



SCOTTISH EXECUTIVE

SCOTTISH EXECUTIVE

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

OPEN LEARNING WORKBOOK

© Crown Copyright 2004

This material has been designed and developed for the Scottish Executive and is the property of the Crown, including the intellectual property rights. It is provided for the sole purpose of promoting understanding of the Freedom of Information (Scotland) Act 2002 and may only be reproduced without the prior written approval of the Crown if it is used for that purpose.

CONTENTS

FOREWORD	Error! Bookmark not defined.
INTRODUCTION TO THE WORKBOOK	2
MODULE 1	7
Freedom of Information in context – Why has freedom of information been introduced?	7
MODULE 2	13
Introduction to FOI Scotland - What is freedom of information and what does it do?	13
MODULE 3	19
Scottish Public Authorities - Who does freedom of information apply to?	19
MODULE 4	25
Publication Schemes – Making information available	25
MODULE 5	31
Records Management – Part 1	31
MODULE 6	37
Records Management – Part 2	37
MODULE 7	41
Rights of access - How is a request made?	41
MODULE 8	49
Dealing with and responding to requests for information and fees – how should an authority handle a request? Part 1	49
MODULE 9	59
Dealing with and responding to requests for information and fees – how should an authority handle a request? Part 2	59
MODULE 10	65
MIDWAY REVIEW	65
MODULE 11	73
Access to environmental information	73
MODULE 12	80

Exemptions from the right of access - Can information always be accessed? Part 1	80
MODULE 13	89
Exemptions from the Right of Access – Can information always be accessed? Part 2	89
MODULE 14	95
Exemptions from the Right of Access – Can information always be accessed? Part 3	95
MODULE 15	101
Data Protection – Refresher Module on the effect of the Data Protection Act 1998	101
MODULE 16	113
Interface with data protection - How does freedom of information fit with data protection? Applications for information by data subjects	113
MODULE 17	119
Interface with Data Protection - How does freedom of information fit with data protection? Application for information by those other than the subject of the data	119
MODULE 18	125
Human Rights	125
MODULE 19	131
Reviews, decisions and enforcement	131
MODULE 20	143
Final Review	143
GLOSSARY	149
APPENDIX 1 Study Skills	159
APPENDIX 2 Flowchart	165
APPENDIX 3 Answers to self-assessment questions	173

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 – TRAINING MATERIALS

Foreword to Open Learning Workbook for Scottish Public Sector Staff

“Openness is central to a modern, mature and democratic society and serves to strengthen government and to empower people”. These were the words of Jim Wallace, the Deputy First Minister, in the Forward to “An Open Scotland”, the consultation document that preceded the Freedom of Information (Scotland) Act 2002. The legislation has been passed by the Scottish Parliament, and the responsibility now lies on all of us across the public sector to turn the ideal of openness, a core founding principle of the Scottish Parliament and Executive, into reality.

The Act will come fully into force on 1 January 2005, but Scottish public authorities need to be preparing for that well in advance. A vital element to those preparations must be the provision of appropriate guidance and training for staff, and I am therefore very pleased that the Executive has been able to put together an integrated suite of materials which we are making available to all bodies to whom the legislation applies.

This open learning workbook is the main element in the suite of training materials; a template for an awareness-raising leaflet is also available and a “train the trainers” pack will be available very shortly. The materials have been developed by Masons, the solicitors, on behalf of the Scottish Executive, and has benefited from the comments and experience of a cross-sector verification group drawn together under the Scottish Freedom of Information Implementation Group. The workbook reflects the current position, but will be revised over time to reflect changes to guidance or legislation, and to respond to feedback on the materials from authorities or Scottish civic society more widely.

Copyright of the materials remains with the Scottish Executive, but authorities are welcome to copy and further develop the materials in a way which best suits the needs of their own organisations.

I am confident that this open learning workbook and the associated materials will provide an invaluable tool for Scottish public authorities and their staff as they prepare to implement the Freedom of Information legislation, and I look forward to seeing in practice the increased openness and accountability that the Act promotes.

TAVISH SCOTT
Deputy Minister for Finance and Public Services

INTRODUCTION TO THE WORKBOOK

COVERAGE

The Freedom of Information (Scotland) Act 2002 Open Learning Workbook (the "Workbook") has been developed for use by those working in the public sector in Scotland. The Workbook covers the background to the Freedom of Information (Scotland) Act 2002 (the "Act" or "FOISA"), the way that it works and the relationship with other areas of law.

The Workbook is intended to help you, the user, achieve a clear understanding of the FOISA, in a timescale and manner that suits you.

The FOISA is a major new piece of legislation which will affect everything and everyone in the public sector in Scotland. Sometimes getting "up to speed" with new legislation, however important, can involve a commitment of time and resource which can be ill-spared. The aim of the Workbook is to present all the material you will need to learn about the FOISA in an accessible way.

Although primarily designed as a Workbook for individual study, the material can also be adapted for use in other ways, for example the case studies could be used to stimulate classroom discussion.

STRUCTURE OF THE MATERIAL

Order of Modules

The modules are set out in the following order:

Module 1

Freedom of Information in Context – Why has freedom of information been introduced?

Module 2

Introduction to FOI Scotland – What is freedom of information and what does it do?

Module 3

Scottish Public Authorities – Who does freedom of information apply to?

Module 4

Publication Schemes – Making information available

Module 5

Records Management – Part 1

Module 6

Records Management – Part 2

Module 7

Rights of Access – How is a request made?

Module 8

Dealing with and responding to requests for information; and fees – how should an authority handle a request? Part 1

Module 9

Dealing with and responding to requests for information; and fees – how should an authority handle a request? Part 2

Module 10

Midway Review

Module 11

Access to environmental information

Module 12

Exemptions from the right of access – Can information always be accessed? Part 1

Module 13

Exemptions from the right of access – Can information always be accessed? Part 2

Module 14

Exemptions from the right of access – Can information always be accessed? Part 3

Module 15

Data Protection – Refresher module on the effect of the Data Protection Act 1998

Module 16

Interface with data protection – How does freedom of information fit with data protection?
Applications for information by data subjects

Module 17

Interface with data protection – How does freedom of information fit with data protection?
Application for information by those other than the subject of the data

Module 18

Human Rights

Module 19

Reviews, decisions and enforcement

Module 20

Final Review

Each module deals with a particular aspect of the Act or a related topic. The modules have been arranged in a logical order; however, you could vary the order if you prefer as the modules are designed to be flexible.

Structure of the modules

1. Content and learning objectives

Each module starts with a statement of the content and learning objectives for that module in order to introduce you to the subject matter of the module. A suggested time allocation is also included. Bear in mind that this is only a guide and some people will take longer than others to complete the same task. You may choose to spend longer if you decide to look up material from other sources.

2. Learning materials

In each module the essential information is presented in the learning materials.

3. The strategic view

Each module contains brief suggestions on how an authority may wish to look at the Act strategically and what activities it should be undertaking in each area.

4. Summary

A summary is included after the learning materials for each module; you can use this to recap on what you have covered in each module.

5. Keywords

As far as possible the Workbook uses clear, non-technical and non-legal language. However it is inevitable that you will have to come to terms with and understand some legal and technical terms. These have generally been designated as **Key Words**. Efforts have been made to introduce the Key Words gradually rather than asking you to start the course by adjusting to a new vocabulary. Key words are highlighted in the module in which they first appear. A separate glossary of Key Words has been included at the end which refers to the module in which the term is first used, although other modules may deal with the term in more detail. Where possible, each key word gives a reference to where the definition or explanation comes from. If there is no reference then the explanation is a general description of what the term means.

6. References and Resources

Each module gives you a list of the relevant section numbers from the Act so that you can refer directly to the legislation if you wish.

Links to further material on websites are also provided.

7. Self assessment checklists

Each module provides questions for you to check your understanding against. You should review these at the end of each module and check your answers against the answers provided in Appendix 3.

8. What they said

Each module gives a selection of quotes to illustrate the views of others about the Act.

9. Case studies

There is a case study in each module. You should work through each case study once you have read the learning materials for each module. Some case studies may take longer than others; work through the case study until you are comfortable that you have completed it to the best of your ability. You may need to refer back to the learning materials as you work on the case study and you may wish to refer to other materials or websites to help you. Some case studies do not have right or wrong answers, they are designed to help you think about the legislation and how it affects your organisation rather than to test you on what you have read. Efforts have been made to vary the nature of the work material; for example you may be asked to write a report, a briefing paper, a letter, or suggest a solution to a problem. Please note that in many cases the case studies are fictional. Those that are based on real scenarios or sources are attributed.

Hints and tips for studying

As the Workbook is intended for individual study some hints and tips for those who have not been involved in routine study for some time are included in Appendix 1.

Task

1. Spend 15 minutes familiarising yourself with the layout of the Workbook including the learning materials, self assessment questions and case studies. Think about the order in which you will tackle the modules, how long you will spend on each one and how you will tackle the task or case study.
2. If you have not studied for some time, read the study skills section in Appendix 1 and draft a study plan based on some of the suggestions.

MODULE 1

FREEDOM OF INFORMATION IN CONTEXT – WHY HAS FREEDOM OF INFORMATION BEEN INTRODUCED?

1.1 CONTENT AND LEARNING OBJECTIVES

This module explains the broader context in which the Freedom of Information (Scotland) Act 2002 ("FOISA" or "the Act") has been introduced. Once you have worked your way through this module you should understand:

- The ideas underlying the introduction of the Act
- The public interest in access to information

SUGGESTED TIME ALLOCATION: 1 hour

1.2 LEARNING MATERIALS

1.2.1 Why freedom of information?

*"Openness is central to a modern, mature and democratic society".
Scottish Executive; An Open Scotland; 1999*

"The Act will give everyone the right to access the wealth of information that is held by Scottish public authorities. It will help to increase the accountability of public bodies, breaking down a culture of official secrecy and making sure that public bodies look outward to the needs and aspirations of the individuals and communities that they are there to serve." Scottish Executive FAQs

The Scottish Parliament has passed the Freedom of Information (Scotland) Act 2002. The details of this Act are covered in the rest of the Workbook. Firstly, it is helpful to understand some of the reasons why this Act has been introduced and why it is important.

1.2.2 The public interest in freedom of information

The quote from An Open Scotland captures the essence of the **public interest** in freedom of information by describing it as central to a democratic society. A democracy is (colloquially) "government by the people for the people" and such government, in order to be truly democratic, must be conducted as openly as is possible. The public should be entitled to know what those who govern them are doing in their name.

There are some specific reasons why the public might wish a government to be open. For example:

- To enhance the structuring of decision making to improve accountability and participation;
- To ensure the proper administration of justice and law enforcement;

- To contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money;
- To ensure the public are adequately informed of any danger to public health or safety, or to the environment.

All of these have been recognised by the Scottish Ministers in their section 60 Code of Practice (due for publication in Spring 2004). This will be covered in more detail throughout the workbook.

1.2.3 **A right to information in Scotland**

One approach to considering the public interest in access to information is that it enables the public to see that the standards required in public life are being met. As such the starting assumption under the Act is always that access to information should be provided wherever possible. Secrecy will always require a strong justification.

This is why the Act starts with a general right to information. Section 1 of the Act says that **"A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority."**

Those who have to deal with and make decisions about how access requests are handled and whether exemptions should be claimed in particular cases should consider the issues in this broader context. As the Scottish Executive has put it in the Overview,

"The public interest test involves considering the circumstances of each particular case and the exemption that covers the information. The balance will always lie in favour of disclosure; information should only be withheld if the public interest in withholding is *greater* than the public interest in releasing it."

If there were any doubt about the overriding purpose and approach of the FOISA the long title to the Act should be considered. It is,

"An Act of the Scottish Parliament to make provision for the *disclosure* of information held by Scottish public authorities or by persons providing services for them.." (emphasis added).

Scotland is not the only country to have freedom of information legislation, many countries around the world have this, including the rest of the UK, USA, New Zealand, Canada and Ireland.

1.2.4 **Exemptions under the FOISA**

Striking the balance

"Certain types of information held by a public authority may be regarded as exempt information i.e. it would not have to be provided in response to an individual request. The Act sets out a number of such categories, relating to matters of national security and defence, police investigations, and the formulation or development of government policy."

Before an exemption is cited to withhold information, a public authority will usually be obliged to consider two further points. Firstly, some of the exemptions can only be cited if the release of the information would *prejudice substantially* the purpose to which the exemption relates..... Secondly, some exemptions require the authority to apply the "public interest" test before making a final decision as to whether or not to release information. "

Extract from Freedom of Information Act (Scotland) 2002 Overview published by the Scottish Executive

Where access rights apply they always have to be balanced against other interests in withholding information. Later in the Workbook you will cover the exemptions to the rights of access in more detail.

1.3 THE STRATEGIC VIEW

An authority should consider its own culture and whether this tends towards openness. An authority may wish to consider whether openness is important to it and whether everyone working within the authority is aware of this.

1.4 SUMMARY

The FOISA was introduced by the Scottish Parliament to ensure that people have the right to access information held by Scottish public authorities. It aims to increase openness and accountability in government and other public authorities. The FOISA is an important element in ensuring a thriving democracy.

1.5 KEYWORDS

Public Interest	There is no exhaustive list of what is in the public interest. However it may include factors such as ensuring the efficient and effective running of public services and an interest in ensuring the administration of justice. (See, for example, draft section 60 code).
------------------------	---

1.6 REFERENCES

Section 1 FOISA	Right to information
Section 2 FOISA	Effect of exemptions

1.7 RESOURCES

Scottish Executive FAQs:
www.scotland.gov.uk/government/foi/faqs.pdf

Scottish Executive Overview:
www.scotland.gov.uk/government/foi/foioverview.pdf

The Freedom of Information (Scotland) Act 2002:

www.scotland-legislation.hmso.gov.uk/legislation/scotland/acts2002/20020013.htm

1.8 SELF-ASSESSMENT CHECKLIST

1. The FOISA is intended to achieve the following:
 - increase the general public's access to information;
 - increase the accountability of public bodies; and
 - help public bodies to serve better the needs of their communities.TRUE or FALSE?
2. The Act will have a direct impact on the Scottish Parliament, the Scottish Executive, local authorities and a number of other public authorities in Scotland. TRUE or FALSE?
3. The Act cannot provide complete freedom of information to the public as there is a need to balance the freedom against other matters of public interest, practical matters such as national security, police investigations and the development of government policy. TRUE or FALSE?
4. Scotland is the only country to have introduced freedom of information legislation? TRUE or FALSE? [Click here for answers](#)

1.9 WHAT THEY SAID

"Although freedom of information is, on the face of it, a set of quite simple principles – a legal right of access; a limited set of exemptions to protect sensitive material; and an independent arbiter to supervise the regime – the detail can be far from straightforward". (Jim Wallace - MSP)

"Passing the [Act] will provide a potential to move with the times. A true culture of openness can be created. This is an age in which citizens have high expectations of public and private authorities in respect of information and answers that they want and that affect their lives". (Pauline McNeill - MSP)

1.10 CASE STUDY

Extract Australian newspaper report source *"Views from Down Under"* ACPO FOI project research

The Courier Mail 6 March 2003 reported that the Lord Mayor of Brisbane City Council and the State Premier had been enjoying free tickets to concerts at the Brisbane Entertainment Centre. The newspaper showed photographs of the various officials and politicians attending the venue. The tickets were for events such as Rolling Stones concerts. The Courier used the Australian freedom of information rights to obtain sight of a leasing agreement between the City Council and the venue operator. The lease had subsequently been transferred to another State body but the free tickets had remained. The public authority was guaranteed 12 free tickets for each event in a prime position. The tickets had been used by State officials and politicians to attend popular concerts such as the Stones.

