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A Short Guide to the Freedom of Information Act and Other New Access Rights

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1. INTRODUCTION

On January 1 2005, five important new rights to information came into force:

- The Freedom of Information Act 2000
- The Freedom of Information (Scotland) Act 2002
- The Environmental Information Regulations 2004
- The Environmental Information (Scotland) Regulations 2004
- Amendments to the Data Protection Act 1998

Freedom of Information

The Freedom of Information Act gives you a wide-ranging right to see all kinds of information held by the government and public authorities.

You can use the Act to find out about a problem affecting your community and to check whether an authority is doing enough to deal with it; to see how effective a policy has been; to find out about the authority's spending; to check whether an authority is doing what it says it is and to learn more about the real reasons for decisions.

Authorities will only be able to withhold information if an exemption in the Act allows them to. Even exempt information may have to be disclosed in the public interest. If you think information has been improperly withheld you can complain to the independent Information Commissioner, who can order disclosure.

There are actually *two* new Freedom of Information Acts, one for the whole of the UK *except* Scotland and another for Scotland:

- The Freedom of Information Act 2000 applies to UK government departments - including those operating in Scotland - and public authorities in England, Wales and Northern Ireland. It also applies to the House of Commons, the House of Lords and to the Welsh and Northern Ireland assemblies.
- The Freedom of Information (Scotland) Act 2002 provides similar, though slightly better, rights to information held by the Scottish Executive, Scottish public authorities and the Scottish Parliament.

The UK Act is enforced by the UK Information Commissioner and the Scottish Act by the Scottish Information Commissioner.

Environmental information

If the information you want relates to the environment, your request will not be dealt with under the FOI Act but under new Environmental Information Regulations (EIRs). These implement a European Union directive and provide a stronger right of access than the FOI Acts. A notable feature is that information about emissions to the environment cannot be withheld on grounds of commercial confidentiality.

There are two sets of EIRs, one for the UK and another for Scotland, also enforced by the UK Information Commissioner and the Scottish Information Commissioner.

The definition of "environmental information" is surprisingly wide. It includes information about the state of the air, water, land, natural sites and living organisms including genetically modified organisms. It covers emissions or discharges to the air, water or land including energy, noise and radiation. Information about legislation, policies, plans, activities, administrative and other measures likely to affect any of these or intended to protect them is covered. So are assessments of the costs or benefits of such measures and reports on the implementation of environmental legislation. To the extent that any of these factors affect human health or safety, food contamination, living conditions, built structures or cultural sites, the information about these matters is also environmental information.

Personal information

Your rights to see personal information held about you by public authorities have also been strengthened. The *Data Protection Act 1998* (DPA) already entitles you to see many kinds of personal information about yourself, whether held by public or private bodies. This law has now been amended by the FOI Act to improve your rights to see personal information held by public bodies. The right to information held by private bodies has not been affected. The UK Information Commissioner enforces this right across the whole of the UK including Scotland.

This guide

This guide explains what these new laws do and how you can use them. It deals mainly with questions such as how to make a request and how to challenge refusals. More detailed information about the exemptions and the public interest test will be published later.

- In most cases, the process of applying for information or challenging refusals is the same whether you are using the FOI Act or the EIRs. Where there are significant differences, the guide points them out.
- If you are applying for personal information about yourself under the Data Protection Act, the process is different and is described separately at the end of the guide.
- Where the UK and Scottish FOI Acts are identical, the guide sometimes refers to 'the Act', in the singular. Where the UK and Scottish Environmental Information Regulations are identical, it refers to them as 'the regulations' or 'the EIRs' without separately referring to both sets.

2. OBTAINING INFORMATION

Which bodies are covered by the legislation?

The UK Freedom of Information Act applies to public authorities at all levels: central government departments and agencies; local authorities; NHS bodies including individual GPs, dentists, opticians and pharmacists; schools, colleges and universities; the police, the armed forces, quangos, regulators, advisory bodies, publicly owned companies and the BBC and Channel 4 (though not in relation to journalistic materials). The Houses of Parliament, the Welsh Assembly and, if reconvened, the Northern Ireland Assembly are all also covered. UK authorities which operate in Scotland are covered by the UK Act. For the full list of bodies covered see: <http://www.foi.gov.uk/coverage.htm>

The *Scottish Freedom of Information Act* applies to the Scottish Executive and its agencies, the Scottish Parliament, local authorities, NHS bodies, police forces, schools, colleges and universities and other Scottish authorities. For a full list see: <http://www.itspublicknowledge.info/foiact8.htm>

Courts and tribunals are not covered by either Act nor are the security and intelligence services.

Individual private bodies with public functions, or private contractors providing services on behalf of a public authority, can be brought under the UK or Scottish FOI Act. A Parliamentary order will have to be made to do this. If it is, you will be able to apply for information about those functions or services directly to the private body. No private bodies have been included at the time of writing.

The Environmental Information Regulations apply to authorities which are covered by the FOI Acts and to any other public authorities including courts and tribunals¹ and the security and intelligence services. Private contractors providing environmental services, consultancy or research for public authorities are also covered. So are the electricity, gas, water and sewerage utilities.²

What information is covered by the FOI Act and EIRs?

The FOI Act and EIRs apply to any recorded information held by or on behalf of an authority. This includes paper records, emails, information stored on computer, audio or video cassettes, microfiche, maps, photographs, handwritten notes or any other form of recorded information. *Unrecorded* information which is known to officials but not recorded is not covered.

¹ The right of access to environmental information held by courts and tribunals will apply to information about their administrative functions - not to information about the cases they deal with.

² Department for Environment, Food and Rural Affairs. Draft guidance on the Environmental Information Regulations. Chapter 2: Who is covered by the Regulations? <http://www.defra.gov.uk/corporate/consult/eir-guidance/index.htm>

The age of the information is irrelevant. The new rights apply to information recorded at any time, including information obtained before the FOI Act or EIRs came into force.

Anyone who destroys a record after you have asked for it, in order to prevent its disclosure, would commit a criminal offence. But it is not an offence to destroy records which have not been requested.

Do authorities have to publish information under the Act?

Before requesting information under the FOI Act or EIRs it is usually worth checking what information the authority has already published. In particular, have a look at the authority's 'publication scheme'.

The Act requires every authority to have a publication scheme describing the classes of information that it publishes or intends to publish and saying whether there is any charge for it. These should be available on the authority's website and in hard copy on request. The schemes must be approved by the Information Commissioner and are then legally binding.

Where an authority's scheme commits the authority to publishing all information of a particular description it is obliged to publish *all* that information (unless the definition itself excludes certain information). The information should be supplied to you within a few days of you asking for it or be available for download on its website. The Information Commissioner can if necessary take enforcement action against an authority which fails to publish information specified in its publication scheme.

At the moment many authorities' schemes are made up mainly of information that they had already been publishing and add relatively little that is new, though there are some notable exceptions.

The EIRs also require authorities to organise and progressively publish environmental information which they hold in electronic form. This should include certain specified types of information.³

How do I apply for information under the Act?

