Strategy Branch receives correspondence from the requestor via the website by email / by post

Requests received via the website are acknowledged automatically

Is it a valid information request?

YES **NO**

Record as an FoI request on database

Provide advice & assistance in writing to the requestor

Acknowledge requests received by email / post

Allocate the request to the appropriate member of staff (action officer)

Does the request need referral to the Clearing House?

YES **NO**

Discuss request with action officer complete referral form and email to Clearing House at MoJ

No action required

ACTION OFFICER

Search relevant records and establish if information is held.

What is the outcome?

Request exceeds £600 limit	Issue appropriate letter by email or in writing
Information not held	Issue appropriate letter by email or in writing.
Fully withheld* (apply exemption)	Issue appropriate letter by email or in writing
Partially withheld* (apply exemption)	Issue appropriate letter by email or in writing
Advice and assistance provided	Issue appropriate letter by email or in writing
Repeated/Vexatious (apply exemption)	Issue appropriate letter by email or in writing

* Note - when responding to a request for information directly relating to a Minister a submission should be made to the relevant Ministerial Private Office for approval – otherwise the submission should be made to the Director

What if the outcome is Granted in Full?

Prepare submission to Minister or Director (see note above) → await response

Is the response going to be late?

Issue public interest test letter / late letter

Is the submission approved?

YES	**NO**
Prepare appropriate letter and issue by email / post.	Make amendments to submission and re-submit

ADMINISTRATOR

Whatever the outcome, update the FOI Database and save all relevant documents electronically. If the request is “Granted in Full”, the website will should also be updated.

DEALING WITH AN FOI REQUEST

ESTABLISH AS AN FOI REQUEST

7. The Freedom of Information Act requires that all requests for information be dealt with promptly and in any event within 20 working days of receipt of the request.

Is the information readily accessible?

8. Provide the information or advise the applicant where he/she can get the information. Information which is 'reasonably accessible to the applicant by others means' is exempt under FOI, even if it is accessible only on payment.

What is an FOI request?

9. For any other request for information, you need to satisfy yourself that it is a valid request under the FOI Act:

   - The request is received by letter, email or by fax.
   - The request states the name of the applicant and an address for you to respond. An email address is acceptable.
   - The request describes the information sought and it is not readily accessible elsewhere (e.g. under the Publication Scheme)

The duty to provide advice and assistance

10. If the request does not meet the above criteria, then you may need to clarify the terms with the applicant. Under the Act you have a duty to provide advice and assistance to the applicant. For example:

    - If the request is too vague, then you may need to ask the applicant for clarification to help you identify or locate the information requested. Although requests must be made in writing, it is appropriate to telephone the applicant to discuss their request
    - If the request is too costly (s.12) then you should go back to the applicant and invite him/her to narrow the scope of the request.

11. Never try to ascertain the motive of the request. The Freedom of Information Act is purpose blind in this respect. The purpose of the request is irrelevant in considering whether the information sought should be released.

LOG CORRESPONDENCE

12. The correspondence should be logged on the FOI database:

    - The name of the correspondent
    - The date the correspondence was received
    - The content of the request
    - The name of the action officer
    - The due date of the response

    A reference number will also be allocated.

    In the case of correspondence received via the Scotland Office website, an acknowledgement will have been generated automatically. Where correspondence is received by email or post, an acknowledgement should be sent to the correspondent (using the sample letter in Annex D).

13. If the request is not for you to deal with you must pass it on to the appropriate person as quickly as possible. The deadline for the reply is calculated from the time the request was received in any part of the Department, to the 20th working day excluding public holidays.

14. If you receive a request for information which is not held by us but which may be held by another public authority, you should let the applicant know that the Scotland Office does not hold the information in question. You may suggest he/she re-applies to the other public authority. When you respond you should, if possible, provide the applicant with contact details (using the sample letter in Annex D).

Vexatious, repeated and campaign requests

15. Authorities are not expected to provide assistance to applicants whose requests are vexatious (s.14). Where you have previously complied with a request for information which was made by any person, you are not obliged to comply with a subsequent identical or substantially similar request from that person. If you consider the request to be vexatious then you should consult the FOI officer.

16. If you believe the request to be part of a campaign, such as by journalists or politicians, and/or such that it merits being brought to the attention of Ministers then you should contact the FOI Team for advice. The central Clearing House has issued a list of generic triggers that indicate which type of cases should be brought to their attention (Annex C).

ESTIMATE COST OF COMPLYING WITH REQUEST

17. Where the information is held, you should estimate how long it will take to locate and retrieve the information and to provide the information in the form requested. You cannot include the time taken to consider whether the information should be disclosed. There is provision within the Act to extend the reply deadline where the issue of public interest is being examined. If you think this scenario is likely to arise then contact the FOI Team.

What happens if the request is too costly?

18. The Act does not oblige you to comply with a request if the cost of providing the information would exceed the 'appropriate limit'. This is the case even if the applicant offers to meet the full cost of answering the request. The 'appropriate limit' is currently £600 (s.12)

19. If the request is too broad or too costly (because it exceeds the 'appropriate limit') then you have a duty to provide advice and assistance. You should advise the applicant that the request exceeds the appropriate limit and invite them to narrow the scope of the request. You should then inform them what information could be supplied free of charge and what information could be provided within the cost ceiling.

20. If the applicant refuses to narrow the scope of the request then you should refuse the request. At this point, you should contact the FOI Team. It is open to the applicant to ask for an internal review of this decision.

21. Detailed guidance on fees can be found at http://www.justice.gov.uk/guidance/foi-step-by-step-fees.htm

SEARCH FOR RECORD

22. You will have to find the requested information before you can decide whether to release it. You may have to look in a variety of places, paper records as well as electronic records. You should record what steps you have taken to locate the information.

ASSESS CONTENT OF RECORD

23. Once you have collected all of the relevant material together, you must assess it for release. If you have not already done so, you should check whether:

    - the information falls to be released under the publication scheme
    - the information is already in the public domain, for example by way of an answer to a parliamentary question
    - the information has already been made available via the website

24. The presumption of the Act is in favour of disclosure and information should only be withheld where it is genuinely essential to do so. In some cases, disclosure may be prohibited by another statute or rule of law. Otherwise you have to establish how much information you are unable to disclose, if necessary, line by line.

RELEASING OR WITHHOLDING INFORMATION

25. Under the Act, the applicant is entitled to be informed in writing, subject to certain exemptions, whether the Department holds the information described in the request. You will need to establish whether the Department holds the information requested. You should check the relevant records and indexes and consult staff as appropriate. If the information is not held then, **subject to the need to confirm or deny the existence of the information**, you should advise the applicant (using the sample letter in Annex D).

26. If you decide a document should not be released in its entirety, then there may be some parts that should be disclosed. In these cases the exempt information will need to be blocked out (this is known as 'redaction'). Where information is withheld under the Act you are obliged to provide reasons for your decision.

27. The Freedom of Information Act provides 24 exemptions in all. A few of them are absolute exemptions. The rest are subject either to a prejudice test and/or public interest test. Full details of exemptions can be found at: http://www.justice.gov.uk/guidance/foi-exemptions-guidance.htm

Procedure for exempting information

28. Just because a document has a security marking (e.g. restricted), it does not mean that all the information contained within it is properly exempt from disclosure. A majority of the exemptions are qualified in the sense that, although information may be exempt, there remains a duty to weigh up the competing public interests of disclosure and effective public administration.

29. Once you have identified which portions of the document should be withheld, and which exemption applies, take a photocopy of the document and mark up the exempt material on the photocopy using a coloured marker. Never mark the original document. Record in the margin the particular exemption to be cited. In the case of an electronic record, save a copy of the record and follow the same procedure by highlighting the exempt material electronically.

30. You may find it helpful to complete a refusal notice (Annex E), setting out the reasons why material has been exempted and the exemption which is to be applied. You should have the material re-copied so that the redacted material appears black on the release copy.

31. You should send a copy of the response to the requestor to the Strategy Branch Mailbox.

Consulting third parties

32. When consulting third parties, you should make it clear that the decision whether to release the information or not remains with this office. You must ensure you record third parties' views.