Task

1. Do you agree that the Courier should have been given access to the lease? Do you think that there is a public interest in such information becoming available?
2. Do you consider that the piece should have included details of the officials and politicians involved or was this an invasion of the privacy of the individuals? If it was included do you think that photographs should have been included?

MODULE 2

INTRODUCTION TO FOI SCOTLAND - WHAT IS FREEDOM OF INFORMATION AND WHAT DOES IT DO?

2.1 CONTENT AND LEARNING OBJECTIVES

This module introduces some of the basic information about access to information in Scotland. It sets out the context of the Act and broadly what the Act covers. In other modules you will explore the detail in more depth. Once you have worked your way through this module you should understand:

- When the Act comes into force
- What the Act does in outline
- Rights of access prior to January 2005
- Other rights of access

SUGGESTED TIME ALLOCATION: 50 minutes

2.2 LEARNING MATERIALS

2.2.1 The Freedom of Information (Scotland) Act 2002 – An introduction

The Act was passed by the Scottish Parliament on 24 April 2002 and received Royal Assent on 28 May 2002. The right of access under the Act will not come into effect until 1 January 2005.

Once the FOISA is in force it will give a right of access to all recorded **information held** by **Scottish public authorities** covered by the Act. It will not replace other statutory powers to disclose or use information which such authorities have. All other powers will continue to apply for the moment.

Under the Act authorities will have to develop **publication schemes** so that the public can see what sort of information the authority publishes or intends to publish.

Where information is not proactively made available, public authorities have to respond to specific requests for information. The Act will allow anyone, anywhere to make a request for information to a Scottish public authority. The **applicant** can be a limited company or an individual or another public authority. It can be an employee or a client. There is no restriction on who can use the Act to ask for information; no need to cite the Act when making a request; no need to give reasons for requesting the information.

It does not matter how old the information is or when the public authority first held it or the reason why it was prepared in the first place. As long as it is information held by a Scottish public authority then the right of access will apply. The information however has to be held by a Scottish public authority on its own behalf. If the authority has material in its possession which it holds on behalf of another person, then this information will not

have to be disclosed. However, if it is held on behalf of another public authority then a request to that public authority could be made.

Information held in confidence and supplied by a Minister of the Crown or by the UK Government is also outside the Act. In addition, the applicant may not be able to have the information if it is subject to one of the exemptions.

One of the Act's consequences is that public authorities will need to review and improve the way they manage their records and the Act requires the Scottish Ministers to issue a code of practice on records management.

Another important provision in the Act is the creation of the post of **Scottish Information Commissioner**. The Commissioner has a key role in promoting and enforcing the Act. He has published guidance on preparing publication schemes and will be responsible for approving the schemes of all Scottish public authorities during 2004, in advance of the introduction of the rights of access. He will also handle appeals made by applicants who are dissatisfied with the response made to their request for information.

All of the issues in this introduction are covered in more detail in the rest of the Workbook.

2.2.2 **Rights of Access prior to January 2005**

Although the FOISA does not come into effect until 1 January 2005, certain information about public authorities in Scotland is available to the public before then. Information may be available under non-statutory codes of practice where:

- the organisation is subject to the Code of Practice on Access to Scottish Executive Information, in which case the information could be available under that Code;
- the organisation is part of the NHS in Scotland and is subject to the equivalent NHS Code; or
- the organisation is subject to the UK Code of Practice on Access to Government Information, in which case the information could be available under that Code.

2.2.3 **Other rights of Access**

Even when the Act comes into force, information may still be available in other ways. Examples are:

- Personal information about the applicant available under the Data Protection Act 1998 (this is covered in Modules 15, 16 and 17).
- Environmental Information available under regulations (this is covered in Module 11).

2.3 THE STRATEGIC VIEW

An authority should consider what other rights of access it may be subject to and how these will interface with providing access under FOISA.

2.4 SUMMARY

The Freedom of Information (Scotland) Act 2002 comes fully into force on January 1st 2005. Once in force it provides a right of access to all recorded information held by Scottish public authorities covered by the Act. Anyone, wherever they are based, will be able to make an access request to a Scottish public authority.

Until the Act comes into force, people will still be able to access some information about public authorities through the non-statutory Codes and other access rights and even when the legislation comes into force, other access rights will continue to exist.

2.5 KEYWORDS

Applicant	Applicant is defined in the Act as a person who makes a request for information from a Scottish public authority. (section 1 FOISA).
Held	The term is defined in the Act. Information is held by an authority if it is held by the authority otherwise than on behalf of another person – i.e. it holds the information in its own right or for its own purposes. Information is also held if it is held by another person on behalf of the authority, for example by a storage company or a consultant. Information is not held by an authority where it has been supplied in confidence by a Minister of the Crown or a department of the UK government. (Section 3 FOISA)
Information	Where a request is made for information this means information recorded in any form including on CCTV or video. Where the Commissioner seeks information from an authority this can also include information which is not already recorded. (Section 73, Section 50 and Section 64 FOISA).
Publication Scheme	This is a scheme which relates to the proactive publication of information by the authority. The scheme has to be approved by the Scottish Information Commissioner. If an authority makes information available via its publication scheme, it does not have to provide such information in response to a specific request because the information is already available, although advice and assistance should still be provided. (Sections 23 and 24 FOISA).
Scottish Information	The Scottish Information Commissioner is responsible for enforcing the Act and also for providing guidance on good

Commissioner	practice. (Part 3 FOISA)
Scottish public authority	The Act contains a detailed list of who is to be considered as a Scottish public authority. This list contains a wide range of Scottish public authorities and includes amongst others the Scottish Executive, local authorities, NHS Scotland, colleges, universities and the police. (Sections 3-7 and Schedule 1 FOISA).

2.6 REFERENCES

Section 1 FOISA	General Rights to Information
Section 3 FOISA	Information held by a Scottish public authority
Sections 16 – 18 FOISA	Responses to requests
Section 23 FOISA	Publication Schemes
Section 25 FOISA	Information otherwise available
Section 73 FOISA	Interpretation

2.7 RESOURCES

Scottish Executive FAQs:

www.scotland.gov.uk/government/foi/faqs.pdf

Scottish Executive Overview:

www.scotland.gov.uk/government/foi/foioverview.pdf

The Freedom of Information (Scotland) Act 2002:

www.scotland-legislation.hmso.gov.uk/legislation/scotland/acts2002/20020013.htm

2.8 SELF ASSESSMENT CHECKLIST

1. Access to information about public authorities cannot be requested in Scotland until 1 January 2005. TRUE or FALSE?
2. Requests for information from Scottish public authorities may only be made by people who live in the UK. TRUE or FALSE?
3. The FOISA will apply retrospectively to information held by Scottish public authorities. TRUE or FALSE?
4. Under the Code of Practice on Access to Scottish Executive Information certain public authorities must provide information except where disclosure would not be in the public interest, or risk being sued. TRUE or FALSE?
5. The FOISA imposes a positive duty on public authorities to review and improve the way in which they manage their records and publish information. TRUE or FALSE? [Click here for answers](#)

2.9 WHAT THEY SAID

The pros.....

"Our freedom of information regime will be much more robust than the regime that was set up under the Freedom of Information Act 2000 [the Westminster Act]. I have no doubt that campaigners in England and Wales will continue to press for changes to be made down south to emulate what we have in Scotland" (Roseanna Cunningham - MSP)

"...a new form of democracy: an accountable, visible Parliament, where people were encouraged to participate fully in public debate and the policy-making process...it was proclaimed that the Parliament was to be open and accessible to all. Those same principles sit at the heart of the Freedom of Information (Scotland) Bill" (Jim Wallace - MSP)

The antis...

"..an inflexible regime that is more suited to dealing with appearances than with practicalities." (Lord James Douglas-Hamilton - MSP)

2.10 CASE STUDY

Andrew Black had been in post as Information Officer with a Scottish Parole Board for only a couple of weeks when he was presented with the following letter from Aran Consulting (Ireland) Ltd.

	Aran Consulting (Ireland) Ltd. The Town House Dublin Ireland 23 April 2005
Dear Sir/Madam	
Request for access to information	
Our clients are currently in discussion with your organisation about work carried out in connection with a contract for the supply of IT products and services to you.	
We understand that you are obliged to supply information if requested and therefore make this application for the following material:	
Copies of any and all papers, reports or similar documents or draft documents produced by the Finance or Accounting Department (or any predecessor department with similar functions) between January 1993 and January 1997 which relate to the performance of contracts entered into by the Board.	
We have already checked to see if any of this information is publicly available but it does not appear to be so.	
Please confirm that you will deal with this request with all due expedition. Please let us know if there is any fee for the provision of this information.	
Yours sincerely	
Edward Delts	
Senior Executive Officer	

Andrew had been sorting through his e mails after a long bank holiday weekend, and planning to do some pre-course reading later in the morning, when the Chief Executive called him in and handed him the letter. Andrew took the letter from her gingerly, not expecting to be thrown in at the deep end in his first few weeks.

His place on the training course for his new role was booked (which explained the pre-course reading) but so far the only knowledge he had of handling access requests came from the bit they had been told about access and privacy at the induction session. He only had a hazy memory of that and it had been pretty brief.

The CE's parting words as he left the room did not make him feel any better, "We aren't keen on these people you know. And they are obviously looking for ammunition - we won't want to give them any assistance if we can help it. Can we kick it into touch early on? They're not from Scotland after all".

While Andrew did not know much about the Freedom of Information (Scotland) Act 2002 he had a suspicion that being Irish was no barrier to using it and he rather doubted that it included a sub-section allowing the Board to withhold information from people whom they "weren't keen on".

At least the Chief had not expected him to advise her there and then. He had a bit of breathing space. His first task was simply to review the request and prepare a list of key points (on one side of A 4 - the Chief refused to read anything longer) for the Chief on whether they had to respond.

Task

Prepare a list of five key points for the Chief on no more than one side of A4 on whether the Board has to answer the letter drawing on the material you have learnt in the learning materials for this module.

MODULE 3

SCOTTISH PUBLIC AUTHORITIES - WHO DOES FREEDOM OF INFORMATION APPLY TO?

3.1 CONTENT AND LEARNING OBJECTIVES

This module explains which bodies have obligations under the Freedom of Information (Scotland) Act 2002 and why some public authorities which operate in Scotland are not subject to it. It explains how some private organisations can be made subject to the Act and about what happens in the rest of the UK. Once you have worked your way through this module you should understand:

- Which public authorities the Act applies to
- How organisations in the private sector can be made subject to it.

SUGGESTED TIME ALLOCATION: 1 hour

3.2. LEARNING MATERIALS

3.2.1 Which bodies are covered by the FOISA?

The Act lists those authorities which are covered in a Schedule. They include the Scottish Executive including its agencies, the police service in Scotland, the NHS Scotland and all Scottish local authorities. There are also a number of Scottish non-departmental public bodies listed, for example Highlands and Islands Enterprise and Scottish National Heritage.

It is a comprehensive list and most organisations exercising public functions will be included.

3.2.2 Adding or removing public authorities from the Schedule

The way that public services are delivered changes from time to time and new public authorities may be created or existing ones altered. The Act provides for this by enabling Scottish Ministers to amend, by **order**, the schedule which lists those public authorities to which the Act applies. They can add or remove relevant authorities from the schedule. This might happen if a new public authority is created or if functions are transferred and a public authority ceases to function.

3.2.3 Public authorities to which the Act has a limited application

An organisation does not have to be included for all of its functions. It is possible for an order to designate an authority for only specified functions and to exclude others. An order does not have to apply to all the functions of a public authority.

3.2.4 Organisations in the private sector

The Act allows for Scottish Ministers to apply the Act to private sector organisations, by order, but only in limited circumstances. The organisation must be one which is exercising **functions of a public**

nature or is providing a public service under a contract made with a Scottish public authority.

Before the Act can be applied to any private sector organisation the Scottish Ministers must consult everyone who would be covered by such an order and those who appear to represent them. An order can apply to one or more specified organisations or a class of organisations. It must also specify the service being delivered or the contract in question.

For example, a contractor running a service for a public authority such as a hospital or a school may be designated as a public authority for that service.

3.2.5 **Publicly owned companies**

Some limited companies are wholly owned by a public authority. For example a university may wholly own a publishing company or a research company. Such companies are included in the definition of a public authority under the Act. A company is treated as publicly owned if it is owned by the Scottish Ministers or another Scottish public authority. You should look for guidance on this issue if it affects your authority.

3.2.6 **What happens in the rest of the UK?**

There is a separate piece of legislation which applies to England, Wales and Northern Ireland – the Freedom of Information Act 2000. This is broadly similar to FOISA – it provides for a right of access and publication schemes and contains exemptions. It is enforced by the **UK Information Commissioner**. Some authorities that operate in Scotland but that deal with non-devolved matters may be subject to the UK Act rather than the FOISA, for example the BBC and the Scottish Advisory Committee on Telecommunications.

3.3 **THE STRATEGIC VIEW**

An authority should understand how it is covered by the Act and whether it has any wholly owned companies that will be covered by the Act and how these companies will comply.

3.4 **SUMMARY**

The Act will apply to public authorities. Authorities that will be subject to the Act include the Scottish Executive, the Scottish Parliament, the police service, the NHS and local authorities. Certain non-departmental public bodies will also be covered, such as Highlands and Islands Enterprise. The Act applies to limited companies that are wholly owned by a public authority and, if designated, it may even apply to private companies carrying out functions for a public authority, for example under a contract.

3.5 KEYWORDS

Functions of a public nature	Functions are of a public nature where they are concerned with the actions of the state in ordering society rather than purely private rights.
Order	An order is a term for secondary legislation made by the Scottish Parliament to give effect to more detailed areas under the law.
UK Information Commissioner	The UK Information Commissioner is different from the Scottish Information Commissioner. The UK Information Commissioner has responsibility throughout the UK for data protection and has responsibility for freedom of information in England, Wales and Northern Ireland, and for cross-border public authorities. One of his Assistant Commissioners specifically deals with data protection as it relates to Scotland. The Scottish Information Commissioner only has responsibility for freedom of information in Scotland, not for data protection, although he will liaise closely with the UK Information Commissioner. (See (UK) Freedom of Information Act 2000).