- A request for information under the FOI Act should be in writing: a letter, email or fax will be valid. A request under the Scottish FOI Act can also be made in some other permanent form, such as an audio or video tape. A request to a Scottish authority left on voicemail may also be valid.

³ This includes: texts of international treaties and national legislation dealing with the environment; environmental policies, plans and programmes and, if held in electronic form, progress reports on their implementation; the results of monitoring the environment, environmental agreements, environmental impact studies and risk assessments or references to where these can be found; and the facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals.

- A request under the EIRs can be made in any form. An oral request made in person or by telephone or left on voicemail will also be valid. If you make an oral request in this way, it may be a good idea to confirm it in writing, to avoid possible misunderstandings.

Who do I send the request to?

As long as the request is made to the authority it will be valid.

- The safest thing may be to send it to the authority's FOI officer, if only to ensure it is dealt with by someone who knows about the legislation. The larger authorities will have one. For contact details see the authority's publication scheme or phone the authority.
- You could also send it to the official who handles the issue you're asking about, if you know who that is.
- You could also send it to the minister, chief executive or, if you're a journalist, the press officer.

Can I ask the authority for help in making my request?

Authorities are required to provide reasonable advice and assistance to anyone who has made or wants to make a request for information to them. So if you can't work out what information on your subject the authority holds, or have difficulty framing your request, ask the authority for help. The authority should also assist you if you have a disability which prevents you making a written request.

What should my application say?

(a) Describe the information you want. The more specific you can be the better, as the authority may be entitled to refuse a request which is too sweeping.

- If you know which documents you want, describe them. For example, you might want minutes of particular meetings, a specific report or a set of figures. Alternatively, you may want correspondence or emails between the authority and someone else about a particular issue over a given period.
- You could also ask for information which the authority holds about a particular topic. If so, try and ensure that the topic is relatively narrowly defined. Don't ask for "everything you hold about" a subject, unless that is likely to involve a relatively small amount of material.
- You can also ask questions or ask for a set of data to be extracted from a database.

If you don't know enough about the issue to make a specific request, do some research first. Check to see what the authority publishes about the issue: this may help identify other unpublished information which you may want to ask for. You could also ask the authority's FOI officer to help you clarify what kind of information about the issue the authority is likely to hold.

(b) Include your name and address. This is a legal requirement under the FOI Act though not under the EIRs. Your address can be an email address though a postal address will obviously be necessary if you want material posted to you. Include a phone number if possible. This will speed things up in case the authority wants to ask you about your request.

(c) Say that you're applying under the FOI Act and/or the EIRs. Your request will be valid regardless of whether you mention the legislation, but doing so will remind officials to deal with it correctly. If you think the information you want is environmental information point this out since the EIRs give you a stronger right of access than the FOI Act. All you need to say is "***This is an request under the Freedom of Information Act***" or "***This is an request under the Environmental Information Regulations***". If your request is partly for environmental and partly for other information refer to both sets of laws. However, you won't weaken your rights if you happen to refer to the wrong law.

(d) You don't have to say why you want the information. You are entitled to information, regardless of what you want to do with it.

(e) Specify the form in which you would like access to be given. You can say whether you would prefer to have access by, for example, being sent photocopies or printouts, having material emailed to you or supplied on disk, being given the information in summary form, inspecting the records in person or (if its extremely brief) being given to you by telephone. You are entitled to be given access in more than one form, for example, by inspecting the records first and then having copies.

The authority is required to comply with your preference so long as that is reasonably practicable. If it is not, for example, because it would involve too much work, it is entitled to give you the information in some other reasonable form.

The authority can ask you to pay the costs of putting information into your preferred form, if it is not already held in that way. It should tell you what these costs are first and ask if you are prepared to pay.

(e) Tell the authority you look forward to hearing from it promptly and in any case within 20 working days. These are the legal time limits (see below).

A model letter you can use in applying for information is shown below.

All this means that making an FOI or EIR request is extremely simple. In fact, you don't even need to know about the legislation to benefit from it. If you have asked a public authority for information

since January 1 2005 you will probably have made a valid request under the legislation, so long as your request was in writing. If your request was for environmental information, it will have been valid even if not made in writing. The authority's response to you should have complied with the Act's requirements, even though you didn't know about them at the time.

How long does the authority have to reply?

The authority must supply the information you have asked for, or explain why it cannot, promptly and within 20 working days. If it can supply the information before the end of the 20 working days it must do so.

Some extensions are allowed:

- Where an authority is required to consider disclosing exempt information under the UK FOI Act's public interest test,⁴ the 20 working days can be extended for a "reasonable" time. This extension should only be needed where the public interest test raises particularly complex questions. If the authority does need an extension it is required to tell you how long it expects this to be and must still disclose any non-exempt information within 20 working days. This extension does not apply under the Scottish FOI Act. Scottish authorities have to deal with all requests - including those which involve the public interest test - within 20 working days.
- A 10 working day extension is allowed for requests to the National Archives and Keeper of Records in Scotland for information that is not already publicly available.
- Schools have up to 60 working days to respond to requests received during or shortly before school holidays. Where information is held overseas or where requests can only be answered by personnel taking part in or preparing for military operations, the Information Commissioner can authorise an extension of up to 60 working days if necessary. None of these extensions apply to Scottish public authorities.

The above extensions only apply to FOI requests - not to those under the EIRs. The EIRs (both UK and Scottish) allow the normal 20 working day period to be extended to up to 40 working days where the complexity and volume of the requested information make it impracticable to comply within the normal limit. This is the only permitted extension.

⁴ To withhold information under most exemptions, the authority must show not only that the information is exempt but also that the public interest in keeping it confidential is greater than the public interest in disclosure. This means that exempt information may have to be disclosed on public interest grounds. See page 22.

3. MODEL LETTER

You can use this model letter to help you request information under the FOI Act or EIRs. You don't have to use these precise words - adapt the letter to suit your own circumstances. If your request is for personal information about yourself don't use this letter but see Part 8 of this guide.

Your address

Freedom of Information Officer

Name and address of public authority

Date

Dear FOI Officer,

This is a request under the *Freedom of Information Act / Environmental Information Regulations*. *(Delete whichever does not apply. If your request is for non-environmental information, mention just the FOI Act. If it is for environmental information, mention just the EIRs. If it involves both kinds of information, mention both laws.)*

Could you please supply me with *(describe the information you want as specifically as possible).*
Please include copies of material which you hold in the form of paper and electronic records including emails *(this is not strictly necessary as the authority should provide you with the information you have asked for regardless of the form in which it is held. But it may be useful to remind it to look through its electronic records and emails as well as any paper records.)*

I would be grateful if you would supply this information in the form of *(state your preferred format if you have one - eg by providing me with photocopies / by email / by allowing me to inspect the records etc. If you have no particular preference omit this paragraph)*

If I can help to clarify this request please telephone me on *(your phone number)* **or contact me by email at** *(your email address).*

I look forward to hearing from you promptly, as required by the legislation, and in any case within 20 working days.

Yours sincerely

(Your name)

4. CHARGES

Will I have to pay for the information?