RESPOND AND LOG REQUEST AS HAVING BEEN DEALT WITH

33. It is important to record and document your decision. You should record locally what you have released and log the date that the response was sent. The FOI Team should be informed of the outcome and will log the response centrally.

34. In the event that you intend to release a previously undisclosed document, you should send the material to be disclosed together with a copy of the response to the FOI Team. The FOI Administrator will place the document on the Scotland Office website.

Monitoring Compliance

35. The FOI Team are responsible for monitoring compliance with the relevant access legislation. This is done in the following ways:

- by monitoring refusals
- by monitoring charges
- by maintaining the publication scheme
- by acting as the point of contact in dealings with Clearing House
- by coordinating internal reviews and communicating with the Information Commissioner as required

ANNEX A

INTERNAL REVIEW

1. The applicant may seek an internal review of the initial decision if they are dissatisfied with the Department's initial response i.e. refusal of information, form of access, charges, or excessive delay etc.

2. The internal review process is the last opportunity for the Department to assess its position before the matter is considered by the Information Commissioner. Even in cases where the Permanent Secretary or Ministers have been involved in the original decision the internal review process should not be waived. It is possible that even over a comparatively short period of time the sensitivity of the information can have diminished sufficiently to allow the information to be released after internal review, or that the public interest in disclosing the information has increased since the original decision to refuse was taken.

3. The FOI Team coordinate the internal review process. If you receive a request for an internal review you must refer it to the FOI Team immediately. The target for dealing with internal reviews is 20 working days from the date of receipt.

The internal review process

4. The FOI administrator will send an acknowledgement to the complainant within two days, informing them of the date when they can expect a response.

5. The formality of an internal review requires a separate FOI file which you should prepare. The reviewing officer will require sight of all previous papers.

6. The reviewing officer will usually be appointed by the Deputy Director, Edinburgh and must not have been involved in the original decision. The reviewing officer has a non statutory period to conduct the review, draft the internal review notice and issue a response.

The Role of the Internal Reviewer

7. The role of the internal reviewer is threefold:

   - to assess whether the Department has complied with its responsibilities under the FOI Act, including timeliness; and the duty to advise and assist
   - to assess whether the exemption was applied properly; and
   - to re-consider the public interest in disclosure and determine whether the information should be disclosed

8. The internal reviewer must set out their decision in a submission to the Deputy Director, Edinburgh to approve the decision. A draft response letter to the complainant should be included.

9. Once the decision is approved, the internal reviewer communicates the decision to the complainant and advises the FOI administrator who electronically records the outcome of the decision.

ANNEX B

INVESTIGATIONS BY THE INFORMATION COMMISSIONER

1. It is open to the requestor to challenge the Department's decision by referring it to the Information Commissioner.

2. The Information Commissioner expects public authorities to act swiftly in the event of a complaint. They will demand a copy of the request, a copy of the decision notice, a copy of the information requested by the applicant and the information from the internal review process.

3. The FOI Team are the point of contact with the Office of the Information Commissioner providing the Information Commissioner with the case papers and advising the Director of the Information Commissioner's decision.

ANNEX C

INTERACTION WITH CENTRAL CLEARANCE UNIT

1. A central Clearing House, located within MoJ, has been established to ensure consistency across central Government in relation to the application of the Freedom of Information Act (and the Data Protection Act and Environmental Information Regulations). The Clearing House however ceased to operate in March 2012 and any information relating to this is therefore out of date.

2. The Clearing House will offer advice and assistance to Whitehall Departments in dealing with information requests which are particularly difficult or have cross Government implications to ensure a consistent and appropriate approach is taken.

Which information requests should be referred to the Clearing House?

3. Cases that are within the generic list of triggers outlined in Annex C (i) should be referred to the Clearing House. The list of triggers is not intended to be exhaustive and will be revised as required.

4. Advice should also be sought from the Clearing House on how to handle cases in the following circumstances:

   - Campaigning initiatives falling short of round robins or suspected round robin requests
   - Applications from news media, MPs, organised campaigns and groups
   - Exemptions and case law advice.

5. There may also be cases which need to be referred even though they are not caught by a trigger. The important point is that officials stay alert to any request that may have the capacity to set precedents.

Ministerial Veto

6. If it is not already involved, the Clearing House should be referred to where the use of a Ministerial Veto is being considered.

Round Robin Requests

7. If you receive a request that you suspect is a round robin or has gone to more than one Department, you should inform the FOI Team. If it is established that a request is a "round-robin" the Clearing House will co-ordinate the Government's response but Departments will be expected to respond individually.

How to make a Referral

8. Where requests for information raise difficulties or give rise to the consideration of an exemption, then the FOI Team will determine whether a case needs to be referred to the Clearing House and will be the liaison point between the Department and the Clearing House.

Meeting Statutory Timeframes

9. All referrals should be sent to the Clearing House by the FOI Administrator as soon as possible and in all cases within 5 working days of receipt. The Clearing House has a target of 10 working days in which to provide advice on referrals. However, if it is considered that this may take longer than the 10 working day target, the Clearing House will inform the relevant referring Department on the day it receives the referral.

10. The 20-day time limit to respond to requests is extremely demanding. This limit can be substituted with "such time as is reasonable in the circumstances" in some cases which require a complex balancing of a public interest test.

11. The referring Department is responsible at all times for keeping the applicant informed of the progress of a case. This particularly applies if the Clearing House deems that more time than normal is required to assess the public interest in a difficult case.

Dispute resolution

12. There is the potential for dispute between the referring Department and the Clearing House on advice given. The Clearing House must be informed of any disagreement immediately and it will then work together with the Department to prepare a submission for the Departmental Minister asking for their agreement. This will incorporate any further advice that the Clearing House has obtained. If the Minister does not agree with the decision of the Clearing House, the Secretary of State for Constitutional Affairs will meet with the Minister to agree a response. Ultimately, there is recourse to a Cabinet Committee and/or Cabinet if Departments are not able to agree.

ANNEX C (i)

Cases that should be referred to the MoJ FOI Policy and Strategy Unit (Clearing House)

- Any Cat 4 case where Departments cannot agree the approach
- Cases engaging s35/36 where the proposed handling differs from working assumptions
- Non procedural ICO cases that relate to Cat 4 information
- Internal Reviews where considering release of information which was classed as Cat 4 the first time around.
- Official Appointments
- National Security
- Royal Cases (ICO/IT only)
- Honours
- Special Advisers
- Ministers (collective responsibility, cross-cutting scope, high political sensitivity)
- High likelihood of harmful media interest/story running at the time
- Tribunal cases (excluding cases relating to information being held)
- Cabinet Papers
- Requests relating to No 10

Cases that should not be referred to the MoJ FOI Policy and Strategy Unit

- New or novel use of exemptions (bar National Security)
- Any Cat 3 case where Departments cannot agree an approach
- Non procedural ICO cases that relate to Cat 2-3 information
- Royal cases (first time request/IR – refer to Cabinet Office on Clearing House form)
- Ministers (low sensitivity, no cross cutting scope)

Procedural IT cases relating to information being held

ANNEX D

STANDARD RESPONSES TO FOI REQUESTS

Acknowledging a request

Requests received via the website are acknowledged automatically. Requests received by email or by post will normally be acknowledged by the FOI Team.

Thank you for your request for information about (subject). Your (letter/email) was received on (date) and is being dealt with under the terms of the Freedom of Information Act 2000. We shall deal with your request promptly and let you have a response by (20 working days from date of receipt). If you have any queries about your request, please contact me.

Information available under publication scheme/readily accessible

Thank you for your request for information about (subject). Your (letter/email) was received on (date) and is being dealt with under the terms of the Freedom of Information Act 2000.

Under the Act, we are not required to provide information which is already reasonably accessible to you. The information you have asked for is available at (provide link). I enclose a copy / you can request a paper copy by contacting me.

If you have any queries about this letter please contact me.

Advice and assistance

I am writing regarding your request for information which I received on (date). In that request you asked us for (outline of request).

As discussed by (telephone, email) I will be unable to proceed with your request without clarification of the information you wish to receive. To help us do so, I would like to know (specific question).