3.6 REFERENCES

Section 4 FOISA	Power to amend Schedule 1
Section 5 FOISA	Power to designate Scottish public authorities
Section 6 FOISA	Publicly owned companies
Section 7 FOISA	Public authorities to which the Act has a limited application
Schedule 1 FOISA	Scottish public authorities

3.7 RESOURCES

UK Act: www.hmsso.gov.uk

3.8 SELF ASSESSMENT CHECKLIST

1. The Act will apply to the following bodies:
 - the NHS in Scotland
 - the Scottish Executive
 - limited companies wholly-owned by public authorities, and
 - Scottish Water.TRUE or FALSE?
2. The definition of public authorities extends to companies that are wholly-owned by public bodies, unless the owning body is covered for some of its functions only. TRUE or FALSE?
3. Where a private sector body performs a public service under a contract made with a Scottish public authority, the Act can be applied to such a private sector body by way of an Order made by a Scottish Minister. TRUE or FALSE?
4. The Scottish Parliament has power to pass legislation on anything that falls within the "reserved matters" listed in Schedule 5 of the Scotland Act 1998. TRUE or FALSE? [Click here for answers](#)

3.9 WHAT THEY SAID

"...it is important to ensure there is proper coverage....there should be no gaps."
(Gordon Jackson - MSP)

"...the Bill applies across the length and breadth of the Scottish public sector" (Jim Wallace – MSP)

"The Bill is an interesting document for finding out how many organisations in Scotland are public bodies. Public servants, ministers and quangos are listed in vast array." (Alastair Morgan – MSP)

"... commercial organisations and voluntary and community bodies should be open to scrutiny when they undertake public work and spend public money." (Roseanna Cunningham – MSP)

"Schemes that are to be built for the public and part-funded with public money should be open enough to ensure the beneficiaries are not mainly the shareholders in the private sector." (John Farquhar Munro – MSP)

3.10 CASE STUDY

The Highlands Care Initiative was set up in 1999 as a non-profit making limited company to provide an integrated service to clients in remote areas in need of social services, medical or other support. In view of the difficulties of service delivery in some areas it was recognised that an integrated delivery would offer both savings and improvements in the level of service.

The initiative employs an administrator and provides a number of vehicles which are available to all of the participants. It has set up video conferencing facilities in rural areas, with links that allow routine exchanges, for example clients use them to hold regular discussions with social workers. They are also used by nurses who link through to doctors while in consultation with the patient.

The partners in the initiative are the local Health Board and local Social Services. There is a Board with representatives of the partners which decides on major issues.

Other aspects of the administration of the Initiative are governed by a set of agreements and protocols. The protocols deal primarily with the flow of information about patients.

The administrator arranged for the purchase of the video conferencing equipment and the vehicles and is responsible for their maintenance as well as booking their use by the partners.

Task

Answer the following questions, based on the material you have read in the learning materials for this module:

1. Is the Initiative a public authority under the FOISA?
2. The Initiative receives a request for information about the purchase of the vehicles and the video conferencing equipment. Does the Initiative have to provide information about the purchase under the FOISA?
3. If a request for the same information is made to each of the partners, will they have to provide the information under the FOISA?

MODULE 4

PUBLICATION SCHEMES – MAKING INFORMATION AVAILABLE

4.1 CONTENT AND LEARNING OBJECTIVES

This module relates to publication schemes. It gives an overview of the legal requirements and looks at guidance that has been issued on publication schemes including the draft Section 60 Code of Practice and good practice guidance issued by the Scottish Information Commissioner.

Once you have worked your way through this module you should understand:

- What a publication scheme is and what it must include
- Provisions relating to approval of schemes
- What the public authority must have regard to in adopting or reviewing its scheme
- Model publication schemes
- What the draft section 60 Code says about publication schemes
- What guidance from the Scottish Information Commissioner says about publication schemes

SUGGESTED TIME ALLOCATION: 1 hour

4.2 LEARNING MATERIALS

4.2.1 Legal requirements

There is a requirement in the Act that each Scottish public authority must adopt and maintain a publication scheme which relates to the publication of information by the authority. This scheme must be submitted to the Scottish Information Commissioner for approval.

The public authority must then publish information in accordance with its scheme and review its scheme from time to time.

A publication scheme must specify:

- the classes of information which the authority publishes or intends to publish, for example minutes of meetings, HR policies etc.
- how information of each class is, or is intended to be, published, for example in a library, on the internet, in the offices of the authority etc.
- whether there is a payment for the information.

When it formulates the scheme or subsequently reviews it, the authority must consider the public interest in allowing access to its information, especially to information which relates to the provision of services by it, the cost to it of providing such services or the standards attained by these

services and to information which consists of facts or analyses which have been used to make decisions of importance to the public. The authority must also have regard to the public interest in the publication of reasons for decisions made by it.

The publication scheme itself must be published by the authority in any manner it sees fit but it would be appropriate to publish it in a variety of formats.

4.2.2 **Approval by the Commissioner**

Each public authority must submit its scheme to the Scottish Information Commissioner for approval. When the Commissioner looks at a scheme, he can approve it for a limited period and he also has the power to give six months notice to revoke a scheme. When refusing or revoking approval, the Commissioner must give reasons for his decision. There is a timetable available from the Commissioner's website by which authorities must submit their schemes for approval. For example, the Scottish Ministers and the Scottish Parliament must submit their schemes to the Scottish Information Commissioner by 28 February 2004 for the Commissioner to approve by 1 June 2004. In this case, the scheme should then be up and running by 1 June 2004 – all publication schemes come into effect during 2004, before the right of access in 2005.

4.2.3 **Model publication schemes**

The Commissioner has a power to prepare and approve model publication schemes for particular classes of authority or to approve model schemes that have been prepared covering authorities in a particular sector. For example, it is likely that colleges of further and higher education will have their own model publication scheme that they submit to the Commissioner for approval. The advantage is that each relevant authority within the sector covered by a model scheme can just adopt the scheme without having to submit it for further approval. If they make changes to the model scheme then they will need to seek approval but nevertheless this may still be more advantageous than each authority within the sector starting work on a bespoke scheme. Model schemes may be appropriate for smaller public authorities with limited resources.

4.2.4 **Guidance**

There is various guidance and information on publication schemes. The Scottish Information Commissioner has issued a Guide to Publication Schemes under the Freedom of Information (Scotland) Act 2002. This is discussed later.

The Act includes a provision for the **Scottish Ministers** to issue guidance to public authorities on discharging their functions under the Act. This is known as the **section 60 code of practice**. The section 60 code is still in draft format. It has been the subject of public consultation and will be revised and formally issued in the Spring of 2004.

The section 60 code is **non-statutory** but complying with it will mean that authorities will be taken to comply with their duty to provide advice and assistance (this duty is discussed in Module 8) and should help them

comply with their other obligations under the Act, including those in relation to publication schemes.

4.2.5 **Draft Section 60 Code**

The draft section 60 Code of Practice says that *"The routine publication of more information is likely, over time, to lead to a reduction in the number of individual requests for specific pieces of information due to the operation of the exemption applicable in cases where the information is otherwise accessible. Authorities, therefore, have an incentive to include more information in their publication schemes as this will obviate the need to provide that information in response to a request under section 1. However, it would be good practice for authorities to keep a log of requests made for information which is not currently included in their publication schemes. Authorities could then consider the need to add that class of information as a new class to be covered by the scheme."* This demonstrates that a publication scheme is not intended to be static, an authority should consider adding to it where appropriate.

The draft section 60 Code also suggests that the publication scheme should include details of the authority's procedures for handling requests for information. The procedures should include an address or addresses, including e-mail where possible, for applicants to direct requests. The Code also recommends providing a telephone and fax number and where possible the name of an individual who can assist.

4.2.6 **Commissioner's Guidance**

The Scottish Information Commissioner has issued good practice guidance on publication schemes which authorities should refer to when implementing and reviewing a scheme. This guidance expands on the draft section 60 Code. There are a number of key points of which authorities should be aware.

- The guidance suggests that classes of information should be defined as clearly as possible. A class of information is not the same as actual information, so that the actual information within a class may vary from time to time but the overall class description will stay the same. Classes therefore need to be defined carefully.
- Where information is to be withheld on grounds of a possible exemption, the guidance suggests two main ways to address the matter. First, authorities might choose to state in the preamble to their publication scheme that the classes of information may contain exempt information. Alternatively it may be preferable to define each class in a way that makes it clear that the classes do not contain exempt information. An example of an appropriate class description given by the guidance is for "staff policies" which could be entitled *"Internal procedures which collectively establish the procedures to be followed by and the conduct expected of members of the authority's staff in the performance of their duties. Some of the material in this class may be withheld if its release would compromise the health and*

safety of staff or would release personal information relating to staff or other individuals."

- The guidance recommends that documents are made available in a variety of formats wherever possible and that publication schemes indicate the formats in which a document is available. Specific reference is made to duties authorities may have under the Disability Discrimination Act 1995 and the Race Relations (Amendment) Act 2000.

4.3 THE STRATEGIC VIEW

An authority will need to prepare a publication scheme. It should first determine who will be responsible for this and the deadline involved. A model scheme may be developed for particular sectors and authorities should keep abreast of this.

Authorities should decide what information to publish, in which formats and whether a charge will be made. For example, authorities could review what information is already published or not published and the reasons for this, what enquirers are most likely to want and what exemptions may be relevant to the authority.

An authority needs to submit its scheme to the Scottish Information Commissioner for approval and ensure that responsibility for the ongoing management of the scheme has been allocated.

4.4 SUMMARY

Each public authority must have a publication scheme. The purpose of a scheme is to make information available so that people can access it without having to make an individual request. A scheme will set out what classes of information the authority publishes, how the information is made available and whether there is a fee for the information. An authority can adopt a model scheme or develop its own, but each scheme must be approved by the Scottish Information Commissioner.

4.5 KEYWORDS

Non-statutory	This means a rule or code which is not found in a law but which is adopted by an organisation. Non-statutory arrangements may still have enforcement mechanisms attached to them, which may in some cases lead ultimately to the courts.
Scottish Ministers	The Scottish Ministers is the collective term used for the Scottish Executive which is the devolved government for Scotland and is accountable to the Scottish Parliament. It is responsible for most of the issues of day-to-day concern to the people of Scotland, including health, education, justice, rural affairs, transport and local government.
Section 60 Code	This is a code of practice issued by the Scottish Ministers which deals with handling requests for information. At January 2004 the code is still in draft form. It will be issued in finalised form in Spring 2004 following consultation with

	the Scottish Information Commissioner. (Section 60 FOISA).
--	--

4.6 REFERENCES

Section 15 FOISA	Duty to give advice and assistance to applicants.
Section 23 FOISA	Publication Schemes
Section 24 FOISA	Model Publication Schemes
Section 60 FOISA	Code of Practice providing guidance in connection with the discharge of functions under the Act.

4.7 RESOURCES

SIC Guidance on publication schemes:
www.itspublicknowledge.info/pscheme.htm

SIC publication schemes timetable:
www.itspublicknowledge.info/timetable.htm

Section 60 Code:
www.scotland.gov.uk/about/FCSD/MCG-NW/00018022/Code60.pdf

4.8 SELF ASSESSMENT CHECKLIST

1. A publication scheme is a list of the documents made available by a public authority as required by the FOISA. TRUE or FALSE?
2. If a relevant authority chooses to adopt a model scheme prepared by the Commissioner for a particular class of authority, the scheme will not have to be submitted to the Commissioner for approval. TRUE or FALSE?
3. The publication scheme must include details of what fee is to be charged for the information in question. TRUE or FALSE?
4. The Commissioner has the power to revoke a scheme provided that he gives six months' notice. TRUE or FALSE?
5. The draft s.60 Code of Practice requires public authorities to provide material in alternative formats or translations in accordance with the requirements of the Disability Discrimination Act or the Race Relations Act. TRUE or FALSE?
6. Where some information in a class is exempt, the authority will have to omit the whole class. TRUE or FALSE? [Click here for answers](#)

4.9 WHAT THEY SAID

"Improving public services is about providing information to the public and ensuring they have access to important public information" (Paul Martin – MSP)

"An effective freedom of information regime will result in more information being in the public domain and encourage public authorities to make information available voluntarily." (Jim Wallace – MSP)

"It is clear that something needs to change. We should not be bashful about that, as we are talking about our information – public information, which is held on behalf of the public, created by the public, paid for by the public and often kept secret by virtue of public funds" (Alastair Morgan – MSP)

4.10 CASE STUDY

"The Scheme refers to all kinds of information, which the House of Commons publishes both for internal and external use. Publication does not refer solely to printed material. It also includes information in other formats such as electronic documents and videos."

House of Commons Publication Scheme

"As well as describing the Classes of Information, our Publication Scheme allows you to browse or search to see what information is available. Having found reference to an information item, you will then be able to access it through this web-site. Where direct access is not possible you will be told how the information can be obtained".

Department of Health Publication Scheme

"This publication Scheme specifies classes of Information that the Town Council publishes or is able to publish on request.

All documents are available as Text documents and can be photocopied with the exception of those marked with an asterisk which are in leaflet or brochure format.

The following charges will apply ..."

Berkhampsted Town Council publication scheme

Task

Either:

1. Make a list of ten factors that should be considered when preparing a publication scheme. Think both about legal requirements and practical requirements.

Or:

2. Have a look at the publication scheme for your authority, if available. Make a short list of comments (5-10) both positive and, if any, negative on the scheme.

MODULE 5

RECORDS MANAGEMENT – PART 1

5.1 CONTENT AND LEARNING OBJECTIVES

This module and module 6 deal with records management. This module deals with what the Act says, it introduces the section 61 Code of Practice on Records Management and explains what it says in relation to the keeping, management, and destruction of records. Module 6 looks at the section 61 Code as it relates to records held and transferred to the National Archives of Scotland and other archives.

Once you have worked your way through this module you should understand:

- What records management is; and
- The relationship between records management and freedom of information

SUGGESTED TIME ALLOCATION: 1 hour

5.2 LEARNING MATERIALS

5.2.1 What is records management?

Records management is typically the creation, keeping, using, storing, preservation and destruction of records. It encompasses the lifecycle of a piece of information from when it is created to when it is destroyed, or if appropriate, put into permanent storage and transferred to an archive. Records can be in a variety of formats, for example, paper, electronic, microfiche, x-ray, notebooks, websites, databases and so on.

The ability to store and find information is important to the normal functioning of an authority. Good records management should aid compliance with the Act. It should help in preparing a publication scheme and in responding to requests for information. It should ensure that fees are kept down and that an authority can meet the timescales for compliance because it can find information promptly.

5.2.2 What does the Act say about it?

The Act does not contain any specific obligations on authorities in relation to general records management. What it does is impose a requirement on the Scottish Ministers to issue (and from time to time revise) a code of practice on records management. This contains what the Ministers think is the desirable practice to be followed by authorities in connection with the keeping, management and destruction of the authorities' records. This is referred to as the **section 61 Code**.

5.2.3 **Section 61 Code**

The section 61 Code, as well as setting out desirable practice in connection with the keeping, management and destruction of records includes guidance on:

- transferring records to the Keeper of the Records of Scotland or other public archives;
- reviewing records before they are transferred and identifying information covered by an exemption under the Act.

The Scottish Ministers have regard, when issuing or revising the section 61 Code, to the public interest in allowing public access to information held by Scottish public authorities. The Commissioner and the Keeper of the Records of Scotland must be consulted by the Scottish Ministers before issuing or revising the Code.