Unless your request requires the authority to do a large amount of work, you will probably be entitled to the information free of charge, apart from any copying or postage costs. However, the precise charging rules vary between the different laws.

If the authority does make a charge, for example, for photocopies, it should tell you in advance and ask you if you are prepared to pay. It will be entitled to ask for payment in advance. If it does, the countdown towards the 20 working day response period will stop until you pay. So if you are willing to pay, do so quickly.

Charges under the UK FOI Act

So long as the authority does not have to spend more than a set amount finding your information, it can only charge you for copying, printing and postage. The cost limit:

- for a government department is £600. This is equivalent to about three and a half days work, at a fixed rate of £25 an hour.
- for all other authorities is £450. This is equivalent to about two and a half days work at the same fixed rate.

Remember: this is *not* the charge that *you* will have to pay. If the cost of dealing with your request is below these limits you can only be charged the copying, printing and postage costs. But if the cost is above these limits, the authority is not required to provide the information at all.

In calculating how many hours work will be involved, an authority can take into account the time it expects to spend checking whether it holds the information, finding and extracting the information, putting it into any special form you've asked for and editing it to remove any exempt information. But it *cannot* include the time spent deciding whether the information has to be disclosed, which is often the most time-consuming part of the exercise.

Where your request would cost more than the £600/£450 limit, the authority can:

- refuse to supply the information altogether. It should advise you what information you could have without exceeding the limit or what you could do to reduce the scope of your request so that it does not exceed the limit.
- supply the information only if you agree to pay the full costs of finding, extracting and editing the information. Since this will be at least £450 or £600 the cost is likely to be prohibitive for most people. Even if you are prepared to pay, you can't force the authority to supply the information if it doesn't want to. However, the authority could decide to let you have the information for a lower fee.

If you split a large request up into several smaller requests, and they are made within 60 working days of each other, the authority can add the costs of the requests together and refuse to provide the requested information if the total exceeds the relevant limit.

There is no set charge for photocopies or printouts. The government's guidance says the charge must be "*reasonable*" and that "*in most cases, photocopying and printing would be expected to cost no more than 10 pence per sheet*".⁵

Charges under the Scottish FOI Act

Most requests to Scottish public authorities will be free or cost very little.

- The first £100 of the costs of responding to a request, including any photocopying costs, will automatically be waived.
- If it costs the authority more than £100 to respond to your request it can charge you 10% of these costs. The maximum hourly rate is £15 an hour, which means the most you can be charged for staff time is £1.50 an hour. The authority can charge for the work involved in locating, retrieving and providing the information but it cannot charge for the time spent deciding whether it holds the information and deciding whether it should be disclosed.
- You will also have to pay the full copying, printout and postage costs. Photocopying charges are not fixed, but the Scottish Executive's guidance says "*if the cost to the authority for*

⁵ Department for Constitutional Affairs. Guidance on the application of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. <http://www.dca.gov.uk/foi/feesguide.htm>

photocopying material is 10 pence per A4 sheet, it would be unacceptable to include a greater charge for this element".⁶

- A Scottish authority does not have to provide information if it would cost more than £600 to do so. But it should tell you what information you could have without exceeding this limit or advise you on how you could narrow your request to stay within the limit.
- If you make two or more separate requests for related information, they have to be answered, even if the combined cost exceeds £600. A Scottish authority can only refuse requests where the combined cost exceeds £600 if it publishes that information within 20 working days.

Environmental Information Regulations

The EIRs allow authorities to charge a "reasonable amount" for information but don't specify what that should be.

- The UK government's draft guidance on the EIRs says that any charges "*should not exceed the cost of providing the information, for example, the cost of photocopies*".⁷ It encourages UK authorities to apply the UK FOI Act's charging scheme to requests for environmental information which can be dealt with within the £450 or £600 limits described above. This would mean that so long as the cost to the authority is below the relevant limit you would only be charged for photocopying, printing and postage. An authority cannot refuse to provide environmental information just because the cost exceeds that limit. But it would be able to charge you more for it - though the charge must still be "reasonable".
- The Scottish Executive's guidance on the Scottish EIRs also says that authorities may decide to adopt the Scottish FOI Act's approach to charges where the cost is below £600.⁸ These are described above. If the cost exceeds these limits the authority is still required to deal with the request though it can charge a "reasonable" amount for doing so.
- If you just want to inspect records, no fee can be charged under the EIRs.

⁶ Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002. <http://www.scotland.gov.uk/library5/government/sedfpa.pdf>

⁷ Department for Environment, Food and Rural Affairs. Draft guidance on the Environmental Information Regulations. Chapter 6: Handling requests for environmental information. <http://www.defra.gov.uk/corporate/consult/eir-guidance/index.htm>

⁸ Scottish Executive, Guidance on the Implementation of the Environmental Information (Scotland) Regulations 2004 November 2004 Paper 2004/18. <http://www.scotland.gov.uk/library5/environment/aeig-00.asp>

What if an authority charges *more* for environmental information than it does for other information?

Because the EIRs, unlike the FOI Act, do not specify precisely what level of fees can be charged for environmental information some authorities may try to charge more for environmental information than for other information. For example, they may charge for the time spent finding information even where this does not exceed the £600 or £450 limit which applies under the FOI Act. You should consider challenging such charges.

The EIRs require any charge to be "reasonable" and you should argue that a higher charge for environmental information is unreasonable. The EIRs implement an international treaty⁹ and a European directive¹⁰ designed to improve public access to environmental information. To penalise applicants by imposing higher charges for environmental information than for other information is inconsistent with the purpose of these measures. Complain to the Information Commissioner if necessary.

However, an authority may be allowed to charge more than just the copying/postage costs if:

- the cost to it of dealing with your request would be more than the £600 or £450 limits which apply to FOI requests; or
- you have requested information which the authority normally sells on a commercial basis because this is the only way in which it could afford to continue producing the information.

⁹ United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed at Aarhus, Denmark, 25 June 1998

¹⁰ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

5. WHEN INFORMATION CAN BE WITHHELD

Under the UK and Scottish FOI Acts authorities can refuse to supply information if:

- The cost of finding and extracting the information would cost more than the set cost limit (see above).
- The authority has already provided you with the same or substantially similar information in which case you may have to wait a "reasonable" time before you can apply again.
- Your request is "vexatious" - for example, if it is made in order to disrupt the authority's work or is part of an obsessive pattern of requests.
- The information is covered by an exemption which is not subject to the Act's public interest test. These are known as "absolute" exemptions.¹¹
- The information is covered by an exemption to which the public interest test does apply but in this case the public interest in withholding the information is greater than the public interest in its disclosure.

The grounds for refusing information under the EIRs are more limited. There are fewer exemptions and all but one are subject to a public interest test.¹² The authority cannot refuse a request because the cost exceeds a set limit, nor can it refuse a repeated or vexatious request. However, it can refuse if the request is "too general" or "manifestly unreasonable".

The exemptions, and the way the public interest test operates, are described in Part 7 of this guide.

¹¹ Under the FOI Act the term "absolute" only means that the public interest test does not apply to the exemption in question. It does not necessarily mean that there is absolutely no access to the information in question.