Please note that if I do not receive appropriate clarification of your information requirements within three months from the date of this letter, then I will consider your request closed.

If you wish to discuss any of the above please contact me.

2 variants – provides applicant with information requested

I am writing to confirm that the Scotland Office has now completed its search for the information which you requested on (date).

i. A copy of the information is enclosed

ii. A copy of the information is enclosed in the format you requested

If you have any queries about this letter please contact me.

3 variants: (i) Nothing found; (ii) Information not held; (iii) Has been destroyed

I refer to your request for information about (subject) which was received on (date) and is being dealt with under the terms of the Freedom of Information Act 2000.

I am writing to advise you that we have searched our records and taken all reasonable steps to locate the information asked for.

i. However, we have been unable to locate the information concerned.
ii. So far as we are able to determine, the Scotland Office does not hold the information requested.
iii. However, the information concerned has been destroyed in line with our established records management practice.

(Delete as appropriate)

If you are dissatisfied with the decision made in relation to your request you may ask for an internal review. A request for an internal review should be addressed to:

FOI Officer
1 Melville Crescent
Edinburgh
EH3 7HW

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The contact details are:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

If you have any queries about this letter please contact me.

Not held by the Scotland Office, but re-apply to another public authority

Thank you for your request for information about (subject). Your (letter/email) was received on (date) and is being dealt with under the terms of the Freedom of Information Act 2000. Having reviewed your request we have

identified that this could be more appropriately responded to by (name of Public authority). If you have not already done so then you may wish to write to (name of public authority and address)

Refusal of all information requested

I am writing to inform you that the Scotland Office has decided not to disclose the information you requested about (subject) on (date)

The information you requested is being withheld, as it falls under exemption (xx) of the Freedom of Information Act 2000. I enclose an explanation behind our decision (Annex E)

If you are dissatisfied with the decision made in relation to your request, you may ask for an internal review. A request for an internal review should be addressed to:

FOI Officer
1 Melville Crescent
Edinburgh
EH3 7HW

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The contact details are:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

If you have any queries about this letter please contact me.

2 variants – provides applicant with some information requested

Thank you for your request for information about (subject). Your (letter/email) was received on (date) and has been considered under the terms of the Freedom of Information Act 2000. I am writing to confirm that the Scotland Office has now completed its search for the information which you requested. I wish to advise you that some of the information requested, cannot be disclosed for the reasons given in the annex attached to this letter (Annex E).

i. (A copy of the information which can be disclosed is enclosed)
ii. (A copy of the information which can be disclosed is enclosed in the format you requested)

If you are dissatisfied with the decision made in relation to your request you may ask for an internal review. A request for an internal review should be addressed to:

FOI Officer
1 Melville Crescent
Edinburgh
EH3 7HW

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The contact details are:

Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

If you have any queries about this letter please contact me.

Neither Confirm Nor Deny

I am writing in response to your letter of (date) requesting information regarding (subject).

The Scotland Office can neither confirm nor deny that it holds the information you requested as the duty in s.1.1 of the Freedom of Information Act 2000 does not apply by virtue of s(xx) of the Act. However, this should not be taken as conclusive evidence that the information you requested exists or does not exist.

If you are dissatisfied with the decision made in relation to your request, you may ask for an internal review. A request for an internal review should be addressed to:

FOI Officer
1 Melville Crescent
Edinburgh
EH3 7HW

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The contact details are:

Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

If you have any queries about this letter please contact me.

NAME
SCOTLAND OFFICE

ANNEX E

Exemption in full	
Factors for disclosure	*Factors for witholding*
•	•
Reasons why public interest favours withholding information •	

ANNEX F

WHY IS THERE A DIFFERENT SCOTTISH FOI ACT?

- In line with the principles of devolution, the Scotland Act 1998 was amended to make clear that the Scottish Parliament has competence to legislate on Freedom of Information.

- The Scottish Parliament has therefore, legislative competence with regard to public access to information held by Scottish public authorities.

- A key aspect of the devolution agreement on FOI is that any public authority in the UK will operate only one FOI regime. Government Departments and other reserved bodies operating in Scotland (such as the Ministry of Defence) and cross–border public bodies will therefore be subject to the UK regime.

- The Scottish and the UK Acts are similar in many respects as this is an area where it makes sense to have a degree of compatibility.

- However, the Scottish FOI regime had its own unique genesis in political commitments in the original Partnership Agreement for the first Coalition Executive; went through its own separate consultative and legislative processes; and reflects the particular circumstances and aspirations of devolved Scotland.

DIFFERENCES BETWEEN THE UK FOI ACT AND THE SCOTTISH FOI ACT

The two Acts are broadly similar in many respects. Some of the main differences between the two regimes are:

- The **scope** of the two Acts. The Scottish Act applies to Scottish public authorities which fall under the responsibility of the Scottish Parliament. The UK Act applies to all other public authorities operating in the United Kingdom including government departments, Cross Border public authorities and other reserved bodies operating in Scotland.

- The **harm tests** in the Scottish Act require that disclosure would "substantially prejudice" the interests covered by an exemption. The UK Act stipulates only "prejudice".

- The UK Act is **policed** by the UK Information Commissioner. The Scottish Act is policed by the Scottish Information Commissioner (the UK Information Commissioner also polices the Data Protection Act, data protection legislation is not devolved).

- Under the UK Act complainants or public authorities may on a point of law, **appeal** to an Information Tribunal against a decision made by the Information Commissioner. The Scottish Act does not have a similar provision and appeals against a decision by the Scottish Information Commissioner are made to the Court of Session.

- The Scottish Act provides a straightforward **right of access** to information held, whereas the UK Act provides a right to be told whether or not information is held and to be provided with that information.

There are also other **more minor differences** between the two Acts some of which are set out below:

- The Scottish Act requires public authorities claiming an exemption to exercise the public-interest test, where applicable, within the 20 working day response period. The UK Act does not give a time limit.

- The publication scheme requirements are different in the following ways:

  - The Scottish Act requires public authorities to take into account the public interest in information relating to:
  - the provision of services, including the cost of provision and the standards of those services;
  - major decisions made by the public authority, including facts and analyses on which the decisions are based.
  - The UK Act only requires public authorities to have regard for the public interest in allowing public access to the information held by the authority and in the reasons for major decisions made by the authority.

- The UK Act allows information which is due to be published at some future date to be withheld until its publication (where it is reasonable to do so). The Scottish Act limits the withholding of information that is to be published to a maximum of 12 weeks, unless the information relates to a programme of research.

ANNEX G

HANDLING REQUESTS INVOLVING PRE-DEVOLUTION RECORDS

The Scotland Office and the Scottish Executive have reached an Agreement on practical arrangements for the handling of FOI requests that relate to the pre-devolution files of The Scottish Office.

In summary:

- The Scottish Executive will manage all pre-devolution records in accordance with their standard Records Management Procedures.
- The Scottish Executive will handle all requests for information concerning these records, consulting the Scotland Office as appropriate.
- For records deemed to be mainly concerning devolved functions, Scottish Executive staff will handle any requests for information in accordance with the Scottish FOI Act.
- Where Scottish Executive staff consider a request to be concerning a record mainly of a reserved nature, then they will consult the Scotland Office. This would then be handled under the UK FOI Act.
- In the event of a dispute, it should usually be possible to resolve any issues by discussion between Scotland Office and Scottish Executive officials. In some instances, it may be necessary to refer the matter to Ministers. The Agreement provides that, where it is not possible to resolve an issue in this way, it will be referred to the Joint Ministerial Committee (JMC) Secretariat in accordance with the Memorandum of Understanding and JMC agreement.

PLEASE NOTE THAT A LINK TO GUIDANCE WILL BE INSERTED HERE AT A LATER DATE

ANNEX H

Checklist

RECEIPT OF CORRESPONDENCE

- ❒ **<u>Can Request be dealt with outside of FOI Act?</u>**. e.g. if information is readily accessible through the publication scheme or already in public domain then advise the correspondent accordingly

<u>Check that request comes within scope of FOI Act</u>.