Part One of the section 61 Code deals with records management. The key points are summarised below.

- Recognise records management as a specific corporate function and give this function effective organizational support. Ensure there is integration with freedom of information, data protection and other information management issues.
- A designated senior member of staff should have the lead management responsibility for records management. Policies and procedures should be in place, and good quality staff recruited. Training for all staff should be provided.
- An authority should have a records management strategy which includes a records management policy, arrangements for registration and tracking of records, guidelines on appraisal and closure of records, a selection policy for permanent preservation, disposal schedules, a record of the destruction of records, adequate storage and a consideration of business continuity.
- An authority should have an overall policy statement on how its records are managed which should be endorsed by senior management who should ensure it is adhered to.
- Active records management policies should be in place to enable the authority to obtain the maximum benefit from the quick and easy retrieval of information. This should include consideration of electronic records.
- The disposal of records must be undertaken in accordance with clearly established policies.

5.2.4 **What happens if an authority does not comply with the Code?**

The Code is supplementary to the Act but it is not a law, authorities do not have any legal obligations to comply with it. However, it is designed to help authorities meet their duties under the Act and so failure to comply may lead to the authority failing to comply with the Act itself. Also, the Scottish Information Commissioner has to promote observance of the Code and if he considers an authority is failing to comply, he can issue a **practice recommendation**. Practice recommendations are discussed further in Module 19.

5.2.5 **Other issues**

Annex A of the section 61 Code of Practice provides a reference to the many standards and specifications that relate to records management. Authorities are encouraged to meet with the best practice contained in the standards of most relevance to them.

There is a model action plan developed by the Records Management Sub-Group of the Scottish Freedom of Information Implementation Group to assist authorities in setting up good records management practice and systems which comply with the section 61 Code. Sector specific model action plans are also being developed.

5.3 **THE STRATEGIC VIEW**

A specific project stream should deal with records management. An authority should first ensure that there is a clear responsibility for records management, that there are appropriate resources available and that records management staff are adequately trained.

A review and assessment of the authority's current records management arrangements should then take place. This should include electronic records and archiving and retention policies.

An authority should introduce a clear records management policy which is appropriately supported and maintained to ensure that it is followed by staff at all levels in the organisation.

5.4 **SUMMARY**

Good records management practices will assist authorities to meet their duties under the Act. They will ensure the creation of reliable records, make them easy to locate to deal quickly with access requests, and provide arrangements for their eventual archiving or destruction. Records management is covered by a separate Code of Practice, the section 61 Code, rather than by the Act itself. The Code provides guidance on records management policies, records management training and the keeping, management and destruction of records, both paper based and electronic.

5.5 KEYWORDS

Practice Recommendation	This is a recommendation as to good practice which the Scottish Information Commissioner may give to a public authority if it considers the authority is not following the Codes of Practice under the Act. (Section 44 FOISA).
Section 61 Code	This is a code of practice issued by the Scottish Ministers which deals with records management. (Section 61 FOISA).

5.6 REFERENCES

Section 44 FOISA	Recommendations as to good practice.
Section 61 FOISA	Code of Practice on Records Management.

5.7 RESOURCES

Section 61 Code:

www.scotland.gov.uk/about/FCSD/MCG-NW/00018022/s61code.pdf

Model action plan:

www.nas.gov.uk/miniframe/foi/map.pdf

5.8 SELF ASSESSMENT CHECKLIST

1. The section 61 Code of Practice is a statutory code with which public authorities are legally bound to comply. TRUE or FALSE?
2. The section 61 Code suggests that records management should be regarded as a specific corporate function and be given appropriate resources to be dealt with as such. TRUE or FALSE?
3. In order to give records management the status that it deserves, the section 61 Code advocates that senior management should take the lead responsibility for it to ensure adequate implementation of the records management strategy. TRUE or FALSE?
4. The Code states that public authorities should maintain all records that they have created for a minimum of two years. TRUE or FALSE?
5. Where the Scottish Information Commissioner feels that a public authority is failing to adhere to the FOISA Codes of Practice, he may issue a Practice Recommendation. TRUE or FALSE? [Click here for answers](#)

SOME VIEWS OF RECORDS MANAGEMENT

"It sometimes surprises people that an archivist's job is as much to do with deciding what can go in the shredder as with preserving the precious relics of past ages. But our work is concerned not just with unique old documents but with helping to manage the reams of contemporary records - from committee papers, to correspondence and cash receipts produced by offices all over the University every day. By operating a records management, appraisal, storage and retrieval service we help the University make the best use of its resources and ensure that important current events are recorded in the archives of the future." *Heriot-Watt University – Archives, Records Management and Museum Service*

"The archival records of Edinburgh are many things; unique, irreplaceable, trivial, priceless, fascinating, boring, copious, dirty, delicate, robust, leather bound, centuries old, yesterdays, published, unknown, significant and voluminous. Above all they are a hugely significant memory and resource of inestimable worth to Edinburgh, its inhabitants and its visitors.

"Most aspects of Edinburgh history are illuminated by our political, administrative, judicial, business, personal, domestic, criminal, religious, social, legal and commercial archives. It is the primary task of the City Archives to rescue, preserve and improve access to these records, increasing their use and exploitation by all parties." *Edinburgh City Archives*

"Electronic record management is a key technology underpinning electronic government. The electronic delivery of services to business and the citizen will produce electronic records as evidence of individual transactions; these records will need to be retained and maintained in a controlled manner over the medium to long term:

To ensure that government is accountable

To support evidence based policy making and decision taking

To maintain a reliable record of government activity and decisions

To provide a source of reliable evidence in the event of legal action

To ensure compliance with Data Protection and future Freedom of Information legislation." *Information Age Government in Scotland*

"The right information at the right time makes a difference to the patient and citizen, to health care workers, to managers and to NHS Scotland as the largest organisation in the country. Information and communications technologies is a fast-developing field.

"The national plan provides a clear statement of national priorities for health and the NHS with an emphasis on translating policy into tangible, practical measures that will deliver results. The plan explicitly recognises the importance of information and information and communications technologies" *Information Management and Technology for NHS Scotland*

"Any freedom of information legislation is only as good as the quality of the records to which it provides a right of access. Such rights are of limited use if reliable

records are not created in the first place, if they cannot be found when needed, or if the arrangements for their eventual archiving or destruction are inadequate. Consequently, all Scottish public authorities are expected to have regard to the guidance in this Code to ensure they are managing their records effectively. For many authorities this will mean a significant culture change for all of their staff – senior managers have a responsibility to lead and promote that change." *Section 61 Code*

Task

Think about what you see as the reasons for records management and what constitutes good records management. Make notes on what you would put in a flyer promoting records management in your organisation (approx 1 side A4).

MODULE 6

RECORDS MANAGEMENT – PART 2

6.1 CONTENT AND LEARNING OBJECTIVES

This module builds on module 5 by looking at what the section 61 Code of Practice says in relation to records transferred to archives.

Once you have worked your way through this module you should understand:

- What the section 61 Code of Practice says on the transfer of records to archives
- How to deal with records held by an archive

SUGGESTED TIME ALLOCATION: 50 minutes

6.2 LEARNING MATERIALS

6.2.1 Records transferred and held in archives

Part Two of the section 61 Code deals with arrangements for authorities which transfer records to the **Keeper of the Records of Scotland** at the **National Archives of Scotland ("NAS")**. This is dealt with by specific legislation in the Public Records (Scotland) Act 1937 and the Public Registers and Records (Scotland) Act 1948 which says that certain authorities either must transfer or may transfer records to the Keeper.

Part Three of the section 61 Code deals with arrangements which apply to those authorities which transfer records to other public archives, for example archives operated by the authority itself, another authority on its behalf, or by a private company on its behalf.

6.2.2 Review of records

Authorities which transfer records to archives should, in co-operation with the archives, establish procedures for ensuring that records become available to the public at the earliest possible time. This means that records should be regularly reviewed by authorities and those suitable for permanent preservation be identified as soon as possible. The selection and transfer of records to the NAS normally occurs before the records reach 30 years old. Electronic records should be transferred as early as possible in their lifetime, and the authority should consult with the NAS at the time the records are created.

The review of records should identify those which can be made publicly available, and those which should not be put on public access because exemptions may still apply.

6.2.3 Exempt records

If information may still be exempt after transfer, the authority should prepare a schedule which identifies this information, cites which exemption applies and why and identifies a date when release may be appropriate. The authority should also consider whether all the information in documents is exempt or whether some information may not be, in which case the authority should consider how it could release the non-exempt information.

Exemptions are discussed in Modules 12, 13 and 14. In particular, those that may apply to historical records and those that do not apply to historical records are discussed in Module 12.

6.2.4 Access to records held in a public archive

Where there has been a transfer to archives other than the NAS, the authority remains responsible for the records for the purposes of the Act as they are held on behalf of the authority. The authority still has to deal with access requests. However, if the archive makes the records available to the public on request and the authority puts this in its publication scheme then the section 61 Code states that this means that the documents are reasonably obtainable and so the authority can simply refer an applicant to the archive. There should be agreement between the authority and the archive as to handling requests and accessibility of the information.

6.3 THE STRATEGIC VIEW

The records management stream should take account of the section 61 Code of Practice.

There are statutory provisions covering the retention of some public sector records and requirements for transfer to the National Archives of Scotland. Authorities should understand which requirements apply to them and ensure that these are being met.

6.4 SUMMARY

Under public records legislation, certain authorities are required or permitted to transfer records to the National Archives of Scotland. Part Two of the section 61 Code outlines how such authorities should review and transfer their records. Other authorities transfer some records to other public archives and the procedures they should follow are covered in Part Three of the Code.

6.5 KEYWORDS

Keeper of the Records of Scotland	The Keeper is responsible for the preservation of historical records in Scotland.
National Archives of Scotland	The historical records of Scotland are kept in the national archive.

6.6 REFERENCES

Public Records (Scotland) Act 1937

Public Registers and Records (Scotland) Act 1948

6.7 RESOURCES

Section 61 Code:

www.scotland.gov.uk/about/FCSD/MCG-NW/00018022/s61code.pdf

6.8 SELF-ASSESSMENT CHECKLIST

Questions

1. Compliance with the section 61 Code of Practice will ensure an authority's compliance with its statutory obligations in respect of record-keeping generally. TRUE or FALSE?
2. Under the Public Records (Scotland) Act 1937 and the Public Registers and Records (Scotland) Act 1948 certain authorities are either required or permitted to transfer records selected for preservation into the custody of the Keeper of the Records of Scotland. TRUE or FALSE?
3. Transfer of records to the National Archives of Scotland ("NAS") should normally take place by the time the records are 30 years old, but may take place earlier. TRUE or FALSE?
4. Even where an authority has transferred records to a public archive other than the NAS, that authority still has to deal with access requests. TRUE or FALSE?
5. Where some information in a document is exempt, an authority is entitled to withhold the entire document. TRUE or FALSE? [Click here for answers](#)

6.9 WHAT THEY SAID

"One fear is that the Bill covers only recorded information...the fear exists that information may deliberately not be recorded in order to avoid disclosure" (Gordon Jackson – MSP)

"A desire to keep information is always an expression of someone's self interest – generally someone in public service" (Stewart Stevenson – MSP)

"An effective freedom of information regime will result in more information being in the public domain and encourage public authorities to make information available voluntarily". (Jim Wallace – MSP)

6.10 CASE STUDY

"Scotland's records define our history and path to the present, and set the context for our future. The passing of the Freedom of Information (Scotland) Act 2002 on 24 April this year is part of that future and emphasises the need for all Scottish public authorities to be fully aware of their responsibilities for the records they create and manage.

"But records and the National Archives of Scotland do more than provide for the transparency of governance and the material for scholarly pursuits. They tell the many stories of Scotland – stories, based on facts and recorded testimonies, which lie at the heart of human experience and which add to the diversity and richness of Scottish culture.

"It is the Executive's belief that we must preserve and learn from our heritage. All forms of cultural experience can contribute to education and lifelong learning, and participation in cultural activity assists in the acquisition and honing of many key life skills.

"Historical records are, therefore, more than just documentary evidence, they are an important keystone of our cultural identity. The survival of this rich and inspirational documentary source would be in doubt without the efforts of our highly-skilled archivists.... I pay tribute to the valuable work of public archives across Scotland, and NAS in particular, who preserve our records and make them available to the public."

Dr Richard Simpson, Deputy Minister for Justice, November 2002

"NAS has one of the most varied collections of archives in the British Isles. It is the main archive for sources of the history of Scotland as a separate Kingdom, her role in the British Isles and the links between Scotland and many other countries over the centuries. The NAS holds records spanning the 12th to the 21st centuries, touching on virtually every aspect of Scottish life."

NAS website, www.nas.gov.uk

Task

1. In your view, what is the importance of maintaining some records for permanent preservation and transferring them to the National Archives of Scotland or a local authority archive?
2. What do you think people in 50 years or 100 years might use the records created by your authority for?
3. If you do not already know, find out if your authority has an archives policy. How does this policy affect the records you create and use?

MODULE 7

RIGHTS OF ACCESS - HOW IS A REQUEST MADE?

7.1 CONTENT AND LEARNING OBJECTIVES

This module discusses the right of access to information in Scotland under the Freedom of Information (Scotland) Act 2002. It deals with how to make a request for information; Modules 8 and 9 build on this module by discussing how to handle and respond to requests. Once you have worked your way through this module you should understand:

- Who can make a request
- Which authorities a request can be made to
- What information can be requested and in what format
- What should be included in a valid request
- Some general information about what fees may be charged
- What other access rights exist

SUGGESTED TIME ALLOCATION: 1 hour

7.2 LEARNING MATERIALS

7.2.1 Who can make a request?

Any person who requests information from a Scottish public authority which holds it has a right to be given the information by the authority. A person making a request is called an applicant. There are a wide range of Scottish public authorities, many are listed in the Act itself, others may be designated by order by the Scottish Ministers (for example companies providing a public service under a contract made under the Private Finance Initiative) or are publicly owned companies. Module 3 has more information on Scottish public authorities.

An applicant does not have to be an individual; a company can make a request, as can other types of organisations such as charities, pressure groups, political parties and other public authorities. Applicants do not have to be based in Scotland; anyone, anywhere can make a request.

7.2.2 Access Rights for children

There is no reason why a child cannot exercise the right of access; what the Act says is that where there is an issue as to whether a child has the legal capacity to exercise a right, they should be presumed to have capacity where they have a general understanding of what it means to exercise the right. The Act also says that a person who has attained the age of twelve years is presumed to have sufficient age and maturity to have this understanding although children under twelve could still be considered to have such understanding. Issues of legal capacity may arise, for example, where an authority has to correspond regarding fees

but in most cases, if a request is received from a child, it should be appropriate to respond to that child.

7.2.3 What can be requested?

The applicant can request any information held by an authority in a recorded form. This might include computer documents, handwritten notes, plans, videos and tape recordings and photographs. It does not matter how old this information is as long as it is recorded. The information does not have to have been created by the authority and so could have been provided to the authority by someone else. Information does not have to be about the authority and so may relate to third parties. Information is also covered where it is held by someone else on behalf of an authority.