¹² Although the FOI Act uses the term "exemptions" the EIRs refer to "exceptions". This guide uses the term "exemptions" in both cases.

How will exempt information be withheld?

If some of the information you have asked for is exempt, the authority must still supply the rest. It could do this by, for example:

- sending you a photocopy of a document from which any exempt information has been blacked out.
- sending you a printout of information held on computer minus the exempt information.

The authority should tell you that it has withheld information and explain why (but see the question below).

Can authorities refuse to even tell me whether they hold the information I've asked for?

An authority is normally required to tell you whether it holds the information you have asked for, even where it does not have to disclose the information. But in certain circumstances the authority is allowed to refuse to even confirm or deny whether it holds the information. The test under the UK Act (and both sets of EIRs) is whether confirming that the information is or is not held would itself trigger the exemption. Thus under the UK Act, an authority can refuse to say whether it holds particular information if:

- to do so would be likely to prejudice an interest such as international relations or law enforcement and the public interest in not confirming the existence of the information is greater than the public interest in doing so. (These are the tests that would be used in deciding whether the information must be disclosed).
- the information relates to a matter such as the formulation of government policy or investigations carried out by a prosecuting authority and the public interest in not confirming the existence of the information is greater than the public interest in doing so.
- the information itself wouldn't have to be disclosed under any circumstances, for example, in the case of information about the work of the security services or court records.

Under the Scottish FOI Act the test is slightly different. An authority can refuse to say whether certain types of exempt information exist where to do so would be "contrary to the public interest". This can be done only in relation to certain exemptions but not all.¹³

¹³ The exemptions for which this type of a response can be given are those under sections 28 to 35, 39(1) or 41 of the Freedom of Information (Scotland) Act. See Tables 1 and 2.

6. CHALLENGING DECISIONS

Who decides on the exemptions and the public interest test?

Initially, the public authority will decide whether information is exempt or disclosure is in the public interest, but you can challenge its decisions. If you do, the UK Information Commissioner or the Scottish Information Commissioner will decide these questions.

What should I do if I am unhappy with the authority's decision?

If an authority has refused some or all of the information that you have applied for it should write to you:

- telling you which exemption it is relying on and why it considers that the exemption applies, if this is not obvious, and
- if it is an exemption to which the public interest test applies, explaining its reasons for claiming that the public interest in withholding the information is greater than the public interest in disclosure.
- informing you of your rights of appeal.

If you're not persuaded by the authority's reply, be prepared to challenge it. The legislation will only work if requesters are persistent and appeal against unfounded refusals.

The first stage of any appeal should be to ask the authority itself to reconsider its decision. The Information Commissioner will not normally deal with a complaint from you unless you have done this.

If a UK public authority tells you that it has not established an appeals process for dealing with FOI appeals, you will be free to complain directly to the Information Commissioner. Most UK authorities probably will have their own appeals processes, though they are not obliged to. Scottish authorities *are* required to have their own appeals process.

You can appeal about any aspect of the authority's handling of your request which you think may not comply with the FOI Act or EIRs. This may be a decision that information is exempt, that disclosure is not in the public interest, that the authority has refused to confirm whether or not it holds the information, that the cost of finding information exceeds the cost limit, about a

photocopying or other charge, that the authority has taken too long over your request, that it has not provided you with reasonable advice and assistance or has dealt with your request under the wrong legislation (eg if you think it should have been dealt with under the EIRs and not the FOI Act).

How do I make an appeal?

To make an appeal:

- Send a letter, fax or email to the authority and ask it to reconsider its decision. It should have given you the address for appeals when replying to your request. Include your name and address and a phone number if possible. If you are appealing about a Scottish authority's decision you can also do so in some other permanent form, for example by sending it a tape recording.
- Say that you are appealing under the FOI Act or the EIRs (if environmental information is involved) or, if appropriate, both.
- Say which aspect of the decision you are unhappy about and say why you think its wrong, if you can. But it isn't your responsibility to demonstrate that the authority is wrong. The authority has to show that it has complied with the law.

There is no set time limit within which you must make an appeal under the UK FOI Act. But if you are appealing under the Scottish FOI Act or under the EIRs you must do so within 40 working days of the decision.

There is no charge for appealing to the authority or for complaining to the Information Commissioner.

How long does the authority have to decide on the appeal?

- There is no set time limit for an authority to deal with an appeal under the UK FOI Act. The guidance for central government departments says complaints about simple matters should be dealt with in 2-3 weeks and complex complaints within 6 weeks.¹⁴ An authority should tell you at the outset how long it expects the appeal to take.
- An appeal under the UK EIRs must be dealt with as soon as possible and in any case within 40 working days.

¹⁴ DCA, Freedom of Information: Procedural Guidance, Chapter 9.
<http://www.dca.gov.uk/foi/guidance/proguide/chap09.htm>

- An appeal under the Scottish FOI Act or Scottish EIRs must be completed with as soon as possible and in any case within 20 working days.

The guidance on the UK legislation says the complaint should if possible be dealt with by a more senior person than the original decision-taker. The Scottish guidance says the review should be carried out by someone who wasn't involved in the original decision.

How do I complain to the Information Commissioner?

You can complain to the Commissioner if:

- the authority has dealt with your appeal but you still believe it has failed to comply with the legislation in some way.
- the authority hasn't dealt with your appeal within the required time limit (see above). The only law which doesn't have a fixed time limit is the UK FOI Act. But if a UK authority hasn't reached a decision within a reasonable time, ask the UK Information Commissioner if he will investigate.

Write to the UK or Scottish Information Commissioner (depending on whether your request involves a UK or Scottish public authority) explaining what you are complaining about and, if you can, why you think the authority is wrong. Include copies of your request and all correspondence or emails with the authority. The Commissioner's website may provide specific advice on making complaints. If possible check it before sending your complaint.

UK Information Commissioner Information Commissioner's Office Wycliffe House Water Lane Wilmslow Cheshire SK9 5AF Telephone: (01625) 545 700 Fax: (01625) 524 510 www.informationcommissioner.gov.uk	Scottish Information Commissioner Office of the Scottish Information Commissioner Kinburn Castle, Doubledykes Road, St Andrews, Fife KY16 9DS Telephone: (01334) 464610 Fax: (01334) 464611 e-mail: enquiries@itspublicknowledge.info www.itspublicknowledge.info
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What will the Commissioner do if he upholds my complaint?

If the Commissioner finds that the authority has failed to comply with the legislation he will issue a notice requiring it to disclose the information or do whatever else is necessary to comply.

An authority which fails to comply with the Commissioner's notice could be brought before a court and treated as if it was in contempt of court. In theory this could lead to a fine or even imprisonment.

Can the Commissioner's decisions be challenged?

There is a right of appeal against the Commissioners' decisions:

- Under the UK FOI Act or EIRs you can appeal to the Information Tribunal against the Commissioner's decision and so can the authority. There is a right of appeal against the Tribunal's decisions to the High Court on a point of law.
- Under the Scottish FOI Act or EIRs the only right of appeal against the Commissioner's decisions is to the Court of Session on a point of law.
- An appeal on a point of law means you can only challenge the decision on limited grounds, for example, if you believe that the law has been misinterpreted, a serious factual error has been made or the decision is one which no reasonable person could have reached.