- ❒ Was it received in writing/email?
- ❒ Does it contain the name and address of the applicant?
- ❒ Does request contain sufficient details to allow identification of records sought?
- ❒ If request does not contain sufficient particulars, contact requester within 2 days.

<u>Record the request (FOI Team only)</u>.

- ❒ Enter the details on the FOI database.
- ❒ Discuss request within the FOI Team.
- ❒ Issue acknowledgment letter unless acknowledged automatically

<u>Check in detail content of request</u>.

- ❒ Is it vexatious?
- ❒ Is it a repeated request?
- ❒ Does it appear to be part of a campaign?
- ❒ Is it from a journalist/MP/MSP/special interest group?
- ❒ Does the Clearing House need to be involved?
- ❒ Do Press Office need to be informed/consulted?
- ❒ Does the request merit being brought to particular attention of Ministers?

❒ COST?

SEARCH AND RETRIEVAL

<u>Search for and locate records relevant to the request as early as possible.</u>

- ❒ Establish if there are administrative reasons for refusing the request, e.g. if the record does not exist or cannot be found; if the request is not sufficiently detailed to enable the records sought to be identified. <u>Remember that the Act obliges the Department to provide advice and assistance to the requester</u>
- ❒ Identify and retrieve the records as soon as possible.
- ❒ Keep a note of all the steps taken to locate records.
- ❒ Seek confirmation of searches undertaken from relevant divisions, if appropriate (e.g. if adequacy of search may be challenged).
- ❒ Copy all records that come within the scope of the request.
- ❒ Prepare a schedule of records

EXAMINING THE RECORDS

- ❒ Check each page for exempt material.
- ❒ Undertake informal consultations with colleagues, or other relevant persons as appropriate.

Third Party Consultation

- ❒ Consider whether the records coming within the scope of the request, contain third party information.
- ❒ Undertake formal consultations if required.
- ❒ Ensure views of third parties are recorded.

MAKING THE DECISION

- ❒ What exemptions, if any, apply?
- ❒ Where required, is the prejudice test satisfied
- ❒ Consider views of third party, where appropriate.
- ❒ Consider what public interest factors apply.
- ❒ Take the decision based on the relevant facts.
- ❒ Record your deliberations as appropriate.

Access considerations

- ❒ Delete exempt material carefully e.g. using Post-it Correction Tape and photocopying.

NOTIFYING THE DECISION

- ❒ If the request is **granted**, provide the information. Send copy of letter and released material to the FOI Team/Scotland Office Strategy Branch mailbox.

RECORD ACTION TAKEN (FOI TEAM ONLY)

- ❒ Close record on FOI database

ANNEX I

THE DUTY TO NEITHER CONFIRM NOR DENY

The FOI Act provides applicants with two rights under s.1.

1. The right to be told whether the authority holds the information that has been requested - s.1(1)(a).

2. The right to have that information communicated to them - s1. (1)(b).

The duty under s1 (1) (a) is referred to as the duty to confirm or deny. When responding to a request for information, it may be necessary to 'Neither Confirm Nor Deny' (NCND) that the authority holds the information.

Why is NCND needed?

In some situations, simply confirming or denying whether the public authority holds a particular category of information could itself disclose sensitive and damaging information.

For example, if a Police Force is asked for all the information that they have on surveillance operations in relation to particular premises. In the hands of the Police Force, any information that they do have, is likely to fall within the exemption in s. 30 (investigations and proceedings conducted by public authorities), as it is held by that authority for the purposes of a criminal investigation (the application of section 30 is subject to the balance of the public interest but there is a strong public interest in maintaining the integrity of surveillance operations) However, simply refusing to provide the requestor with the information would not go far enough to protect the integrity of any operations. If the Police were to confirm or deny that they have the information then that would, in itself, indicate whether or not the Police have had an interest in the premises concerned. To disclose even that amount of information could be prejudicial to any operations or investigations that are taking place or may take place in the future.

When can NCND be used?

All exemptions bar s.21 (information accessible to the applicant by other means) include a provision which enables a public authority, in certain circumstances, to neither confirm nor deny whether it has the information that has been requested.

When withholding information, it is necessary to:

i. consider if the exemption applies; and
ii. to consider whether (if the exemption applies) it is necessary for the authority to Neither Confirm Nor Deny that it holds the information requested.

NCND provisions are complex and will not be applicable in all circumstances. When considering whether or not it is necessary to use NCND a number of factors will need to be taken into account.

1. The wording of the exemption

   The NCND provisions are different according to the type of exemption, and the wording of the provisions for NCND must be considered carefully in each circumstance.

   Absolute exemptions (except sections 34, 41 and 44) **and sections 30, 35, 37, and 39** - NCND provisions operate by reference to whether or not the information that has been requested is itself exempt. For instance, if person requests information that is, or would be, exempt under section 35(1) (a) because it relates to the formulation and development of government policy, then the duty to confirm or deny is automatically excluded (section 35(3)). Section 27 exempts information that relates to communications with members of the Royal Family. If a request is received for information that would fall within this category, then the duty to confirm or deny whether that information is held is automatically excluded (section 37(2)).

   Qualified exemptions (except sections 30, 35, 37 and 39) and sections 34, 41 and 44 - NCND provisions generally operate by reference to the harm or prejudice that would occur if the existence of the information was confirmed or denied. For example, if No 10 receives a request for 'all correspondence between the Prime Minister and the president of country X', it is quite possible that the disclosure of some of that information would prejudice international relations so would be exempt under section 27. However, to confirm that No 10 does hold some correspondence between the PM and the president of country X may be entirely uncontroversial and so unlikely in itself to harm international relations: the duty to confirm or deny would not be excluded. It is entirely possible, and indeed most probable, for information to be withheld under a qualified exemption as the public interest favours withholding, but there would be no problem with confirming that the information is held.

   In all cases when considering whether to use the NCND provisions of exemptions care must be taken to ensure that the wording of the provision is properly understood.

2. The wording of the request

   The wording of the request will be a useful indicator of whether it is necessary to apply NCND. As a general rule, the broader the request, the less likely it will be necessary to NCND. Conversely, the more specific the request, the more likely it will be necessary to NCND.

   For example, a prominent individual may be treated after a traffic accident. The hospital receives a request for information on the treatment he received, which is likely to be exempt under s.40 (personal information) because its disclosure would breach the data protection principles. However, if it is public knowledge that the individual was treated at the hospital concerned, the hospital would be unlikely to breach the data protection principles by confirming that it has information on the treatment that the individual received. Consequently, the duty to confirm or deny would not be excluded.

   If a more detailed request for information relating to any heart condition the individual suffered from or treatment they received for any heart condition, the hospital would refuse the information under s.40 (personal information).

   NCND advises that it holds such information (if it was not otherwise in the public domain), as to confirm or deny in this circumstance would reveal whether the individual had a heart condition – which would in itself be a release of personal information.

ANNEX J

FOI REQUESTS AND ACCESS TO PAPERS OF PREVIOUS ADMINISTRATIONS

Extract from guidance issued by MoJ in April 2010

This guidance is aimed at requests for information produced during the lifetime of a previous government of a different political colour from the current administration. In some cases these requests will be for factual information that can be released with relatively little deliberation by officials and some will be for information which officials will identify as clearly exempt under the Act and these will accordingly be refused. For the less clear cases in between, this guidance is aimed at preserving the convention on ministers' access to papers of previous administrations. In particular it covers requests for information on:

- decision making within former administrations;
- matters particular to individual former Ministers (e.g. expenses or diaries); and
- high profile issues related to previous administrations which are still of significant interest.

1. Informing the former Minister of receipt of a relevant request

As soon as a Department receives a request that refers explicitly to a former Minister, or clearly relates to one, the Department must inform the former Minister in question, although without calling for any response at this stage. The purpose of this step is to notify the former Minister that the request had been received.