When making a request an applicant must comply with certain formalities for a request to be valid.

- The request must be in writing or in some permanent form that can be referred to subsequently.
- This may be a letter, an e-mail, a handwritten note or a recording made on audio or video tape but a simple telephone call would not be sufficient (although a recorded telephone call may be).
- The request must state the name of the applicant and an address for correspondence.
- The request must describe the information requested.

An applicant can express a preference for receiving information in one or more of the following ways:

- a copy in permanent form or another form acceptable to the applicant; this could be a photocopy or printout, a disk or video etc;
- a digest or summary of the information;
- a reasonable opportunity to inspect the records containing the information.

7.2.4 Fees

An authority is not required to charge for information but is allowed to do so under the Act. If the authority decides to charge a fee, it must write to the applicant with a **fees notice** setting out the fee that applies. Authorities cannot set their own fees; they must comply with **Fees Regulations**. As at January 2004, the fees regulations are not expected to be finalised until Summer 2004 at the earliest.

Although there are formalities, it is important to note that authorities must provide advice and assistance to applicants and those wishing to make requests. This is discussed further in the next two modules.

7.2.5 Other Rights

Other rights or possibilities of accessing information will continue to exist. For example, people will be able to find information from publication schemes; they will have rights of access to their own personal information under the Data Protection Act 1998 and they may have other statutory rights to information such as under environmental access regulations. Environmental access rights are discussed in Module 11.

7.3 THE STRATEGIC VIEW

Authorities should consider who has responsibility for dealing with requests for information and assisting applicants in making a request.

They should consider the need to make general information available to the public and the need for all staff to understand how to recognise a request and what to do if they receive one – whether dealing with this themselves or referring it on.

7.4 SUMMARY

The Act introduces a general right of access. Any person who makes a request to an authority for information will be entitled to receive it, provided no exemptions apply. The request can be made by an individual or an organisation. The request does not have to be made by someone in Scotland. Anyone, anywhere can make a request for information. Authorities are only obliged to provide recorded information, such as computer documents, handwritten notes and videos. It does not matter how old the information is. Requests must be in writing or in another permanent form. Requests must state the name and address of the applicant and describe what information is required. There is no need to cite the Act or explain why the information is being sought. Authorities may charge a fee in accordance with fees regulations.

7.5 KEYWORDS

Fees Notice	A Scottish public authority must serve a fees notice in writing if it wishes to charge an applicant for requested information. The notice must set out the charges. (Section 9 FOISA).
Fees Regulations	Fees regulations will set out what Scottish public authorities can charge an applicant for the provision of information. As at January 2004 these are not yet available and are not expected to be finalised until Summer 2004 at the earliest. (Section 9 FOISA).

7.6 REFERENCES

Section 1 FOISA	General Rights
Section 3 FOISA	Scottish Public Authorities

Section 8 FOISA	Requesting Information
Section 9 FOISA	Fees
Section 11 FOISA	Means of providing information
Section 69 FOISA	Exercise of rights by children

7.7 RESOURCES

SIC FAQs:

www.itspublicknowledge.info/faqs.htm

7.8 SELF ASSESSMENT CHECKLIST

1. The following are entitled to make a request to an authority for information under the FOISA:

- a lecturer at the London School of Economics;
- Mrs Brown of 61 The Mews, Edinburgh;
- Greenpeace USA, Washington DC; and
- ICI Paints, Slough.

TRUE or FALSE?

2. An applicant sends an e-mail request for information but fails to provide an address for correspondence; the authority is still required to respond. TRUE or FALSE?
3. An authority receives a request from The Tooth Fairy who provides a valid address in London for the purposes of correspondence. The authority is obliged to respond to the request if it is able. TRUE or FALSE?
4. Authorities are not required to charge for providing information, but if they do so they must get approval from the Scottish Information Commissioner for the level of fees that they have set. TRUE or FALSE?

[Click here for answers](#)

7.9 WHAT THEY SAID

Knowledge is power. The right to knowledge about the activities of those with public power is important. That is one of the key checks and balances on the exercise of public power under our constitutional arrangements in Scotland" (Robert Brown – MSP)

"The right of access is open to all. It can be exercised by anybody worldwide, and the [Act] is specifically designed so that it will be exercised" (Jim Wallace – MSP)

"Applicants do not need to cite legislation or specific sections of it, nor need they say why they are requesting the information. The [Act] establishes a right to know that is not reliant on establishing a need to know." (Jim Wallace – MSP)

"There is no use in having a Freedom of Information Act if ordinary members of the public do not know how to access it or use it" (Maureen McMillan – MSP)

7.10 CASE STUDY

The case for broadband

"Outside centres of population, accessibility to broadband in rural areas is still running at only 1 – 7 per cent. This is at a time when businesses are increasingly including broadband access in their location decisions" *Country Landowner & Rural Business, June 2003*

"The countryside is in danger of missing out on the next generation of broadband internet services. ISDN is not available more than 3km from an exchange, which means most of rural Britain. DSL is not available in rural areas, and the high prices paid by telecom companies for third-generation mobile phone licences may mean that they can't afford to build a large infrastructure to serve rural Britain, but only the most profitable urban areas." *Countryside Alliance*

"We have started a campaign ... to get Broadband Internet access enabled in the East Neuk of Fife. The way the campaign works is to get people who may be interested in getting Broadband, to register their interest (This does not commit you to taking Broadband) and once the registered number of people on the telephone exchange reaches the required trigger level, [Broadband will be enabled]." *East Neuk Wide Broadband Campaign*

"... we are not satisfied that enough of Scotland's people are gaining access to broadband quickly enough. The population coverage of the technology in Scotland is less than the percentage figure for the UK as a whole and we mean to address this..." *Iain Gray, MSP, Connecting Scotland, our broadband future Making it Happen*

Robbie Largo is a farmer in the East Neuk of Fife and, in order to increase revenue, he is considering converting an outbuilding into units to rent out to small businesses or start-ups. He also has a couple of spare bedrooms that he is considering advertising in nearby St. Andrews in the hope that research students may be attracted by a quieter working and living environment away from the bright lights of the town.

Robbie's business plan to borrow money for the units is rejected as there is no broadband availability, the reasoning being that the bank's policy on start-up loans is not to lend money unless there is a firm commitment to invest in high spec IT facilities. "After all", reasons the bank manager, "we'd be shooting ourselves in the foot if we gave you the money and then turned away all your potential tenants".

Undeterred, Robbie decides to get the rooms let out in the meantime but the students always seem to lose interest when they realise that their internet access is going to be by ordinary telephone line (although Robbie suspects that their concerns are not always academic).

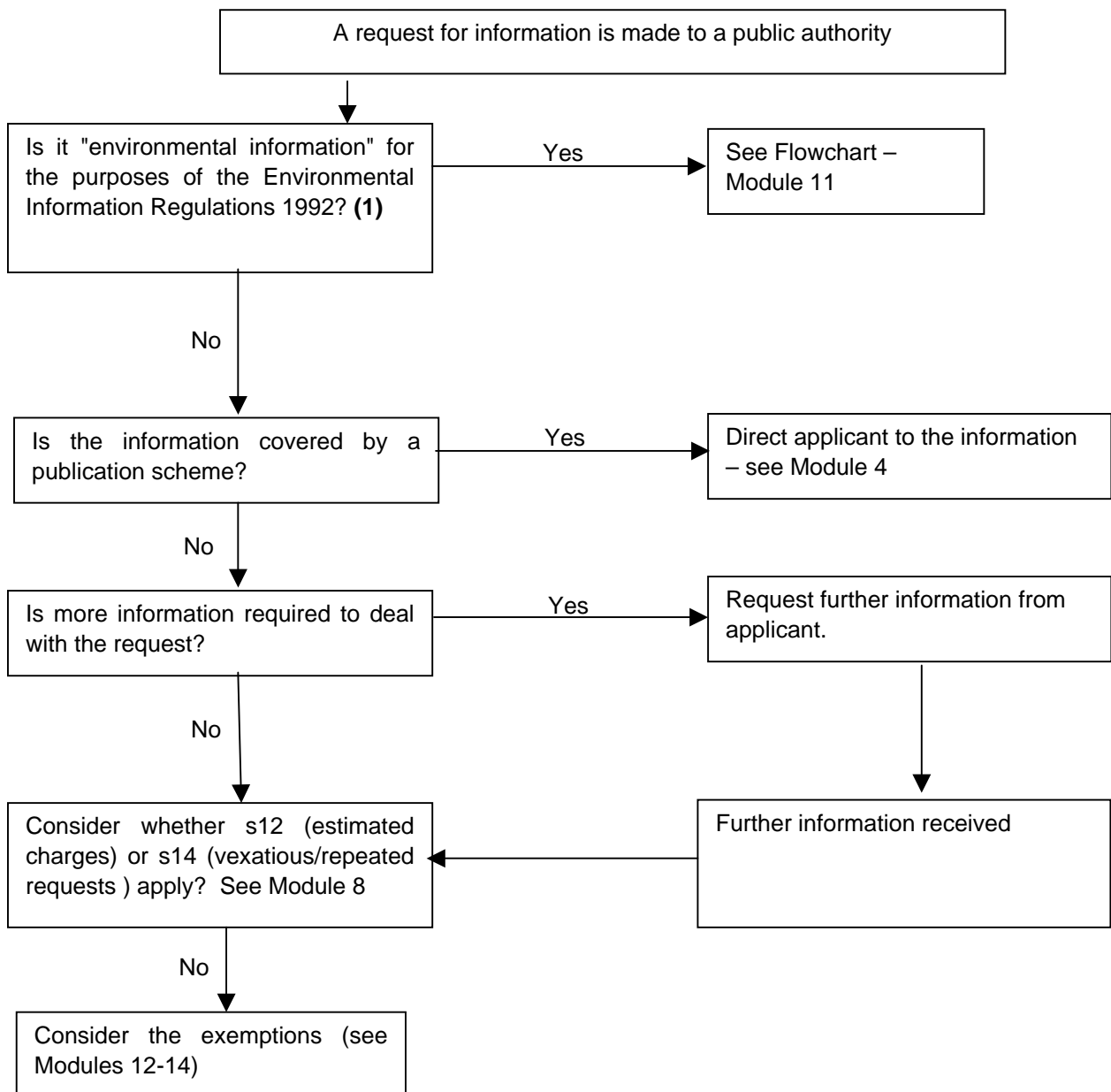
Robbie asks his ISP provider AT & C when the problem might be resolved but doesn't really get much help from the customer "helpline" although they do refer him to the East Neuk Wide Broadband Campaign which he signs up to. Unfortunately the review point for the Elie exchange is when 200 people have registered an interest and so far only 61 seem to have done so. Slightly more perturbed now, he decides to see what the Scottish Executive has to say on the matter. "Well", he thinks, "farmers should be encouraged to diversify" and he's read that other

countries are investing heavily in IT infrastructure, why should Scotland be any different?

Task

Using the material in this module, imagine that you are Robbie and make a request to the Scottish Executive requesting information relating to its broadband strategy. You can make this as wide or as narrow as you wish.

MODULE 7 – HOW A REQUEST IS MADE



(1) These are the current Regulations in this field but will be replaced by the Environmental Information (Scotland) Regulations by 1st January 2005.

MODULE 8

DEALING WITH AND RESPONDING TO REQUESTS FOR INFORMATION; AND FEES – HOW SHOULD AN AUTHORITY HANDLE A REQUEST? PART 1

8.1 CONTENT AND LEARNING OBJECTIVES

This module and Module 9 discuss how an authority should handle a request for information, building on the information that you have already covered in Module 7. This module primarily covers the legal issues and general details from the code on handling requests. Module 9 concentrates on other aspects of the draft section 60 Code.

NB: At January 2004 the section 60 code is in draft form. It will be issued in finalised form in Spring 2004 following consultation with the Scottish Information Commissioner.

Once you have worked your way through this module you should understand:

- When public authorities can ask an applicant for more information
- The time limits for responding to requests
- The requirement for reviews
- The requirement to provide advice and assistance
- What formats requested information can be provided in
- That exemptions can be applied
- That a public interest test may apply
- What an authority has to tell an applicant when refusing a request
- What to do if the information is defamatory

SUGGESTED TIME ALLOCATION: 1 hour

8.2 LEARNING MATERIALS

8.2.1 Handling Requests

Scottish public authorities must comply with requests for information under the Act promptly. There is a deadline for compliance of 20 working days after receipt of the request, excluding any time between the point of asking the applicant for further information or for payment of a fee and the receipt of the further information or fee.

- 8.2.2 An authority can request further information from an applicant if it is reasonably required to identify and locate the information. The authority must tell the applicant that it requires further information and specify what this is.

Background to the Code

Section 60 of the Act requires the Scottish Ministers to issue guidance to public authorities on discharging their functions under the Act. A draft code of practice has been issued for public consultation and will be issued in final form by Ministers following consultation with the Scottish Information Commissioner. Complying with the Section 60 Code will mean that authorities will be taken to comply with their duty to provide advice and assistance and also should help them comply with their other obligations under the Act.

The Scottish Information Commissioner will be able to issue a practice recommendation if an authority fails to comply with the code. This in turn may lead to an authority failing to comply with the Act which could lead to enforcement action by the Commissioner. Practice recommendations and enforcement notices are discussed in Module 19.

8.2.3 Duty to provide advice and assistance

There is a duty on public authorities to provide advice and assistance to applicants and those wishing to make requests. An authority will comply with this duty if it complies with the Section 60 Code.

This is a summary of what the draft Section 60 Code says about providing advice and assistance:

- Be prepared to explain the key provisions of the Act to potential applicants.
- Consider appointing an Information Officer or unit that handles requests.
- Do not give applicants the impression that they must disclose reasons for making the request.
- Give particular consideration to those with a disability or with communication difficulties.
- Discuss the request with the applicant and provide practical advice.

For example, offer to take a note of the request over the telephone and send the note to the applicant for confirmation; once returned, this would constitute a valid request; make sure a stamped addressed envelope is provided.

If possible tape the call itself with the consent of the applicant; this would constitute a valid request as it would be capable of subsequent reference.

- Help the applicant to describe more clearly what information they require where they have provided insufficient information to enable the authority to identify and locate the information sought or where it is unclear; contact the applicant as soon as possible to clarify the request.

- Consider providing an outline of the different types of material that might meet the request.
- Provide access to catalogues and indexes.
- Provide a general response with further options.
- If the request would exceed the cost limit, tell the applicant what could be provided within the cost.

The overall theme of the advice is that authorities should be prepared to be flexible when dealing with requests for information.

8.2.4 **Format**

If, at the time of making the request, an applicant asks for information in a particular way, as discussed in Module 7, the authority must, so far as is reasonably practicable, give effect to that preference. The authority may take into account the cost of providing the information as well as any other relevant factors. If it decides that it is not reasonably practicable to meet the preference then it must notify the applicant why and still provide the material in another format. The Act specifically states that in considering the format, the authority must still have regard to its duties under the Disability Discrimination Act 1995. An Annex to the Section 60 code will provide an outline of the key responsibilities an authority has under that legislation.