Can ministers overrule the Information Commissioner?

Both UK and Scottish ministers have a veto which allows them to overrule certain decisions taken by the Commissioner. This is one of the most contentious aspects of the legislation.

- Under the UK FOI Act and EIRs, cabinet ministers can veto any decision of the Information Commissioner or Information Tribunal which requires a government department to disclose exempt information on public interest grounds. The government has said that all cabinet ministers will be consulted before a veto is used.
- The Welsh First Minister, and the Northern Ireland First Minister and Deputy First Minister acting jointly, also have a similar veto in relation to the devolved administrations.
- Under the Scottish legislation, the First Minister can veto decisions of the Scottish Information Commissioner if he orders the Scottish Executive to disclose some classes of exempt information on public interest grounds. The information must be of "exceptional sensitivity"

and the veto cannot be used in relation to some types of exempt information.¹⁵ The First Minister must consult other ministers before using the veto.

Use of the veto cannot be kept secret and could be judicially reviewed.

¹⁵ The veto can be used where the Scottish Information Commissioner orders disclosure on public interest grounds of certain types of exempt information, including that which relates to the formulation of government policy, ministerial communications, Law Officers' advice, the operation of a ministerial private office, national security, information supplied in confidence by a foreign government or international organisation, information which could be withheld during legal proceedings and information relating to honours. The veto cannot be used where the Commissioner orders disclosure of other types of exempt information on public interest grounds, including information whose disclosure would substantially prejudice commercial interests, law enforcement, the economy, relations between devolved assemblies or an assembly and the UK government or in relation to the exemptions for information due to be published in the next 12 weeks, trade secrets, information likely to endanger health and safety or the environment or communications with the Royal Family.

7. EXEMPTIONS & THE PUBLIC INTEREST TEST

This section describes the main exemptions under the FOI Act and EIRs.

- [Table 1](#) lists the FOI Act exemptions which are subject to the public interest test.
- [Table 2](#) lists the FOI Act exemptions which are not subject to the public interest test
- [Table 3](#) lists the EIR exemptions. With one exception, they are all subject to the public interest test.

The Tables only provide summaries of the exemptions. You should check the legislation itself for the full text.

Exemptions subject to the public interest test

For those exemptions which are subject to the public interest test, an authority seeking to withhold information must:

- show that the information is exempt, and
- show that the public interest in keeping the exempt information confidential is greater than the public interest in its disclosure.¹⁶

If the authority cannot meet both the above tests, the information must be disclosed.

The decision on whether the information is exempt may involve different kinds of questions. Some exemptions apply only where it can be shown that disclosure is likely to harm particular interests, such as defence, international relations, law enforcement or commercial interests. The actual test of harm varies depending on which law is involved. For example, under the UK FOI Act it is usually whether disclosure is likely to “*prejudice*” those interests, while the Scottish FOI Act uses the more

¹⁶ Under the UK Act, for those exemptions which are subject to the public interest test, exempt information must be disclosed unless “*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*” [section 2(2)(b)]. Under the Scottish FOI Act such exempt information must be disclosed if “*in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption*” [section 2(1)(b)]

demanding “*prejudice substantially*” test.¹⁷ In such cases, even information whose disclosure would prejudice or prejudice substantially a particular interest may have to be disclosed if, on balance, the public interest favours it.

Other exemptions have no test of harm and apply to all information of a particular kind or all information obtained in particular circumstances. The FOI exemption for information “*relating to the formulation or development of government policy*” is an example. But the public interest test also applies to these exemptions. The outcome will depend on whether the public interest in confidentiality outweighs the public interest in disclosure of the requested information.

Some exemptions are *not* subject to the public interest test. If information is shown to fall within one of these, the authority can withhold the information without considering whether it should be disclosed in the public interest. The Act refers to these as “absolute” exemptions. This does not mean that there is *absolutely* no access to the information in question, merely that the Act’s public interest test does not apply.

The public interest test

The term “public interest” is not defined in the FOI Act or EIRs. In general, the “public interest” refers to the interests of the general community or a section of it, as opposed to a purely private interest. It does not mean “what the public is interested in” or curious about.

Depending on the circumstances, the public interest in disclosure may involve helping to ensure that:

- there is informed public debate about significant decisions
- the public are able to participate effectively in decisions affecting them
- there is adequate scrutiny of the decision-making process
- authorities are accountable for the spending of public money
- authorities do their job properly

¹⁷ The Scottish EIRs adopt the same test as the Scottish FOI Act, namely whether disclosure would be likely to “*prejudice substantially*” the interest in question. The test under the UK EIRs is whether disclosure would “*adversely affect*” various interests.

- the public is not deceived about the way public authorities, or bodies which they regulate, operate
- the public are informed about possible dangers to health and safety or the environment and the adequacy of measures taken to prevent them
- authorities deal fairly with the public
- any misconduct is exposed
- unfounded concerns about the authority are dispelled.

Where public interest arguments of these kinds apply they would support the case for disclosure. But any public interest arguments *against* disclosure also have to be taken into account. These will normally involve the need to prevent damage to the interests specified in the exemptions, such as defence, international relations, law enforcement or commercial interests. The final decision will depend on the relative weight of public interest arguments for and against disclosure.

Certain factors should *not* be taken into account in considering the public interest. These have been described in guidance issued by Scottish ministers under the Scottish FOI Act, though they will be equally relevant under the UK legislation:

"In deciding whether a disclosure is in the public interest, authorities should not take into account

- *possible embarrassment of government or other public authority officials;*
- *the seniority of persons involved in the subject matter;*
- *the risk of the applicant misinterpreting the information.*
- *possible loss of confidence in government or other public authority"¹⁸*

¹⁸ Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities Under the Freedom of Information (Scotland) Act 2002

Exemptions and the EIRs

The EIRs provide more limited grounds for withholding information than the FOI Act:

- There are fewer exemptions.
- All exemptions (with the exception of part of the personal data exemption) are subject to the public interest test.
- The EIRs state that a public authority must “apply a presumption in favour of disclosure”. The exemptions must also be interpreted “in a restrictive way”¹⁹
- Information about emissions cannot be withheld under several key exemptions, including the exemption for commercial confidentiality and several other exemptions.
- The right of access to environmental information overrides any restriction on disclosure in other legislation or under common law. This is the opposite of the position under the FOI Act where these restrictions override the right of access.
- Where the information which has been requested has been produced by the authority itself or on its behalf, the authority is required to ensure that it is up to date, accurate and comparable.

Table 3 shows the exemptions in the UK and Scottish EIRs. The main difference between them is in the harm test. Many of the UK exemptions apply where disclosure would “*adversely affect*” a particular interest, whereas the Scottish exemptions adopt the more demanding test of whether disclosure would “*substantially prejudice*” that interest.

¹⁹ This is a requirement of the EU directive which the regulations implement. It also explicitly stated in the Scottish EIRs.