2. Informing the former Minister of a decision made without consultation

If the Department concludes, on consideration of the request in consultation with FoI Policy and Strategy Unit, that:

- no exemption appears to apply, and the information should be disclosed; or
- the information is exempt from disclosure and should be withheld,
- the former Minister should be notified *before the requester is told*. In the latter case, it would also be courteous to inform him or her which exemption applies.
- Where the former Minster is no longer alive, the Permanent Secretary of the relevant department should be informed *before the requester is told.*

3. Consulting a former Minister on the public interest

If the Department is minded to release the information to which a qualified exemption applies, or is uncertain as to whether or not the balance of the

public interest favours disclosure in such a case, the former Minister should be consulted at that point. The decision on disclosure is ultimately one for which the public authority will be legally responsible. The purpose of consulting the former Minister is to uncover any public interest considerations which the Department might not yet have identified, or given appropriate weight to.

If the information appears to officials that it might be exempt under section 36, the MoJ FOI Policy and Strategy Unit will refer the matter to the Attorney-General. The Attorney-General will act as the ‘qualified person’ and determine whether or not the information falls within the terms of the exemption. This judgment is prior to an assessment of the public interest on whether or not information that falls within the terms of the exemption should be released.

Where a former Minister is to be consulted, Departments should prepare a note for the former Minister.

The note should:

- Help the former Minister by providing the wording of the request and any additional information obtained;
- Where appropriate, give an indication of the information held by the authority failing within the scope of the request;
- State the exemptions which appear to apply (with a brief explanation); and
- invite the Minister to suggest any considerations he or she would wish the public authority to take into account before it reaches a decision on the balance of the public interest

The note must not:

- state the public interest considerations that the Department has already identified; indicate any preliminary view that the Department may have formed about whether the information should be disclosed; and
- disclose, expressly or implicitly, and legal advice that the Department has received in handling the request.

In many cases former Ministers may express an interest in knowing who the requester is. There may be cases where to reveal the identity would be inappropriate, for example it might breach a confidence or unfairly disclose personal data. If there is any doubt about the position, advice should be sought before identifying the requester to the former Minister.

Former Ministers should be given adequate time to prepare their responses. It is reasonable to allow former Ministers five days to examine the papers and identify public interest considerations, although there will be some cases where former Ministers can respond much quicker. Others may need longer to examine voluminous papers, and consider complex issues. A courtesy

phone call to the office of the former Minister to inform them that a FoI request has been received, and that the timescales for responding to it are short because of the 20 day deadline set out in the Act, is often helpful. Cabinet Office should also be kept informed of contact with former ministers.

Where the Minister who would otherwise have been contacted is no longer alive, departments should instead contact the Party Leader.

4. Making a decision after consultation

Once the MoJ FOI Policy and Strategy Unit or Department has consulted the former Minister, and given appropriate consideration to his or her response, the Department must then decide whether any exemptions apply – absolute or qualified. With qualified exemptions, it must determine in all the circumstances of the case whether the public interest in disclosure is outweighed by the public interest in release.

Where the MoJ FOI Policy & Strategy Unit and the Department consider it appropriate, they will ask the Attorney General to make a decision as to whether section 36 is engaged.

In general terms, decisions relating to other exemptions should be taken by the Permanent Secretary of the Department (unless the Act expressly requires a particular person to take a decision in relation to an exempt).

The Department should inform the former Minister of its decision before it notifies the requester. If the decision goes against the wishes of a former Minister, the Department might give a suitable indication of why that decision had been made.

Where the Minister who would otherwise have been contacted is no longer alive, departments should instead contact the Party Leader

ANNEX K

GUIDANCE NOTE ON THE EXTENSION OF TIME

This note provides supplementary guidance on extending the time for response when you are considering the public interest under a qualified exemption. Public authorities must take the following factors into account:

1. The letter attached provides a basic template to follow when one or more qualified exemptions apply to a request. It sets out the basic level of information that needs to be given to the applicant, and will not be suitable for all situations. If being used, it must be sent promptly, and in any event before the 20 working day deadline expires.

2. Relying on section 10(3) in order to extend the time for responding fully because a decision has not yet been reached on the public interest test should not become standard practice. Section 10(3) only allows departments to delay responding until ‘such time as is reasonable in the circumstances’. Whether any delay is ‘reasonable in the circumstances’ is subject to the usual enforcement process i.e. internal review, followed by complaint to the Information Commissioner. Where it is possible to consider the information, make an assessment of the public interest and respond within 20 working days, departments must do so.

3. Departments must have fully considered the information requested before deciding that the public interest test means that the time for response has to be extended. This initial assessment should take place promptly. Authorities must not presume that all the information requested falls within the terms of an exemption without considering it and must not issue blanket extensions of time: as referred to above, decisions to use section 10(3) are subject to the enforcement procedures.

4. If there are absolute exemptions which **do** apply to some of the information that has been requested, the letter extending the time for response should also be used to refuse the information covered by the absolute exemption, citing the exemption which applies, and stating (if not apparent) why it applies. As absolute exemptions do not confer any possibility of extending the time limit, it is essential that any response relying on their use is sent promptly and no later than 20 working days after receipt of the request.

5. If there is a possibility that you may rely on a qualified exemption in order to neither confirm nor deny that you hold the requested information, and you need additional time in order to consider the public interest, you should seek legal advice to assist the drafting of this letter.

ANNEX L

PSEUDONYMS

The Information Commissioner ('IC') has issued guidance on requests made using pseudonyms (false names). Such requests can involve names on a spectrum from 'Mickey Mouse' to 'John Smith'. The MoJ FoI Policy & Strategy Unit agrees with the guidance, and has produced this policy note of key points to keep in mind when handling such requests. The IC's guidance is at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/name_of_applicant_fop083_v1.pdf

1.1 1. Guiding principles

You will be best placed to judge whether it appears that the requester is obviously using a pseudonym. You should, however, follow these guiding principles:

- Where an applicant has used an obvious pseudonym, you should, **as a matter of good practice, at least consider the request.**
- You can treat as invalid an FOI request where the real name of the applicant (whether an individual or a corporate body) has not been used;
- You must consider whether a request may fall under the EIRs (which do not have an equivalent requirement for requesters to state their name and address);
- Requests involving known or obvious pseudonyms cannot be the subject of a valid complaint to the IC under s.50 of FOIA;
- Whilst it may be difficult to be certain that a pseudonym has been used, you should avoid getting into potentially protracted correspondence about whether it is a real name or not. Departments should not, as a matter of course, seek proof of the applicant's identity (except where the identity of the requester is relevant – see examples in section 3 below). The default position should be to accept the name, unless there is good reason to enquire further – again, see section 3 below;
- Either an email or postal address is acceptable as an address for correspondence; and

2. Releasing information or confirming none is held

- Key to handling an obviously or apparently pseudonymous request will be whether you can disclose **all** the information requested or you can confirm that no information is held. For example, where identity is not relevant to the request (i.e. where the request is not for personal data, where there is no question of the request being vexatious or repeated and where there is no question of aggregating costs) and you are content to disclose all the information requested you should do so. Likewise, you may wish to confirm that information is not held, even though technically the request is invalid.

- Where you decide to release information (or confirm it is not held) to an applicant using a pseudonym, you should inform the applicant that, although the request is technically not valid because it has not been submitted under their real name, you have decided to provide the information requested (or confirm the information is not held) outside the framework of FOIA. Where you provide information outside the framework of FOIA, you do not need to mention the FOIA appeals process (i.e. internal review and appeal to IC) as it does not apply.

3. Refusing invalid requests

- If exemptions need to be considered, or the identity of the requester may be relevant to the request (e.g. it is a request for the applicant's own personal data, there is reason to believe the request is vexatious/ repeated or to determine whether aggregation of costs may apply), the IC's guidance explains that the requester should be advised that the request is not technically valid and that in order to deal with it under FOIA they need to make it using their real name.
- Where you decide to refuse a request on the grounds that it has been submitted under an obvious pseudonym, you should respond to explain why you are not dealing with the request under FOIA as you require the real name of the requester for the FoI request to be valid. You do not need to mention application of exemptions, public interest considerations or the FOIA appeals process as they do not apply.

The key point to remember is that requests should not be rejected without any consideration whatsoever.

ANNEX M

OFFICIAL SALARIES

Public interest continues in the remuneration of civil servants and former civil servants, especially those of a senior grade. The earnings of a named person constitutes 'personal data'. This policy note provides advice for requests relating to salaries and the identification of individuals.