8.2.5 **Exemptions**

Exemptions may apply under the Act which may mean that the information does not have to be disclosed. There are exemptions that are referred to as "**absolute**" and exemptions that are referred to as "**non-absolute**". If an exemption is absolute and the information requested fits the exemption, then the authority does not have to disclose the information under the Act. If an exemption is non-absolute then, even if the information requested fits the exemption, the authority must consider a public interest test. This involves looking at whether, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by the public interest in maintaining the exemption. Modules 12, 13 and 14 deal with exemptions.

8.2.6 **Refusals**

If an authority decides that it will claim an exemption then it must give the applicant a written **refusal notice**. A refusal notice must generally state that the authority holds the information, that it is claiming an exemption, and why it applies. If it is a non-absolute exemption then the authority must explain why the public interest in maintaining the exemption outweighs the public interest in disclosing it. This notice must be served within the 20 working day period.

Similarly, if the authority estimates that the cost of complying with the request would exceed an upper cost limit set by the Fees Regulations then it is not obliged to comply with the request. The authority must write to the applicant and advise them of this within the 20 working day timescale.

A Scottish public authority does not have to comply with a request if it is **vexatious** and it does not have to comply with identical or substantially similar requests from the same person unless there has been a reasonable period of time between the making of the request and the subsequent request. Again, they must tell the applicant within the 20 working day period that this is the case unless they have previously dealt with such a repeat or vexatious request and it would be unreasonable to expect them to serve a further notice. This is what the draft Section 60 Code says about vexatious, repeated, multiple and campaign requests:

- It is for the authority to decide if a request is vexatious.
- Irritation or nuisance caused by the applicant is not sufficient for a request to be vexatious in the absence of something else.
- Use the power to refuse a request on vexatious grounds sparingly and do not abuse it simply to avoid dealing with a request.
- When considering a repeat request, what is a reasonable period of time involves an assessment by the authority in the particular circumstances of the case.
- Under the Fees Regulations an authority may not be required to comply with a number of related requests because the total cost would exceed the threshold. The authority should consider whether there is another more cost effective way of making the information available, for example by putting it on its website.
- Base decisions about vexatious, repeat and multiple requests on clear-cut reasoning and be able to justify these to the Scottish Information Commissioner if necessary.

If an authority does not hold the information then it must give the applicant written notice of this within the 20 working day period.

8.2.7 **Reviews**

Any refusal notice or notice stating that the fees would exceed the set amount must give details of the authority's complaints procedure, the right to request the authority to review its actions and decisions on a request and the right to complain to the Scottish Information Commissioner. A dissatisfied applicant can ask the authority to review its actions and decisions relating to a request. This is discussed further in Module 19.

8.2.8 **Defamation**

A person defames another if he publishes information about the individual which would make others think less of him. There may be some material which is held by authorities which contains derogatory or negative comments about individuals. If the authority provided such material in response to a FOISA request the individual could claim that the authority had defamed him and take the authority to court. The Act gives authorities some protection against this happening.

Authorities cannot refuse to answer a FOISA request because the response would disclose defamatory material but as long as the defamatory material was supplied by a third party the authority will not be liable for defamation.

If the defamatory material was written or created by the authority's own staff however the authority will be liable.

8.3 THE STRATEGIC VIEW

Authorities will need to develop procedures for handling requests, ensuring compliance with the codes of practice as well as the legislation.

Authorities should consider how to provide advice and assistance to applicants and to those wishing to make a request.

It may be sensible to develop a procedure for gathering together the information required to respond to requests and to develop standard form documentation for responding to requests.

Authorities should develop a consistent approach to charging fees and dealing with exemptions.

8.4 SUMMARY

The Act specifies how authorities should handle requests for information. Requests should be dealt with promptly and in any case within 20 working days. Authorities can ask for more information if necessary in order to identify the information requested. Exemptions may apply to some information, which means that the information does not have to be disclosed. If an exemption applies, the applicant should be given a written refusal notice. An authority is not obliged to comply with a request if the cost of doing so would exceed the amount set by the Fees Regulations or if the request is vexatious. If the information is not held by the authority, it must notify the applicant. If an applicant is dissatisfied with the way their request is dealt with, they can ask the authority for a formal review.

The draft section 60 Code gives advice on certain aspects of handling requests. The Code describes some of the different ways that authorities can fulfil their duty to provide advice and assistance to applicants. For example, they could explain the Act to potential applicants, they could help those with disabilities, they could help the applicant to describe what they want more clearly. The Code also discusses how vexatious and repeated requests could be handled.

8.5 KEYWORDS

Absolute Exemptions	<p>These are exemptions to which no public interest test applies. Where an absolute exemption applies the public authority does not have to consider whether there is any public interest in disclosing the information. Absolute exemptions include the following classes of exempt material:</p> <p>Information otherwise accessible (Section 25 FOISA)</p>
----------------------------	---

	<p>Prohibitions on disclosure (Section 26) i.e. information which is prevented from being disclosed by other legislation</p> <p>Certain confidential material (Section 36(2) FOISA)</p> <p>Court Records (Section 37 FOISA) and</p> <p>Certain personal information (Section 38(1) FOISA).</p>
Non-Absolute Exemptions	<p>Even if one of these exemptions applies the public authority must still consider whether the public interest in providing the information outweighs the interest served by the application of the exemption. If this is the case the information should still be given.</p> <p>Examples of non-absolute exemptions are information intended for future publication (Section 27 FOISA) and national security and defence (Section 31 FOISA).</p>
Refusal Notice	<p>This is the notice which a Scottish public authority must give to an applicant if it is claiming that information requested is exempt. (Section 16 FOISA).</p>
Vexatious	<p>A public authority does not have to comply with requests for information if the request is vexatious. The term is not defined but generally it is expected this would set a high threshold and authorities should not regard a request as vexatious merely because it is inconvenient or troublesome. (Section 14 FOISA).</p>

8.6 REFERENCES

Section 1 FOISA	General Entitlement
Section 2 FOISA	Effect of Exemptions
Section 10 FOISA	Time for Compliance
Section 11 FOISA	Means of Providing Information
Section 12 FOISA	Excessive Cost of Compliance
Section 14 FOISA	Vexatious or repeated requests
Section 15 FOISA	Duty to provide advice and assistance
Section 16 FOISA	Refusal Notices
Section 17 FOISA	Notice that information is not held
Section 20 FOISA	Refusals
Section 21 FOISA	Further review

8.7 RESOURCES

Section 60 Code:

www.scotland.gov.uk/about/FCSD/MCG-NW/00018022/Code60.pdf

8.8 SELF-ASSESSMENT CHECKLIST

1. If an authority responds to a request for information within 20 working days this will satisfy the statutory requirement to be prompt. TRUE or FALSE?
2. If an authority considers that an absolute exemption applies in respect of the information requested, then before reaching its final decision the authority must apply the public interest test. TRUE or FALSE?
3. The public interest test involves looking at whether information that is covered by an exemption should nonetheless be disclosed because the public interest in disclosing the information outweighs the public interest in maintaining the exemption. TRUE or FALSE?
4. The following are *all* valid grounds for serving a refusal notice:
 - the information requested is covered by an exemption and does not have to be disclosed;
 - the cost of complying with the request would exceed the upper cost limit set by the Fees Regulations;
 - the request is vexatious.TRUE or FALSE?
5. If an authority fails to take account of the Code, the Scottish Information Commissioner may issue a practice recommendation specifying the steps that must be taken by the authority. TRUE or FALSE?
6. If an authority responds to a request for information and provides defamatory material, it will be only be liable where the defamatory material was supplied by a third party. TRUE or FALSE? [Click here for answers](#)

8.9 WHAT THEY SAID

"Local authorities need to have information officers who will assist people who request information" (Maureen McMillan – MSP)

"Ordinary people want a courteous efficient service in which openness and an acknowledgment of their right to ask for and receive information is assured" (Maureen McMillan – MSP)

"There are issues for public authorities in respect of the costs of providing a freedom of information regime, but we should focus on the potential costs for individuals and ensure that those are not a barrier. (Pauline McNeil – MSP)

"...if Ministers can set fees by regulation, what is to stop them setting the fees at a level that would prevent the information being accessed by members of the public?" (Murdo Fraser – MSP)

"... the charging regime should neither discourage applicants nor impose unreasonable or limitless burdens on Scottish public authorities" (Minister for Justice letter to Justice 1 Committee)

8.10 CASE STUDY

"[A Scottish tourist agency] has been accused of avoiding promoting deer stalking and shooting because of a culture of political correctness. It is being claimed that the blood sport is not being advertised on [their] website because it is considered to be "elitist." The claim was made by the owner of a 5,000-acre sporting estate who went on to point out that shooting and stalking employs 7,200 full-time workers and is vital to the rural economy. According to the British Association for Shooting and Conservation, more than 100,000 visitors come each year to Scotland in pursuit of the sport which can cost up to £500 a day." *RampantScotland.com Scottish snippets No. 264*

Task

Consider the following possible requests made to the agency. For each one, do you think that the agency might be able to rely on a claim that the request is repeat, vexatious or multiple? For each one what might the agency take into account when deciding?

1. On 15 July 2005 Sabine Dupont makes a request for information about the number of enquiries about deer stalking received by the agency in 2004.
2. On 20 July 2005 Claire Cowan makes a request for information for the number of enquiries about deer stalking received by the agency in 2003 and 2004.
3. On 23 July 2005 Save Our Deer Stalking (a (fictitious) group that campaigns for the promotion of deer stalking in the UK) makes a request for any policies or information relating to the advertising or promotion of deer stalking in Scotland. The letter is signed Sabine Dupont, Chief Co-ordinator.
4. On 24 July 2005 the agency receives identical requests from a journalist from a country sports magazine in France, a journalist from a country sports magazine based in England but also sold in Scotland and a journalist from a Scottish tourism magazine all relating to this issue.
5. Between 5 August 2005 and the end of August 2005 the agency receives approximately 50 requests from 50 different individuals all in the same format and asking for information about the agency's policy on promoting deer stalking and related accommodation in Scotland. It transpires that campaigns have been run by several magazines to encourage their readers to write in and ask for this information.
6. On 15 August the agency receives a request from the same journalist from the Scottish tourism magazine about the amount of money the

agency spends on promoting the whisky industry in Scotland. The letter states that this is required for an article about the good work put in by the agency in promoting this type of tourism.

MODULE 9

DEALING WITH AND RESPONDING TO REQUESTS FOR INFORMATION; AND FEES – HOW SHOULD AN AUTHORITY HANDLE A REQUEST? PART 2

9.1 CONTENT AND LEARNING OBJECTIVES

This module builds on Modules 7 and 8 by looking at further material from the Act and the Section 60 Code.

NB: The material in this module reflects the terms of the draft section 60 code of practice. The code will be issued in finalised form in Spring 2004 following consultation with the Scottish Information Commissioner.

Once you have worked your way through this module you should understand what the Code advises on:

- Publication schemes
- Consultation with third parties and some general considerations on confidential information
- Monitoring requests

SUGGESTED TIME ALLOCATION: 1 hour

9.2 LEARNING MATERIALS

9.2.1 Publication schemes

The Section 60 Code gives the following advice on publication schemes:

- Routinely publish information in your publication scheme to reduce the number of individual requests.
- Consider keeping a log of requests to see which classes of information it may be appropriate to put into the scheme.
- The publication scheme should include details of the authority's procedures for handling requests.
- The publication scheme should include an address (including where possible an e-mail address) to which applicants may direct their request.
- A telephone number and fax number and name of an individual who can provide assistance should also be included.

9.2.2 **Transferring requests for information**

In some cases, when an authority receives a request, it may find that it does not hold the information. The Section 60 Code will advise that if an authority does not hold the requested information, the most appropriate course of action is to inform the applicant promptly that it does not hold the information.

However if a public authority is aware that another authority holds the information, the first authority should consider the most helpful way of assisting the applicant. It may be that an authority should provide the applicant with contact details of the new authority but only if the first authority has confirmed that the information is held by the new authority and seeking that confirmation does not delay the first authority in providing a response to the applicant.

If the applicant's request makes it clear that it should be transferred if the authority does not hold the information then the first authority will still need to confirm that the new authority does have the information and to inform the applicant that the transfer has been made.

If an authority holds most of the requested material and another authority the rest then the authority should think about coordinating one response to the applicant if this does not cause delay or additional costs.

Again, the draft Section 60 Code advises that transfers may be difficult to administer and may have data protection implications therefore the starting point will generally be to inform the applicant that information is not held and redirect them where appropriate.

9.2.3 **Consultation with third parties and some general considerations on confidential information**

An authority could be asked for information that it holds but that does not originate from it or that is not about it. For example information could have been provided by or relate to a private company such as a contractor. Such third parties may want their information to be protected but the Section 60 Code will advise authorities to consider carefully any request to have information covered by a confidentiality clause and resist this unless this genuinely is needed e.g. to protect a trade secret or sensitive personal information.

If a request for information involves third party information, the authority should consider consulting the third party where their views may help the authority to work out if an exemption applies or where the public interest lies.

An authority does not need to consult where it does not intend to disclose for some other legitimate reason; where the views of the third party would not affect its decision or where there is no possible exemption and so it is required to disclose.

A refusal of a third party to consent to disclosure does not, in the absence of anything else, mean that the information should be withheld.

There may be a need to consult with the UK government and non-devolved public bodies where information requested relates to them, again unless their views cannot affect the decision or consultation.

9.2.4 **Monitoring requests**

The Section 60 Code will suggest that there should be an appropriate system in each authority to monitor performance under the Act although monitoring all requests for information may be unnecessary.

Authorities should consider monitoring refusals and the reasons for the refusals; fees; reviews and outcomes; cases where the time limits have been exceeded and why.

9.3 **THE STRATEGIC APPROACH**

Authorities may also wish to consider practical issues around dealing with vexatious or repeat requests or those that are part of an organised campaign. They should consider how they will consult with relevant third parties and transfer requests.

It would be sensible to establish monitoring and reporting procedures to track the number of requests received and how these are dealt with. This may help with dealing with subsequent similar requests.

An authority should have a complaints procedure in place and monitor how effective this is.

9.4 **SUMMARY**

The section 60 Code will give advice on certain aspects of handling requests. This includes advice on what to put in publication schemes, what to consider when transferring requests and consulting with third parties and on monitoring requests.

9.5 **KEYWORDS**

None

9.6 **REFERENCES**

None

9.7 **RESOURCES**

Section 60 Code:

www.scotland.gov.uk/about/FCSD/MCG-NW/00018022/Code60.pdf

9.8 **SELF ASSESSMENT CHECKLIST**

1. Public authorities have a statutory obligation to comply with the section 60 Code of Practice in order to demonstrate their compliance with the Act. TRUE or FALSE ?

2. The Section 60 Code suggests that publication schemes should include the following:

- details of how requests are handled by the authority;
- an address to which requests for information should be directed;
- telephone and fax numbers of a named individual who can provide assistance; and
- details of how complaints can be made to the Parliamentary ombudsman.

TRUE or FALSE?

3. Where a request is made for information that is not held by an authority, that authority should inform the applicant promptly that it is unable to provide the information sought. TRUE or FALSE ?