TABLE 1

FOI exemptions to which the public interest test applies (summary)

UK FOI Act		Scottish FOI Act	
Section 22	<p>Information intended for publication which it is reasonable to withhold until publication.</p> <p>For this exemption to apply, there must have been an intention to publish the information before the request was received</p>	Section 27	<p>Information intended for publication within the next 12 weeks which it is reasonable to withhold until publication.</p> <p>Information obtained from a continuing research programme whose disclosure is likely to substantially prejudice the programme or interests of those involved in it.</p>
Section 24	<p>Information whose exemption is required to safeguard national security</p> <p>The exemption can be established by a ministerial certificate which the Information Commissioner cannot overturn. However, the Information Tribunal can set aside the certificate if, applying judicial review principles, it finds there were no reasonable grounds for it.</p>	Section 31(1)	<p>Information whose exemption is required to safeguard national security</p> <p>The exemption can be established by a ministerial certificate which the Information Commissioner cannot overturn. However, the certificate could be set aside by judicial review if the court finds there were no reasonable grounds for it.</p>
Section 26	Information likely to prejudice defence	Section 31(4)	Information likely to substantially prejudice defence
Section 27(1)	Information likely to prejudice international relations or the UK's interests abroad	Section 32(1)(a)	Information likely to substantially prejudice international relations or the UK's interests abroad
Section 27(2)	Information obtained in confidence from another government or international organisation	Section 32(1)(b)	Information obtained in confidence from another government or international organisation
Section 28	Information likely to prejudice relations between any of the devolved administrations or between a devolved administration and the UK government	Section 28	Information likely to substantially prejudice relations between any of the devolved administrations or between a devolved administration and the UK government
Section 29	Information likely to prejudice the economic interests of the UK or the financial interests of a devolved administration	Section 33(2)	Information likely to substantially prejudice the economic interests of the UK or the financial interests of a devolved administration

<p>Section 30</p>	<p>Information obtained during investigations by the police or prosecuting authorities into potential offences or for the purpose of criminal proceedings or obtained during investigations which could have led to charges being brought.</p> <p>Information relating to the obtaining of information from confidential sources in connection with investigations, proceedings or regulatory functions</p>	<p>Section 34</p>	<p>Information obtained during investigations by the police or prosecuting authorities or for the purpose of criminal proceedings or held in connection with an inquiry into the cause of a death.</p> <p>Information relating to the obtaining of information from confidential sources in connection with investigations, proceedings or regulatory functions</p> <p>Note that there is no right of appeal to the Commissioner against decisions of a procurator fiscal or the Lord Advocate, where he is acting in his capacity as head the systems of criminal prosecution and investigation of deaths in Scotland. It may be possible to challenge such decisions by judicial review.</p>
<p>Section 31</p>	<p>Information likely to prejudice law enforcement, the administration of justice or various regulatory functions</p>	<p>Section 35</p>	<p>Information likely to substantially prejudice law enforcement, the administration of justice or various regulatory functions</p>
<p>Section 33</p>	<p>Information likely to prejudice the functions of an authority responsible for auditing or assessing the effectiveness of other public authorities.</p>	<p>Section 40</p>	<p>Information likely to substantially prejudice the functions of an authority responsible for auditing or assessing the effectiveness of other public authorities.</p>
<p>Section 35(1)</p>	<p>Information held by a government department or the Welsh Assembly relating to:</p> <p>(a) the formulation or development of government policy</p> <p>In applying this exemption, government must take account of the particular public interest in disclosing factual information which provides an informed background to decision-taking.</p> <p>(This means that factual information about policy decisions is particularly likely to be disclosed on public interest grounds, though other information may also be disclosable on these grounds.)</p>	<p>Section 29(1)</p>	<p>Information held by the Scottish Executive relating to:</p> <p>(a) the formulation or development of government policy</p> <p>In applying this exemption, the Scottish Executive must take account of the particular public interest in disclosing factual information which provides an informed background to decision-taking.</p> <p>(This means that factual information about policy decisions is particularly likely to be disclosed on public interest grounds, though other information may also be disclosable on these grounds.)</p>
	<p>(b) ministerial communications</p>		<p>(b) ministerial communications</p>
	<p>(c) Law Officers' advice</p>		<p>(c) Law Officers' advice</p>
	<p>(d) the operation of a minister's private office</p>		<p>(d) the operation of a minister's private office</p>

Section 36	Information which in the reasonable opinion of a 'qualified person' (a minister or designated senior official) would be likely to (a) prejudice collective responsibility (b) inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation or (c) prejudice the effective conduct of public affairs. Although the public interest test normally applies to this exemption it does not apply in the case of requests made to the House of Commons or the House of Lords.	Section 30	Information likely to (a) substantially prejudice collective responsibility (b) substantially inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation or (c) substantially prejudice the effective conduct of public affairs
Section 37(1)(a)	Information relating to communications with the Royal Family	Section 41(a)	Information relating to communications with the Royal Family
Section 37(1)(b)	Information relating to honours	Section 41(b)	Information relating to honours
Section 38	Information likely to endanger an individual's health or safety	Section 39(1)	Information likely to endanger an individual's health or safety
Section 39	Environmental information (This is exempt under the FOI Act because a right of access exists under the Environmental Information Regulations)	Section 39(2)	Environmental information (This is exempt under the FOI (Scotland) Act because a right of access exists under the Environmental Information (Scotland) Regulations)
Section 40(2) (in part)	Most personal data is not subject to the public interest test. However the public interest test does apply to two relatively minor classes of personal data: (a) information which could be withheld from the person to whom it relates if he or she applied for it under the Data Protection Act and (b) a limited category of personal data whose disclosure is restricted under a special provision in section 10 of the Data Protection Act because disclosure would be likely to cause substantial and unwarranted damage and distress to the individual concerned	Section 38(1) (in part)	Most personal data is not subject to the public interest test. However, the public interest test does apply to two relatively minor classes of personal data: (a) information which could be withheld from the person to whom it relates if he or she applied for it under the Data Protection Act and (b) a limited category of personal data whose disclosure is restricted by a notice under s 10 of the Data Protection Act indicating that its disclosure would be likely to cause substantial and unwarranted damage and distress to the individual concerned
Section 42	Information covered by legal professional privilege	Section 36(1)	Information which could be withheld in legal proceedings on the grounds of confidentiality of communications
Section 43(1)	Trade secrets	Section 33(1)(a)	Trade secrets
Section 43(2)	Information whose disclosure would be likely to prejudice commercial interests	Section 33(1)(b)	Information whose disclosure would be likely to substantially prejudice commercial interests