Information already in the public domain:

Particularly for senior officials (SCS grade) departments should, in the first instance, check whether the information requested is already publicly available. Departments may, for instance, publish this information in the departmental annual report. If it is already publicly available, the department should cite s.21 and insert a web link to the information or otherwise inform the applicant how to view it.

Salary details:
Departments should withhold the precise salary of individual employees under s.40 (2) of the FOIA, but otherwise release salary bands.

Salaries constitute personal data where individuals can be identified. While there is a legitimate interest in the public knowing the salaries of individuals, the ICO has stated that it is too great an intrusion into the private lives of employees to disclose precise details, thereby amounting to a breach of the first data protection principle. You may therefore wish to release only the pay band which the individual falls within. The following ICO Decision Notice will be of interest: Decision Notice FS50163927 at: http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50163927.pdf

Names and job titles:
If the requested information is not publicly available, departments should release the job titles and names of senior officials (subject to any particular sensitivities e.g. security concerns regarding the release of an individual's job title and name). In such circumstances, please contact the MoJ FoI Policy and Strategy Unit for further advice. Where names and roles are already in the public domain, for example in the Civil Service Year Book, s.21 can be cited, though departments should still provide advice and assistance so the applicant can gain access to the information.

For those below the SCS, job titles may be released but names should be withheld under s.40 (2). Please refer to the policy note on officials' names for further information.

1.2 Example request

A request asks for a list of names, job titles and the salaries of everyone working within Division X.

If information is already publicly available the request should be dealt with in the following manner:

- Names and job titles of SCS officials – cite s.21 provide advice and assistance and release

However, if no information has been made publicly available the request should be dealt with in the following manner:

- Salaries of SCS officials – release their pay range e.g. John Smith, Director of Division X, Salary £90k – £100k
- Names and job title of non SCS officials in the Division – release job titles, withhold names under section 40(2).
- Salaries of non SCS officials – Release their pay range e.g. Person A, Access Manager, Salary £35k – £45k, Persons B-F Access Officer, Salary £18k

ANNEX N

OFFICIALS' NAMES

Civil Servants do not have an absolute right to anonymity and while officials retain some rights to privacy, many civil servants already have a public face (e.g. a Permanent Secretary; an official advising a member of the public; or an official referenced in the *Civil Service Year Book*). Importantly, Departments should not assume that names of staff at SCS level are automatically releasable, and that the names of junior staff should automatically be withheld.

Cases should be handled individually and according to all the circumstances of the case. However, where Departments propose to depart from this policy note they should consult MoJ FoI Policy & Strategy Unit beforehand.

Questions about officials' names are likely to arise in two circumstances:

1. In requests relating to organisational charts; or
2. When releasing information that contains officials' names used in the course of their duties – i.e. when conveying their opinion or advice.

The general rule is to **release** names of those in the Senior Civil Service. For the names of officials below that grade, **withhold**, citing s.40 and 36(2) c – 'prejudice to the effective conduct of public affairs'.

Other exemptions may apply, depending on circumstances. Where involved in particularly sensitive work, s.38 may apply. Staff in some areas (e.g. dealing with fraud or national security) will represent a real business need for anonymity. Where departments propose to redact names by virtue of s.23 or 24 of the Act, the case should be referred to the FoI Policy & Strategy Unit.

Consider carefully the amount of information already in the public domain. Information already available (e.g. via the Civil Service Yearbook, or from participation at a conference) should in no circumstances be withheld, unless you are citing s. 21 in which case advice and assistance should be provided to the requester on where they can find the information. Also, consideration should be given to the role of the individual, for example it might be more reasonable to release their name if they work in a public facing role such as a press officer.

APPLYING EXEMPTIONS

Section 40: further processing to attribute names to opinions would breach the first Data Protection Principle. It would neither be fair nor meet a Schedule 2 condition.

Where consent is not given, the only likely schedule condition to apply would be condition 6(1) of the DPA, which is tightly bound to the notion of fairness.

Whilst it is often reasonable – and fair – to make known the identities of senior officials, their positions and their attendance at meetings, opinions of these officials should not generally be attributable unless they have otherwise already been disclosed. There may be circumstances when there is a legitimate interest in knowing the advice of or opinion of a particular official – for example, in the case of misfeasance. Nevertheless, civil servants are often asked for their opinions and advice on sensitive matters of policy for which they cannot be held accountable. The constitutional foundation of the work conducted by officials is that in most circumstances they are not personally responsible for projects and policies on which they advise. Accountability for such projects and policies is (in most cases) properly at ministerial level, and there are other mechanisms in place for holding officials to account. In any case, attribution of opinions to individuals is highly unlikely to add to public understanding of Government's work or the mechanics of its reasoning.

Even where there is a legitimate interest in releasing attributed information, however, such processing is likely to be 'unwarranted …by reason of prejudice to the rights and freedoms or legitimate interests of the data subject'. There is a reasonable and clear expectation of anonymity when advising Ministers or debating opinions. As part of the constitutional necessity of an independent and politically neutral Civil Service, officials are not generally entitled either to defend their actions publicly, or to comment on the policies that they are obliged to implement. As an example of the importance of this point, the Civil Service Management Code (http://beta.civilservice.gov.uk/about/work/codes/csmc/CSMC-Intro.aspx) even expressly forbids participation in surveys and states:

'Civil servants must not take part in their official capacities in surveys or research projects, even unattributably, if they deal with attitudes or opinions on political matters or matters of policy.'

To release officials' names into the public domain and therefore to expose individuals to potential censure for their opinions would result in a degree of criticism that they are in no position to counter without breaching the terms of their employment.

It is for this reason that they have a reasonable expectation of their identities being protected: to breach this expectation is neither 'fair' (as noted in the first principle), nor 'necessary' (as in the schedule 2 condition) for the legitimate interest in accountability, as this is met by mechanisms elsewhere. The Information Tribunal has found in past cases (e.g. in *McTeggart, House of Commons vs. Baker)* that the starting point in such questions over personal data should be an assumption of privacy with the onus being to prove the overriding public interest in order to warrant disclosure. The ICO also agreed this was a relevant consideration in his recent decision relating to the conscious sedation of dental patients:

(http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50119242.pdf).

SECTION 36

Section 36(2) c – possible prejudices:

Release of personal data of this sort is likely to lead to an inappropriate increase of e-mail and phone traffic to staff who are not public-facing. This circumvents the normal contact routes for public enquiries and is likely to detract from the normal duties of staff who are employed in internal roles. Those who are employed to deal with the public are in any case best placed to handle these calls.

Particularly when staff works in areas of controversy, release of such details can potentially expose them to inappropriate lobbying and pressure from outside.

Disclosure could undermine the doctrine of Ministerial accountability. Constitutional responsibility for Government policy and action rests with Ministers rather than officials. While it is well known that officials provide advice to Ministers, they are not accountable for the final Ministerial decisions, whether on policy or operational matters.

Disclosure could prejudice the provision of free, frank and neutral advice. This is particularly relevant where the work involved is of particular sensitivity or the official is at a junior grade and is not otherwise publicly identified with the policy area or issue. They would not expect their names to go into the public domain. The ICO generally does not agree with this line of argument, citing responsibilities under the Civil Service Code. However, we still believe that for junior officials it is a valid argument to make.

ANNEX O

TRAVEL COSTS

This policy note covers Freedom of Information requests for travel costs for both Ministers and Civil Servants.

There is a high public interest in understanding public expenditure, including how much travel is undertaken on departmental business and its cost. Additionally, there is minimal prejudice in releasing this type of information.

It is quite possible that departments will have answered PQ's about the total cost of their travel. Therefore, if appropriate, departments should cite s.21 (information accessible by other means) and refer the requestor to the PQ answer.

If a PQ answer does not cover the requested information, departments should consider the Cost Limit (s.12). Whether or not the cost limit is engaged will probably depend upon the level of detail requested. For example, a request asking for a total amount paid by department (x) for air travel in financial year (y), will more likely be answerable within the cost limit than if the applicant had additionally requested; a breakdown of those total amounts, indicating how much was spent on (a) first class flights, (b) business class flights and (c) any other class.