4. Where an authority receives a request for information that it has received from a third party, it is not required to disclose the information if the third party objects. TRUE or FALSE? [Click here for answers](#)

9.9 WHAT THEY SAID

"Several people seeking information about a local cause for concern is not the same as an aggressive campaign and should not be treated as such" (Maureen McMillan – MSP)

"...there seems to be an unwarranted concern that administrative staff would have to cope with a considerable element of bloody-mindedness" (Maureen McMillan – MSP)

"The person who seeks the information may be an eccentric with a bee in his bonnet, a man or woman with a grudge, or an opposition politician who wants to do down the government or council of the day. That does not matter. Public information is held by public authorities in trust for and on behalf of the people, from whom they draw their power" (Robert Brown – MSP)

9.10 CASE STUDY

Learning lessons from the EIRs and Eire

Public authorities may be able to learn lessons from how requests for information have been handled under the Environmental Information Regulations 1992 ("EIRs") which provide for rights to request information about the environment. These (and the new changes) are discussed in Module 11.

Friends of the Earth Scotland found that "Sometimes requests are just plain ignored. A perfectly straightforward request was sent to all of Scotland's local authority Chief Executives, asking simply who was responsible for bathing-water issues in their area. Only 17 authorities replied within 2 months, the deadline specified by the EC Directive. A reminder eventually prompted another 13 replies, some up to 3 months after the initial request. Two authorities never bothered to reply." *Troublemakers – The struggle for environmental justice in Scotland*, Kevin Dunion, Edinburgh University Press 2003

Task

How difficult do you think it will be to respond to requests within 20 working days? What would you do if you realise that this is not possible?

"I believe citizens are now better informed than ever before about how government works and how decisions are made. I also believe that as a result of FOI and other legislation affecting the public service, the culture of public bodies is changing more rapidly, in some cases more than others, to one where they are more comfortable in dealing openly with their clients and citizens in terms of explaining their actions and activities" *Irish Information Commissioner Annual Report 2001*.

Task

Does your organisation have a policy on openness? Do you know what it is? Have you ever encountered any problems connected with the disclosure of information in your organisation? What were they and what caused them? Can you think of any examples of attitudes or behaviour in your organisation which may lead to problems with rights of access?

MODULE 10

MIDWAY REVIEW

10.1 CONTENT AND LEARNING OBJECTIVES

This module summarises what has been covered in the Workbook so far. You may also wish to review the self assessment questions and case studies from previous modules.

SUGGESTED TIME ALLOCATION: 50 minutes

10.2 LEARNING MATERIALS

- 10.2.1 The Freedom of Information (Scotland) Act 2002 ("FOISA" or the "Act") was introduced by the Scottish Parliament to ensure that people have the right to access information held by Scottish public authorities. It aims to increase openness and accountability in government and other public authorities. The FOISA is an important element in ensuring a thriving democracy.
- 10.2.2 The Act comes fully into force on January 1st 2005. Once in force it provides a right of access to all recorded information held by Scottish public authorities covered by the Act. Anyone, wherever they are based, will be able to make an access request to a Scottish public authority.
- 10.2.3 The Act will apply to public authorities. Authorities that will be subject to the Act include the Scottish Executive, the Scottish Parliament, the police force, the NHS and local authorities. Certain non-departmental public bodies will also be covered, such as Highlands and Islands Enterprise. The Act applies to limited companies that are wholly owned by a public authority and, if designated, it may even apply to private companies carrying out functions for a public authority, for example under a contract.
- 10.2.4 The Act will be regulated by the Scottish Information Commissioner who will have a role that includes reviewing decisions made by authorities on access and enforcing the Act.
- 10.2.5 Each public authority must have a publication scheme. The purpose of a scheme is to make information available so that people can access it without having to make an individual request. A scheme will set out what classes of information the authority publishes, how the information is made available and whether there is a fee for the information. An authority can adopt a model scheme or develop its own, but each scheme must be approved by the Scottish Information Commissioner.
- 10.2.6 There are two Codes of Practice that derive directly from the Act; the section 60 Code will give advice on handling requests and includes advice on publication schemes and the section 61 Code deals with records management. The section 60 Code points out that as information which is otherwise accessible (such as in a publication scheme) is exempt under the Act, authorities are encouraged to publish as much as possible so that they have fewer individual requests to deal with. In addition, the section 60 Code states that schemes may include details of the authority's

procedures for handling requests. The section 60 code will be finalised in Spring 2004.

- 10.2.7 The Scottish Information Commissioner has also issued guidance on publication schemes. The guidance gives practical advice on how to construct a scheme for a Scottish public authority, sets out how to submit a publication scheme to the Commissioner for approval and how to adopt a model publication scheme. The guidance also sets out good practice which should be followed wherever possible to ensure full compliance with the Act.
- 10.2.8 Good records management practices will assist authorities to meet their duties under the Act. They will ensure the creation of reliable records, make them easy to locate to deal quickly with access requests, and provide arrangements for their eventual archiving or destruction. Records management is covered by a separate Code of Practice, the section 61 Code, rather than by the Act itself. The Code provides guidance on records management policies, records management training and the keeping, management and destruction of records, both paper based and electronic.
- 10.2.9 Under public records legislation, certain authorities are required or permitted to transfer records to the National Archives of Scotland and the legislation sets out the requirement for this. Part Two of the section 61 Code outlines how such authorities should review and transfer their records. Other authorities transfer some records to other public archives and the procedures they should follow are covered in Part Three of the section 61 Code.
- 10.2.10 The Act introduces a general right of access. Any person who makes a request to an authority for information will be entitled to receive it, provided no exemptions apply. The request can be made by an individual or an organisation. The request does not have to be made by someone in Scotland. Anyone, anywhere can make a request for information. Authorities are only obliged to provide recorded information, such as computer documents, handwritten notes and videos. It does not matter how old the information is. Requests must be in writing or in another permanent form. Requests must state the name and address of the applicant and describe what information is required. There is no need to cite the Act or explain why the information is being sought. Authorities may charge a fee in accordance with fees regulations.
- 10.2.11 The Act specifies how authorities should handle requests for information. Requests should be dealt with promptly and in any case within 20 days. Authorities can ask for more information if necessary in order to identify the information requested. Exemptions may apply to some information, which means that the information does not have to be disclosed. If an exemption applies, the applicant should be given a written refusal notice. An authority is not obliged to comply with a request if the cost of doing so would exceed the amount set by the Fees Regulations or if the request is vexatious. If the information is not held by the authority, it must notify the applicant. If an applicant is dissatisfied with the way their request is dealt with, they can ask the authority for a formal review.

- 10.2.12 The section 60 Code will provide advice on certain aspects of handling requests. The Code describes some of the different ways that authorities can fulfil their duty to provide advice and assistance to applicants. For example, they could explain the Act to potential applicants, they could help those with disabilities, they could help the applicant to describe what they want more clearly. The Code also discusses how vexatious and repeated requests could be handled, the key issues to consider in transferring requests, when third parties should be consulted, monitoring and how complaints should be handled. The section 60 code also introduces some factors which may inform consideration of the public interest.

10.3 **SELF ASSESSMENT CHECKLIST**

1. Scotland needs a Freedom of Information Act because :
 - (a) everyone should have a right to the wealth of information held by public authorities;
 - (b) it will make public authorities more accountable;
 - (c) it will break down the culture of official secrecy; or
 - (d) all of the above ?

2. When determining a request a public authority must have regard to :
 - (a) the type of person or organisation making the request;
 - (b) the age of the information requested;
 - (c) whether there are grounds for refusing the request; or
 - (d) the reasons given for requesting the information ?

3. The Act will NOT apply to which of the following bodies:
 - (a) the Scottish Executive;
 - (b) the Ministry of Defence;
 - (c) Scottish National Heritage; or
 - (d) the Police Service ?

4. In which of the following circumstances is an authority NOT required to re-submit its publication scheme to the Commissioner for approval :
 - (a) if a new class of information is added;
 - (b) if an existing class of information is removed;

- (c) if information within a publication scheme class changes; or
 - (d) if changes are made to a model scheme prepared by the Commissioner ?

- 5. The section 61 Code of Practice does NOT deal with which of the following :
 - (a) good practice in connection with keeping, management and destruction of records;
 - (b) transferring records to the Keeper of the Records of Scotland;
 - (c) reviewing records before they are transferred; or
 - (d) how to implement a model action plan ?

- 6. The Keeper of the Records of Scotland has specific powers under :
 - (a) the Data Protection Act 1998;
 - (b) the Freedom of Information (Scotland) Act 2002;
 - (c) the section 61 Code of Practice; or
 - (d) the Public Registers and Records (Scotland) Act 1948 ?

- 7. Requests for information under the Act can be made :
 - (a) only by UK residents or nationals;
 - (b) only by private individuals;
 - (c) by any person; or
 - (d) by any person provided that they are the subject of that information ?

- 8. If a public authority requests a fee :
 - (a) it does not have to respond to the information request until the fee is paid;
 - (b) it must respond to the request as soon as the fee notice is sent to the applicant;
 - (c) it must respond to the request 2 months after the fee notice is issued; or

- (d) it must respond to the request within 20 days of the fee notice being sent?
9. An authority does not have to comply with a repeat or substantially similar request from the same applicant :
- (a) unless one year has elapsed from the date of the first request;
 - (b) unless the applicant has lost the information provided;
 - (c) unless a reasonable interval has elapsed between requests; or
 - (d) unless a £60 fee is paid ?

[Click here for answers](#)

10.4 CASE STUDY

EQUALITY

The Act specifically states that an authority, when considering a request by an applicant to have information provided in a particular format, must consider its duties under the Disability Discrimination Act 1995 (duty to make adjustments to practices, policies, procedures or physical features so that use of services by disabled persons is facilitated or made possible.) A summary of this legislation will be set out in the section 60 Code. The section 60 Code will also provide advice on dealing with equality issues –

- Be aware of disability issues and comply with the Disability Discrimination Act 1995
- Be aware of responsibilities – statutory or otherwise – to groups with particular needs
- Be flexible and interpret the definition of disability widely
- Provide disabled applicants with information in the format they prefer other than in extreme or exceptional cases
- Do not pass on the cost of responding in an alternative format
- When disseminating information in an area with a high minority ethnic population, consider the need to translate the material
- Consider accessibility to websites and the requirements of the World Wide Web Consortium's Web Accessibility Initiative

Equality – forget no-one

The following are a selection of issues that may be relevant when dealing with equality in delivering freedom of information.

Children

"All children are of equal worth, whatever their ability, colour, ethnicity, gender, health, religion, sexual orientation or social class" *Children in Scotland*

"Children have rights to protection, provision and participation in decisions affecting them, as outlined in the UN Convention on the Rights of the Child" *Children in Scotland*

The following are extracts from the Children in Scotland Citizenship in Practice report "What Matters to You" -

- "My sister gets a letter and opens it herself. I get a letter and I don't get to open it - Young woman aged 16"
- "An essential part of young people being able to exercise more control was people using language the young people understood and explaining what was going to happen."
- "One particular theme *What Matters to You?* has emphatically highlighted is that young people want to take more control and more responsibility of their lives. On a small and large scale, young people identified how they would like more say and more influence over what happens to them. From experiences related by young people it would appear that it is often not their 'disability' that denies them this control but society and its attitude"

Homeless

"Every year thousands of individuals and families all over Scotland don't know what it is like to have the privacy, safety and comfort of somewhere to call 'home'." *Shelter Scotland*

"Approximately 404 people were sleeping rough on the streets of Scotland during October 2002, a decrease of 67 on the same period last year.

"In May 2001 the number of individuals that homelessness projects came into contact with was 500, whilst in October 2001 the figure was 471.

"These are people who will be sleeping in doorways, on park benches, in graveyards, in derelict buildings, below bridges and so on.

There are also a number of people who are homeless, but not recorded by councils or recorded in any other way. These are often called hidden homeless. They live in caravans, in the care of friends and family, or in poor quality, insecure private rented homes. No one knows how many there are." *Shelter Scotland*

Literacy

"In 1997, the OECD's International Adult Literacy Survey defined being literate as the ability to use printed and written information to function in society, to achieve one's goals and to develop one's knowledge and potential. The survey was based on identifying 5 levels of ability rather than a simple 'literate' / 'not literate' dichotomy and suggested over 20% of Scots are at the lowest level of literacy ability." *Adult Literacies in Scotland*

Disability

"Mental Health - The Facts

- 1 in 4 Scots will experience a mental health problem at some point in their lives.
- If it doesn't happen to you it will happen to someone you know.
- A high level of stigma about mental health problems exists within Scottish society.

- Stigma and discrimination are unjustified, unfair and can be illegal.
- For some people, the stigma can be more distressing than the symptoms of their mental illness.
- Over 80% of people with mental ill health make a full recovery.
- Contrary to popular belief, the overwhelming majority of people with mental health problems are neither violent or dangerous." *Penumbra*

The following statistics are taken from the Scottish Executive statistics webpages -

"In 1996 in Scotland, 1.71% of the population was estimated as being visually impaired however only 0.66% of the population are registered as visually impaired (RNIB prevalence rates, 1997)."

"In 1999 in Scotland, 29 thousand people aged 65 and under and 67 thousand people aged over 65 were registered NHS wheelchair users (Disability Scotland). Information suggests that there are 14.5 thousand new wheelchair users every year (Scottish Wheelchair Service, compiled by Disability Scotland)."

"18% of people in Scotland are estimated to suffer from hearing loss (National Study of hearing, 1995)."

"In Scotland 193 thousand, 43 thousand and 235 thousand people receive incapacity benefit, severe disablement allowance and disability living allowance respectively (DSS Information Centre, 2000)."

Older people

The following statistics are taken from the Scottish Executive statistics webpages -

"In June 1999, 18% of Scotland's population were of pensionable age. Current projections suggest that by 2019, 23% of Scotland's population will be of pensionable age."

"In 1999 the expectation of life at birth was 73 for males and 78 for females. For those aged 65, the expectation was 14 additional years for men and 17 for women (General Register Office for Scotland)."

Other languages

The following statistics are taken from the Scottish Executive statistics webpages -

"In 1999, 1.6% of the Scottish population were from an ethnic minority. Over one third of Scottish people from ethnic minorities were from a Pakistani or Bangladeshi ethnic background (Labour Force Survey 1999)."

"The age profile of the ethnic minority population in Scotland is younger than the white population. 57% of the ethnic minority population were under 30 years old compared with 38% of the white population (Labour Force Survey 1998 & 1999)."

"98% of whites and 46% of non-whites living in Scotland were born in the United Kingdom. 24% of non-whites living in Scotland were born in Pakistan or India (1991 Scottish Census)."

"In Scotland employment rates for non-whites are lower than for whites: 48% and 71% respectively (Labour Force Survey 1998 & 1999). This difference is even more marked when looking at gender: 32% of non-white women were in employment compared with 68% of white women (Labour Force Survey 1998 & 1999)."

"19% of non-whites know who their local councillor is compared with 43% of whites (Scottish Household Survey 1999)."

Task

Review what you have learnt so far from the modules. Look through the self assessment questions that you have answered and consider whether there are any areas of the modules that you would benefit from rereading.