TABLE 2

**FOI exemptions to which the public interest test does not apply (summary)
(also known as “absolute” exemptions)**

UK FOI Act		Scottish FOI Act	
Section 21	Information that is reasonably accessible to the applicant already [For information available from the authority on request this exemption only applies if the information is described in the authority's publication scheme]	Section 25	Information that is reasonably accessible to the applicant already [For information available from the authority on request this exemption only applies if the information is described in the authority's publication scheme]
Section 23	Information relating to or supplied by the security and intelligence services, GCHQ, the special forces, the National Criminal Intelligence Service and certain other specified bodies with security functions The exemption can be established by a ministerial certificate which the Information Commissioner cannot overturn. However, the Information Tribunal can set aside the certificate if it finds that the information does not relate to and has not been supplied by such a body.		(No equivalent)
Section 32	Information contained only in court documents	Section 37	Information contained only in court documents
Section 34	Information whose disclosure would infringe Parliamentary privilege. This exemption can be established a certificate signed by the Speaker of the Commons or the Clerk of the Parliaments, which the Information Commissioner cannot overturn.		(No equivalent)

<p>Section 36</p>	<p>The public interest test does <i>not</i> apply where a request is made to Parliament but <i>does</i> apply for requests to all other bodies.</p> <p>In the case of a request to Parliament, information is exempt if in the reasonable opinion of the Speaker of the Commons or the Clerk of the Parliaments, disclosure would be likely to (a) prejudice collective responsibility (b) inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation or (c) prejudice the effective conduct of public affairs.</p> <p>This exemption can be established a certificate signed by the Speaker of the Commons or the Clerk of the Parliaments, which the Information Commissioner cannot overturn.</p>		<p>(No equivalent)</p>
<p>Section 40(1)</p>	<p>Personal data about the applicant.</p> <p>(This is exempt under the FOI Act because a right of access to such information exists under the Data Protection Act)</p>	<p>Section 38(1) In part</p>	<p>(a) Personal data about the applicant (b) personal census information, and (c) health records of a deceased person</p> <p>(Personal data about the applicant is exempt under the FOI Act because a right of access to such information exists under the Data Protection Act)</p>
<p>Section 40 (2) (in part)</p>	<p>Personal data about another individual whose disclosure would breach the data protection principles in the Data Protection Act</p>	<p>Section 38(1) In part</p>	<p>Personal data about another individual whose disclosure would breach the data protection principles in the Data Protection Act</p>
<p>Section 41</p>	<p>Information whose disclosure would be a breach of confidence at common law.</p> <p>(Although the FOI Act's public interest test does not apply, a similar public interest test applies at common law to the decision on whether a breach of confidence has occurred.)</p>	<p>Section 36(2)</p>	<p>Information whose disclosure would be a breach of confidence at common law.</p> <p>(Although the FOI Act's public interest test does not apply, a similar public interest test applies at common law to the decision on whether a breach of confidence has occurred.)</p>
<p>Section 44</p>	<p>Information whose disclosure is prohibited by law</p>	<p>Section 26</p>	<p>Information whose disclosure is prohibited by law</p>

TABLE 3

Exemptions under the Environmental Information Regulations (summary)

(All exemptions are subject to a public interest test apart from some personal data)

	UK EIRs		Scottish EIRs	Notes
Regulation		Regulation		
12(4)(b)	The request is "manifestly unreasonable"	10(4)(b)	The request is "manifestly unreasonable"	
12(4)(d)	The request is "too general"	10(4)(c)	The request is "too general"	An authority can only use this exemption if it has first asked the applicant to provide more details specific and has helped the applicant to do so
12(4)(d)	The request relates to material which is still being completed or to unfinished documents or incomplete data.	10(4)(d)	The request relates to material which is still being completed or to unfinished documents or incomplete data.	
12(4)(e)	The request involves the disclosure of "internal communications".	10(4)(e)	The request involves the disclosure of "internal communications".	
12(5)(a)	Disclosure would adversely affect international relations, defence, national security or public safety	10(5)(a)	Disclosure would substantially prejudice international relations, defence, national security or public safety	The exemption for national security can be established by a ministerial certificate.
12(5)(b)	Disclosure would adversely affect the course of justice, a fair trial or a criminal or disciplinary inquiry	10(5)(b)	Disclosure would substantially prejudice the course of justice, a fair trial or a criminal or disciplinary inquiry	
12(5)(c)	Disclosure would adversely affect intellectual property rights	10(5)(c)	Disclosure would substantially prejudice intellectual property rights	

(12(5)(d))	Disclosure would adversely affect the confidentiality of an authority's proceedings where that confidentiality is provided by law	10(5)(d)	Disclosure would substantially prejudice the confidentiality of an authority's proceedings where that confidentiality is provided by law	Data relating to emissions cannot be withheld under this exemption The exemption only applies where there is a legal basis other than the EIRs for withholding information, eg where disclosure would be a breach of confidence
12(5)(e)	Disclosure would adversely affect commercial or industrial confidentiality which is provided by law to protect a legitimate economic interest	10(5)(e)	Disclosure would substantially prejudice commercial or industrial confidentiality which is provided by law to protect a legitimate economic interest	Data relating to emissions cannot be withheld under this exemption The exemption only applies where there is a legal basis other than the EIRs for withholding information, eg where disclosure would be a breach of confidence or
12(5)(f)	Disclosure would adversely affect the interests of a person who has volunteered the information and (a) the authority has no power to compel the person to provide the information and (b) the authority is not entitled to disclose the information and (c) the person supplying the information has not consented to its disclosure	10(5)(f)	Disclosure would substantially prejudice the interests of a person who has volunteered the information and (a) the authority has no power to compel the person to provide the information and (b) the authority is not entitled to disclose the information and (c) the person supplying the information has not consented to its disclosure	Data relating to emissions cannot be withheld under this exemption
12(5)(g)	Disclosure would adversely affect the protection of the environment	10(5)(g)	Disclosure would substantially prejudice the protection of the environment	Data relating to emissions cannot be withheld under this exemption

13(1)	<p>Personal data about an individual other than the applicant is exempt if (a) disclosure would breach any of the data protection principles (b) the information could be withheld from the person to whom it relates if he or she applied for it under the Data Protection and (c) its disclosure is restricted by a notice under section 10 of the Data Protection Act on the grounds that its disclosure would be likely to cause substantial and unwarranted damage and distress to the individual concerned.</p> <p>The public interest test applies to categories (b) and (c)</p>	11(2)	<p>Personal data about an individual other than the applicant is exempt if (a) disclosure would breach any of the data protection principles (b) the information could be withheld from the person to whom it relates if he or she applied for it under the Data Protection and (c) its disclosure is restricted by a notice under section 10 of the Data Protection Act on the grounds that its disclosure would be likely to cause substantial and unwarranted damage and distress to the individual concerned.</p> <p>The public interest test applies to categories (b) and (c)</p> <p>Personal data about the applicant is not accessible under the EIRs. Access to such information is provided under the Data Protection Act</p>	
5(3)	<p>Personal data about the applicant is not accessible under the EIRs. Access to such information is provided under the Data Protection Act</p>	11(1)		

8. OBTAINING YOUR OWN PERSONAL DATA

What are my rights to obtain information about myself?

For some time there has been a right of access under the Data Protection Act (DPA) 1998 to personal data held about yourself by public or private bodies. This is known as “subject access”, because it is a right of access by the subject of the data.