Other cost considerations will include the time period for which the applicant has requested information. For example, a request for several years of information will be more expensive to answer than for just one year.

Where departments do hold the information and can locate and extract it within the cost limit they should answer factually, though withholding names of staff below SCS level citing s.40/s.36 (see policy note on Official Names).

Departments should consider whether the following statement would be relevant to include in their replies: "Since 1999, the Government has published a list of all Cabinet Ministers' travel overseas costing more than £500 together with the total cost of all Ministers' visits overseas. The list for 2007/08 included, for the first time, travel overseas by all Ministers costing over £500.

ANNEX P

MINISTERIAL DIARIES/WHO THEY MET WITH

Information relating to what Ministers are doing and whom they are meeting is an area in which there is always an interest. This policy note covers details of the lists of Ministers engagements and some of the subject matters that can be found in them. This note does not cover any agendas, minutes or meeting summaries produced following such an engagement listed in the diary.

Cases should be handled individually and according to all the circumstances of the case. However, the broad principles of how departments should respond are set out below.

The Cabinet Office Freedom of Information Team holds the policy lead in this area. If departments propose to depart from the policy set out below, they should consult the team on: foiteam@cabinet-office.x.gsi.gov.uk. Please remember to complete a referral form, copying in MoJ if it is at the IC or Information Tribunal stage.

2. The Broad Principles

Diary information would generally be released in the following circumstances:

- Engagements already in the public domain including speeches, Parliamentary commitments, visits, etc;
- Dates of Cabinet Meetings;
- Meetings of Cabinet Committees (e.g. a specific number of Cabinet Committees were attended. Though they would not be named);
- Regular meetings in the course of business with representative bodies, trade organisations etc. (For example: Law Society, NFU, CBI etc.). This would also include office holders in representative capacity. Individual meetings in this category might need to be withheld if there is a particular public interest in doing so, e.g. where commercial interests or sensitive negotiations are involved; and
- Meetings with representatives of overseas governments and international organisations and courtesy calls. Individual meetings in this category might need to be withheld if there is a particular public interest in do so, e.g. where issues of national security or international relations are involved.

Diary Information that generally should not be disclosed:

- Internal or inter-departmental meetings with other Ministers and/or officials; and
- Future engagements (except where they have been formally advertised or announced e.g. speaking engagements etc.).

Diary Information to be considered on a case-by-case basis:

- Meetings with individual companies or individuals. A number of exemptions may be applicable depending on the context of the meeting,

for example, s.36 (Prejudice to effective conduct of public affairs) or s.43 (Commercial Interests)

Information 'not held' for the purposes of the FOIA:

- Political meetings. Where a meeting might be considered political, the test will be whether a Minister attended in an official or party capacity;
- Constituency meetings; and
- Personal meetings.

Likely Exemptions

It is possible that a number of exemptions may apply. However, the most common ones will likely be:

- Section 35(1)(a) – with regards to diary entry that suggests new/developing policies being discussed; and
- Section 36(2) (b) / (c) – with regards to diary information not covered above for the reasons given in the public interest arguments articulated below.

Release:

- There is a public interest in the release of information where this leads to a better understanding of how Government formulates policy. This can help to inform public debate and to increase public confidence that decisions are properly made.

Withhold

There is a public interest in:

- Ministers being free to consult anyone they choose on any particular issue. This relies on them being able to do so in private. Ministers' freedom to consult whomever they choose will be inhibited if there is always a risk that the names of those they consult will be disclosed.

- Ensuring that Ministers' time is used effectively and efficiently, especially as their work is subject of detailed public scrutiny.

- Preserving thinking space around Ministers when details of meetings would reveal the subject matter under consideration. Unless meetings take place in private and away from public scrutiny, premature disclosure will remove the space which allows Ministers to consider the most important and sensitive policy issues without inhibition.

- Preventing disclosure of officials' names, particularly where this reveals (or appears to reveal) access to Ministers, and so will lead to an individual being lobbied, or where it causes an official to become identified with a particular policy area, so undermining the neutrality of the civil service.

ANNEX Q

SECTION 36 – AUTHORISING A 'QUALIFIED PERSON'

Section 36 relates to information that if disclosed would adversely affect the delivery of effective central government and other public services. Section 36 exempts information whose disclosure would be likely to:

- prejudice collective Cabinet responsibility;
- inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation; and
- prejudice the effective conduct of public affairs.

Section 36 requires a determination by a 'qualified person' that disclosure of the requested information would have one of the specified prejudicial effects. This note details the 'qualified persons' for specific public authorities, and outlines the process of authorising a new 'qualified person(s)'.

Section 36(5) (a) to (n) of the Freedom of Information Act 2000 sets out the qualified person for the following public authorities:

Section 36(5)	Public authority	Qualified person
(a)	Government department in charge of a Minister of the Crown	Any Minister of the Crown
(b)	Northern Ireland department	The Northern Ireland Minister in charge of a department
(c)	Any other government department	Commissioners or other person in charge of a department
(d)	The House of Commons	The Speaker of the House
(e)	The House of Lords	The Clerk of the Parliaments
(f)	The Northern Ireland Assembly	The Presiding Officer
(g)	The Welsh Assembly Government	Welsh Ministers or the Counsel General to the Welsh Assembly Government
(ga)	the National Assembly for Wales	the Presiding Officer of the National Assembly for Wales
(gb)	any Welsh public authority (other than one referred to in section 83(1)(b)(ii)[1] (subsidiary of the Assembly Commission), the Auditor General for Wales or the Public Services Ombudsman for	(i) the public authority, or (ii) any officer or employee of the authority authorised by the Welsh Ministers or the Counsel General to the Welsh Assembly

[1] Section 83 defines "Welsh public authority"

	Wales)	Government
(gc)	information held by a Welsh public authority referred to in section 83(1)(b)(ii)	(i) the public authority, or (ii) any officer or employee of an authority authorised by the Presiding Officer of the National Assembly for Wales
(i)	The National Audit Office	The Comptroller and Auditor General
(j)	The Northern Ireland Audit Office	The Comptroller and Auditor General for Northern Ireland
(k)	Auditor General for Wales	Auditor General for Wales
(ka)	Public Services Ombudsman for Wales	The Public Services Ombudsman for Wales
(l)	Any Northern Ireland public authority other than the Northern Ireland Audit Office	(i) the public authority (ii) any officer of employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly. (also see guidance under s36(5)(o)(ii) & (iii))
(m)	The Greater London Authority	The Mayor of London
(n)	Functional bodies within the meaning of the Greater London Authority Act 1999	The Chairman of a functional body

You will note that the “qualified person” is the most senior individual in charge of the authority (for example, Minister of the Crown, Mayor of London etc). The qualified persons for pure departmental agencies will be the same qualified person as the agency’s parent department (under whose legal umbrella that agency falls).

However, there are a number of public authorities which Departments sponsor or which fall within their policy responsibility, but are legally distinct and are regarded as being at arms length from the main Department. Section 36(5)(o) provides three possibilities for who may act as the “qualified person” for other public authorities who doe not fall within section 36(5)(a) - (n). These are:

Section 36(5)(o)(i) provides for “a Minister of the Crown[2]” to act as the qualified person. This may be agreed between the public authority and the

[2] Note that “Minister of the Crown” is defined in section 84, as meaning having the same meaning as in the Ministers of the Crown Act 1975, namely *“the holder of an office in Her*

sponsoring department. As NDPBs are set up to be at arms-length from departments, we would discourage them from using Ministers as their qualified person. Furthermore, the 'qualified person' in a public authority needs to be sufficiently close to the information in question, in order to take the decision on whether section 36 is engaged. The time it may take to obtain a decision from the Minister of the sponsoring department, should also be taken into account as requests have to be responded to within 20 days.