Prior to January 1 2005 the right of access applied to:

- Personal information held about you in electronic form, for example in emails, a database or in documents held on computer
- Your paper health records (both NHS and private), social work records, local authority housing records or children’s school records
- Credit reference agency records
- Other personal information about you held about you on paper in a “structured” file. This is a file held as part of a collection of files on individuals which is so well organised or indexed that someone looking for specific personal data about you within your file can go straight to it without leafing through the pages.²⁰

The Freedom of Information Act has amended the Data Protection Act to improve the right of access to personal data held by public authorities. From January 1 2005 the right of subject access also applies to *any other* personal data held about you by a public authority. This information is referred to as “unstructured” personal data.

²⁰ This narrow definition is the result of a 2003 Court of Appeal judgment in the case of *Durant v Financial Services Authority*. Prior to that decision it had been assumed that most manual files about individuals were “structured” and accessible to the individuals concerned. The narrower definition excluded many kinds of manual files from this right of access.

What personal information is covered by the new right of access?

Examples of “unstructured” personal data which you are now entitled to see include:

- a file about you which does not qualify as a “structured” file
- information about you held on someone else’s file
- letters mentioning you held in a general correspondence file
- references to you in minutes of meetings, notes of telephone conversations or any other kind of document.

The new right applies to unstructured data even if it was recorded before January 1 2005.

Can I see *all* the unstructured data held about me?

No, you can only see the unstructured data which the authority can find by spending up to a set limit. The limits are those that also apply under the UK FOI Act:

- government departments are required to spend up to £600 looking for and extracting any unstructured personal data you have requested. This is calculated at a fixed rate of £25 for every hour of staff time involved and amounts to about three and a half days work.
- other public authorities, including those in Scotland, are required to spend up to £450 or about two and a half days work looking for unstructured personal data.²¹

If an authority can find and extract the unstructured information you have asked for without spending more than £600/£450 it must disclose it to you, unless an exemption applies. An authority is not required to supply you with any data which could only be found by spending more than these amounts.

Where all the unstructured data about you is easily found, perhaps because it is in a single file or in a number of easily located documents, you should be able to obtain it all, so long as it is not exempt. But if your personal data is scattered throughout the authority’s papers, the cost of searching for it may well exceed the cost limit.

²¹ For a Scottish public authority, the cost limit applied to a subject access request is £450 and not the £600 which applies to an FOI request.

Instead of asking for "all unstructured personal data" which you hold on me, it will help if you describe the specific unstructured data you want. The authority can require you to do this before dealing with your request. Its in your interests to do so, because this will help the authority know where to look - and increase the chances that it will be able to find the data without exceeding the cost limit. For example, you could ask for particular documents, letters or reports or for all unstructured data about a particular incident.

What information is *not* covered by the new right?

The new right of access does *not* apply to unstructured data about personnel matters. If you are a current or former civil servant, public authority employee, office holder or member of the armed forces the right of access to unstructured personal data does not apply to data about your pay, pension, appointment, dismissal, disciplinary record or other personnel matters. However, you can see personnel information about yourself if it is held on computer or in a structured file.

The new right of access also does not apply to unstructured data which:

- is held by a public authority which is not subject to the UK or Scottish FOI Act, such as the courts or security services
- is held by private bodies
- the authority can only find by exceeding the cost limits described above
- is covered by one of the Data Protection Act's exemptions.

How do I apply to see my own personal data?

To make an application, send a letter, fax or email to the body which holds the data. It will help to say you are applying under section 7(1) of the Data Protection Act 1998. However, your request will be valid even if you don't mention the Act. You may be asked for proof of your identity.

Any written request you make for access to your own personal data will be dealt with under the Data Protection Act and not the Freedom of Information Act, even if you say you're applying under the FOI Act.

What will I have to pay?

You can be asked to pay a fee of up to £10 for your personal data. This includes the cost of any photocopies or printouts supplied to you. This is the maximum fee you can be charged, even if your request includes both structured and unstructured data.

Different charges can be made for health, school and credit reference agency records:

- you can be charged up to £50 (which includes the cost of photocopies) for health records held on paper. This higher charge allows for the costs of copying complex records like X-rays. You should not be charged the full £50 for a small number of ordinary photocopies.²²
- for school records, the only charge is for photocopies. You can be asked to pay £1 for the first 20 pages, plus a further £1 for every subsequent 10 pages, up to a maximum of £50 for 500 pages or more.
- a £2 charge can be made for access to records held by a credit reference agency.

Remember that the £450 or £600 cost limits mentioned above are used purely to decide whether or not the authority has to provide the unstructured personal data you have asked for. These costs cannot be passed on to you.

How long does the authority have to supply personal data?

The Data Protection Act requires personal data to be supplied "promptly" and in any case within 40 calendar days (not working days) of the request.

What exemptions apply under the Data Protection Act?

The exemptions and other advice on applying for your personal data can be found in an earlier guide published by the Campaign for Freedom of Information, "Your Rights to Personal Files". You can read this at <http://www.cfoi.org.uk/persfilesintro.html> or obtain it price £5.50 from the Campaign.

²² The Department of Health's guidance says "Charges are for copying and posting the records only and should not result in a profit for the record holder."
http://www.dh.gov.uk/PolicyAndGuidance/InformationPolicy/PatientConfidentialityAndCaldicottGuardians/AccessHealthRecordsFAQ/fs/en?CONTENT_ID=4039714&chk=iOJNGp#4330516

How does the right of access to personal data compare to the right of access to official information?

You may find that a request which you make involves some personal data about yourself and some non-personal information. For example, you might ask for the reasons why your application to a public authority has not been successful and also for a copy of the rules which describe how such applications are dealt with. The first part of your request would involve personal data about yourself and be dealt with under the Data Protection Act. The second part of the request would involve non-personal information and would be handled under the FOI Act.

There are significant differences between the DP Act and the FOI Act:

- Most of the FOI Act's exemptions are subject to a public interest test. There is no public interest test under the DP Act.
- An authority normally has to tell you when it withholds information under the FOI Act. It does not have to do so when withholding information under a DP Act exemption.
- An authority which refuses information under the FOI Act has to tell you how to appeal against its decision. It does not have to do this under the DP Act.
- If you are unhappy with a decision under the FOI Act, you must first ask the authority to reconsider, before you can complain to the Information Commissioner. You are not required to appeal to the authority itself under the DP Act.
- If you complain to the Commissioner under the FOI Act he will normally make a binding decision, requiring the authority to comply with the Act. He will not usually do so under the DP Act, unless there has been a serious breach or one affecting a large number of people. Instead, the Commissioner will usually assess whether it is "likely or unlikely" that the DP Act has been breached. You can, however, apply directly to a court to enforce your rights under the DP Act.
- If the Commissioner does not uphold your complaint under the FOI Act, you can appeal to the Information Tribunal. Under the DP Act, only the body which holds the information can appeal to the Tribunal. Your only option would be the potentially more expensive remedy of court action.

Overall, your rights of appeal under the DP Act are significantly weaker than under the FOI Act. The Campaign has urged the government to improve the DP Act to bring it into line with the FOI Act, but at present there is no indication that it will do so. See <http://www.cfoi.org.uk/pdf/sarconresponse.pdf>