Section 36(5) (o) (ii) provides for a "public authority" to be authorised by a Minister as the qualified person. This provision is primarily aimed at circumstances where the public authority is an office, for example, the Information Commissioner. In such instances, only the office-holder (as public authority) should be authorised under section 36(5)(o)(ii) - not others working to the office holder in his or her organisation. The "public authority" authorised should be the person in charge of the public authority.

s36(5)(o)(ii) might also be used to authorise a public authority's primary decision-making body as the authority's qualified person, as has been noted by the Information Tribunal (Guardian & Brooke v IC & BBC (EA/2006/0011&13), paragraph 26, http://www.informationtribunal.gov.uk/DBFiles/Decision/i81/Guardian%20Brooke.pdf

Where the public authority is not an office, MoJ agrees that, once authorised by a Minister, the authority's primary decision-making body should act as the qualified person under s36 (5) (o) (ii). For example, the authorised public authority's full board (as opposed to committees of that board, or individual Directors/senior staff). The speed/frequency with which the decision making body as a whole would be able to take a decision should be taken into consideration here - bearing in mind that requests have to be responded to within 20 days. That said, the body would not necessarily have to meet to a take a decision in person - it could be taken by email.

Section 36(5) (o) (iii) provides for a Minister to authorise *"any officer or employee of the public authority"* as the section 36 qualified person. As previously mentioned, the "officer or employee" should be the person or persons in charge of that public authority. For NDPBs this would normally mean its Chair or Chief Executive.

Process for authorising a section 36 qualified person under s.36 (5) (o) (ii) & (iii)

A submission to a Minister of the Crown[3], with a letter attached for sign-off, is the usual mechanism for authorising the qualified person. Please note that in any authorisation, to avoid continuity difficulties, qualified persons should not

Majesty's Government in the United Kingdom, and includes the Treasury, the Board of Trade and the Defence Council" (s8 1975 Act). It does *not* therefore include, ministers in devolved government in Scotland, Wales and Northern Ireland.

[3] See Footnote 3.

be referred to by name but by job or office title (egg. Chief Executive, Chairman, Chief Constable etc). It should also be made clear to public authorities in any authorisation that the qualified person may not delegate the power to apply the exemption under section 36**.**

Section 36(6) FOIA makes further provision on authorisations made under s35 (o).

Departments and public authorities are advised to retain a copy of Ministerial letter approving the qualified person.

ANNEX R

ATTACKS ON DEPARTMENTS' IT SYSTEMS

There have been a number of instances of alleged 'IT attacks' targeting not only public authorities but critical national infrastructure e.g. banking systems. This remains a sensitive issue.

If departments receive any requests asking for details of any attacks on their IT systems, they should observe the following policy:

Departments should neither confirm nor deny (NCND) whether they hold the information using the exemptions at s.23 (information supplied by, or relating to, bodies dealing with security matters), s.24 (national security) and s.31 (law enforcement).

It would not be in the interest of the UK's national security, for departments to confirm whether they hold information about attacks against their IT systems. This would enable individuals to deduce how successful the Government is in detecting these attacks. Confirming when information is held or not held, would assist someone in testing the effectiveness of the UK's defences against such attacks. The public interest arguments for NCND under s.31(3) are similar to those used for s.24(2) i.e. a criminal could deduce if their attacks had been detected or not. For example, if a department responded 'no information held' a criminal might carry on hacking knowing they had not been detected. Alternatively, if a department responded that information is held, though exempt, a criminal may believe they have been detected and stop, which could damage any attempt to identify them via law enforcement agencies.

If any of the requested information has previously been released, for example in reply to a PQ, departments should cite s.21 (information accessible to the applicant by other means) and then neither confirm nor deny whether any further information is held using s.23(5), s.24(2) and s.31(3).

ANNEX S

HELD & RAW DATA

This advice aims to deal with the general issues of requests relating to raw data on databases and the searches a department must undertake to confirm whether information is held.

Requests should be dealt with on a case-by-case basis and if the advice below either does not fit with the request, or a department thinks that its response should differ from the policy set out here, it should contact the MoJ FoI Policy & Strategy Unit.

Raw Data & Held:

Tribunals have concluded that information that can be produced using existing information is "held" for the purposes of FOIA (Home Office v Information Commissioner (Leapman: EA/2008/0027) and Johnson v Information Commissioner & MOJ EA/2006/0085). Additionally, the House of Lords stated that the questions of held should be "*construed in as liberal a manner as possible*" (Common Services Agency v Scottish Information Commissioner [2008] UKHL 47).

In Johnson, the Tribunal found that the skill and judgement that must be applied to raw data, may well have a bearing on whether the information is held or whether it is more properly construed as being new information. However, in the Leapman case it *gave* no weight to these factors, adding that there was no reason why the Act – which already required considerable work by public authorities – should not also require a degree of skill and judgement to be exercised.

We now accept that in most circumstances information that can be generated from raw data, will be held for the purposes of FoI. There may, however, be a few exceptional circumstances where information is not held. These cases would involve the application of specialist knowledge to the raw data (see, for example, the scenario outlined in Johnson at para 46), and departments should refer the case to the MoJ FoI Policy and Strategy Unit.

In reaching a decision over whether the information is held or not, consideration should be given to the cost limit. In cases where work is required to manipulate the raw data and is undertaken by departmental staff, the cost estimate should be used in the normal way. However, if an external contractor would be needed to undertake the work, the department should request a quote. If the quote exceeds the appropriate limit departments can apply s.12 as normal.

The guiding principle has to be that if the information in question can be produced relatively easily, the authority should look at releasing the information, having taken into account the cost limit and any specific exemptions e.g. data relating to commercial interests may attract the use of s.43.

Searching for information:

Should a department claim that no information is held (e.g. it does not have a copy of a particular report that has been requested), it will need to be able to demonstrate that fact.

The Tribunal continues to use and MoJ agrees with the test set out in Bromley v ICO and Environment Agency (EA/2006/0072).

Essentially, a department needs to be able to show on the balance of probabilities that it does not hold the information. In coming to its decision, the IT will consider:

- the quality of the initial analysis of the request;
- the scope of the search carried out;
- the rigor and efficiency of the search; and
- If any material is found that points to the existence of the requested information.

It is in a department's interest to keep an audit trail that no information is held, but also that the search was as robust as possible as this will help in any possible future litigation.

If departments are of the view that the information probably is held but cannot locate it, they may wish to consider the application of s12 FOIA (see Quinn v Information Commissioner and Home Office EA/2006/0010).

Given the very wide scope of possible requests relating to data/IT losses, this policy note is unlikely to cover all situations. For situations that are not covered by this note, the case should be referred to MoJ FoI Policy and Strategy Unit due to high/harmful media interest.

Departments will be aware of the sensitivity relating to data losses. Following high profile data losses in 2007, the Government undertook a comprehensive review of its data handling procedures (DHP) and published a report on 25 June 2008 which set mandatory minimum standards to protect information for departments across central Government. The details can be found at the following address:

http://www.cabinetoffice.gov.uk/media/65948/dhr080625.pdf

In compliance with the DHP, departments are required to publish an information charter setting out how they handle information and how members of the public can address any concerns that they have.

Departments are also required to set out in their departmental annual report –

- summary material on information risk, covering the overall judgement in the Statement on Internal Control;
- numbers of information risk incidents sufficiently significant for the Information Commissioner to be informed;
- the numbers of people potentially affected; and
- actions taken to contain the breach and prevent recurrence.

For requested information that will appear in departments' annual reports, s.22 should be cited.

The public interest balance in the context of s.22 focuses principally on the question of timing. The crucial test is whether it is reasonable to withhold the information until the intended date of future publication, whether or not that date is specified. The key issue is not whether to disclose, as that is a foregone conclusion, but when and how. The Act therefore allows the public authority a measure of handling latitude, but that latitude is subject to limitations of reasonableness.

The public interest in permitting public authorities to publish information in a manner and form and at a time of their own choosing is important. It is a part of the effective conduct of public affairs, that the general publication of information is a conveniently planned and managed activity within the reasonable control of public authorities. Where they have taken the decision to publish, public authorities do have a reasonable entitlement to make their own arrangements to do so.

Where information has been requested but police investigations into the breach are ongoing, it is likely that releasing information might prejudice the investigation. Section 31 will therefore be engaged. There is a clear public

interest in withholding any information which if released, could undermine a criminal investigation.

Finally, if any requested information has been released into the public domain e.g. a public statement or in answer to a PQ, s.21 should be cited and advice and assistance provided to enable the applicant to access the information.