The information above and the tasks below should help you to think about issues such as rights of access, publication schemes and records management and dealing with and responding to requests.

1. For each of the categories set out above, consider what sort of information that your organisation has, if any, relating to these issues that it could make available or that it may receive requests for.
2. For each of these categories, think about what the duty to provide advice and assistance might mean and how advice and assistance might be provided. What additional considerations, if any, may be taken into account when providing advice and assistance to people with these particular needs?
3. Who else that comes into contact with your organisation may be in need of a higher level of advice and assistance?

MODULE 11

ACCESS TO ENVIRONMENTAL INFORMATION

11.1 CONTENT AND LEARNING OBJECTIVES

Where information concerns the environment there are special rules for accessing it. The right of access also applies to some bodies which will not be covered by FOISA. This module explains the reason for those rules and what they are.

Once you have worked your way through this module you should understand:

- Why there is a separate set of rules for environmental information
- What is meant by the term "environmental information"
- The legal and international background to the separate access regime
- How access works under the current Environmental Information Regulations 1992
- That Scotland will introduce new regulations which will take effect in January 2005 to coincide with FOISA
- How the environmental access regime interfaces with the FOISA

SUGGESTED TIME ALLOCATION: 1 hour

11.2 LEARNING MATERIALS

11.2.1 Why is there a separate set of rules for environmental information?

"..adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself"

"..every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations".

These words are taken from the start of the international convention, sponsored by the United Nations, which commits those nations which adopt it to be open about information concerning the environment. This convention, the Aarhus Convention, is part of a wider global movement which recognises that environmental effects and the concerns that go with them, transcend normal national boundaries.

The United Kingdom has international obligations which it must meet where information about the environment is concerned. The globalisation of these concerns, for example that the regulation of emissions in one country can affect the climate of others, explains the need for international agreement and action on the protection of the environment.

11.2.2 What information is covered by the term "environmental information"?

The term is broadly defined in the various legal instruments concerned with this area – in effect any recorded information that has any bearing on the environment comes within the scope. As we see later the exact wording is due to alter but the starting point is that this is a wide definition.

In the Aarhus Convention it is a long definition but the main strands cover information about

- the state of the elements including air, water, soil and all biological organisms including genetically modified ones.
- any force or activity or human measure that affects the environment including noise, radiation, legislation, decisions and the material supporting them.
- human life and human health, cultural and built sites.

Remember

The definition is so wide that almost every public authority will hold some environmental information– the special rules for access must be applied where such information is asked for

11.2.3 The background to the special rules for access to environmental information

This Workbook does not go into the detailed legal background but mention is made to explain the context for these regulations. When handling requests for information, staff will need to be alert to the nature of the information sought, not least because the framework governing the release of environmental information falls under these regulations.

In 1990 the European Community passed a Directive (90/313/EEC) which required **Member States** to give citizens access to information about the environment. In order to comply with that, UK-wide regulations were passed (Environmental Information Regulations 1992, as amended in 1998). Although it is these UK regulations that remain in force, Scotland will develop revised regulations under FOISA and it is expected that these will be brought into force in January 2005.

Over the following decade there was an increasing international commitment to improving the environment and this resulted in the adoption of the Aarhus Convention by the United Nations. The Aarhus Convention tightens up the rules from those imposed by the original Directive.

Once the Aarhus Convention was adopted, the European Union decided that the European law on this should be brought into line with the standards which had been agreed internationally and so it has revised the Directive. The new Directive (2003/4/EC) sets equivalent standards to those required by the Aarhus Convention. Although this may seem a bit

messy, it does mean that eventually everyone will be working to the same standard.

The outcome is that the regulations that are now in force are going to be replaced by a new set which will meet the revised international standards.

This should not be a major issue for Scotland or England, Wales and Northern Ireland as the regulations now in place will not require major changes. However, the definition of what constitutes environmental information will be expanded and consequently authorities must be alert to the greater potential to receive requests for such information.

11.2.4 **How access works currently and who is affected**

The bodies covered by the Environmental Information Regulations 1992 (as amended in 1998) are rather wider than under the FOISA. See module 3 for an explanation of bodies covered by the FOISA. As well as public authorities, some private bodies which have responsibilities for the environment are covered.

An access request for environmental information does not have to be in writing but can be made orally. This is a major difference from requests under FOISA.

Remember

If the request concerns environmental information the applicant can make an oral request and it will still be valid. Your authority must deal with it.

The authority currently has 2 months in which to respond to requests and any refusal must be supported by a statement of the reasons for the refusal. There are also obligations to make information publicly available. The charging regime is different from that under FOISA. The authority is able to impose reasonable charges for information.

The exemptions cover some of the same ground as the FOISA but are not identical and in some areas they are not as wide. Commercial confidentiality can be protected as can personal privacy. The exemptions also take account of the circumstances in which a private body has volunteered information to the public body which it could not have been required to disclose and wishes to remain confidential.

11.2.5 **New Environmental Information Regulations for Scotland**

There are plans to introduce new regulations in Scotland on public access to environmental information in the near future. A consultation entitled "Proposals for a new regime on Public Access to Environmental Information" ended on 9 August 2002.

As at January 2004 the Scottish Executive is still working on the revised draft regulations and consultation on these is expected in early 2004. The Regulations are expected to be implemented to coincide with FOISA coming into full force. These will be made under the FOISA and will bring the two regimes closer together.

The main proposed improvements on the existing regime are:

- the definitions of the scope of the Regulations and the bodies affected are clarified;
- the time limit for response to an application is reduced to 1 month in most cases;
- a public interest test is to be introduced which is the same test as applies under the FOISA;
- the Scottish Information Commissioner with power to review the decisions of public bodies to withhold information will provide a strengthened means of review for applicants.

11.2.6 **How the environmental access regime interfaces with the FOISA**

In the absence of the final regulations it is impossible to give precise information about the interface. However some things can be said. If a request concerns environmental information it is to be dealt with under the Environmental Information Regulations. This is a significant point as technically a request for environmental information made under the FOISA will be refused as an exemption in FOISA will apply (either the exemption for information that is available elsewhere or, when the new regulations come into force the specific exemption for information made available under these regulations). In practice however authorities have a duty to provide advice and assistance and should therefore advise an applicant where possible how to word their request in order to get the information required.

11.3 **THE STRATEGIC APPROACH**

Authorities should consider what information they have that may fall within the definition of environmental information.

Staff will need to be able to differentiate between a FOISA request and a request for environmental information and understand the differences in dealing with the two types of request. Monitoring, reporting and complaints procedures should include requests for environmental information.

11.4 **SUMMARY**

Requests for environmental information are a special case and will not be handled under FOISA, they will be dealt with under specific environmental Regulations. Almost every public authority will hold some environmental information and so should be aware of the rules for handling requests for such information. Under current Environmental Information Regulations 1992 a request for environmental information does not have to be in writing and can be made orally. The authority currently has to respond to the request within 2 months (although this is expected to change under the new regulations which are to come into force to coincide with the FOISA i.e. January 2005) and a reasonable charge can be made for the information. Exemptions exist in relation to some information.

The FOISA provides for revised Environmental Information Regulations to be made. It is intended that once made the new regulations will mirror procedures as far as possible with those under FOISA.

11.5 KEYWORDS

Environmental Information	This term is not defined in the Freedom of Information (Scotland) Act but has a wide definition in the Environmental Information Regulations and the Aarhus Convention.
Member States	These are those countries that belong to the European Union.

11.6 REFERENCES

Section 25	Information otherwise accessible
Section 39	Health, safety and the environment
Section 62 FOISA	Power to make provision relating to Environmental Information

11.7 RESOURCES

Scottish Executive Environmental pages:
www.scotland.gov.uk/topics/?pageID=63

11.8 SELF ASSESSMENT CHECKLIST

1. After January 2005 requests for access to environmental information will be dealt with under the FOISA. TRUE or FALSE ?
2. 'Environmental information' would include documentation relating to cost-benefit analyses used by a public authority in environmental decision-making. TRUE or FALSE ?
3. Any person has a right of access to environmental information held by or for public authorities without having to state an interest. TRUE or FALSE ?
4. A request made to a public authority for environmental information must be in writing. TRUE or FALSE ?
5. Where a public authority refuses to make available to the applicant all or part of the information requested, it is obliged to inform that applicant of his rights to a review of the decision to deny access. TRUE or FALSE ?

[Click here for answers](#)

11.9 WHAT THEY SAID

"Currently the public's rights to information are contained in disparate pieces of legislation, codes of practice and Charter commitments. However, the current system is clearly lacking in common sense. An enquiry to SEPA asking who their Chief Executive is would get a reply within 20 working days, whereas an enquiry about emissions from a local factory only has to be answered within two months, because different rules apply to environmental and non-environmental information". (Friends of the Earth Scotland)

11.10 CASE STUDY

HARRISAY TIMES 17 February 2005

Ruddy duck have happily been minding their own business on the Isle of Harrisay since they first settled here from America in the 1940s. Their mostly vegetarian ways have endeared them to the locals and tourists alike with one of our main attractions being the bird sanctuary at Loch Taing where several ruddy duck are known to reside.

All this is set to end with the introduction of a ruddy duck eradication scheme due to commence on Harrisay in the Spring. This follows several pilot eradication schemes elsewhere in the UK.

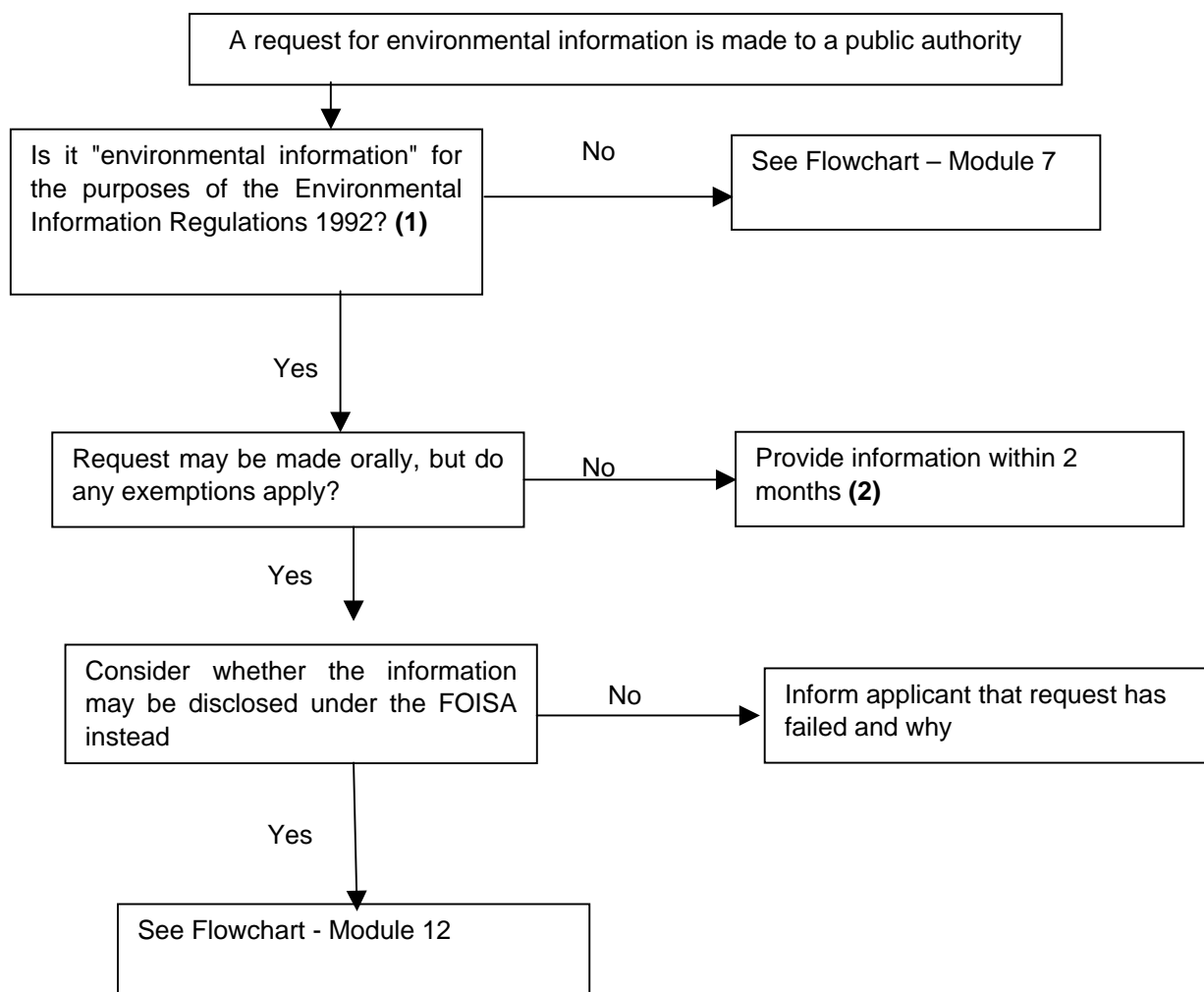
"The problem with the ruddy duck lies not in Scotland but in Spain" said Douglas McVeigh of Birds Scotland. "Several ruddy duck escaped from captivity in the 1950s and established themselves successfully in the wild. Ruddy duck mate with the white-headed duck, both members of the stiff-tail family and in Spain this led to the near extinction of the white-headed duck in the late 1970s. Due to a successful conservation programme, the numbers of Spanish white-headed duck are on the up but hybridisation with the ruddy remains the main threat. We believe the only solution is a complete cull of ruddy duck and will be working with our UK colleagues to ensure that this is carried out in Scotland".

There are an estimated 6000 ruddy duck in Britain and a cull would cost millions. It is not yet clear how the eradication on Harrisay will be funded.

Task

1. You are the secretary of SORD ("Save Our Ruddy Duck") on Harrisay. Using the information in the module, write a letter to Birds Scotland (a fictitious Scottish public authority) requesting information that you consider would be useful to you in mounting your campaign.
2. Consider whether this is an access request under FOISA or under the environmental access provisions and make a note of the key differences between the two, if any.

MODULE 11 – REQUEST FOR ENVIRONMENTAL INFORMATION



- (1)** These are the current Regulations but the Environmental Information (Scotland) Regulations are expected by 1st January 2005
- (2)** Two months is the prescribed period under the Environmental Information Regulations 1992 but new regulations may bring this down to 20 working days in line with the FOISA.

MODULE 12

EXEMPTIONS FROM THE RIGHT OF ACCESS - CAN INFORMATION ALWAYS BE ACCESSED? PART 1 OVERVIEW

12.1 CONTENT AND LEARNING OBJECTIVES

This module gives an introduction to the exemptions in FOISA. It explains some of the main reasons for exemptions and looks at the different kinds of exemptions which can apply, how long exemptions may apply for and how to refuse a request if an exemption applies.

Modules 16 and 17 deal with the data protection exemptions in more detail and Module 11 deals with the exemption for environmental information.

The next two modules set out the exemptions in the order in which they are set out in the Act. There is not necessarily any clear reason why the exemptions are set out in this order in the Act and therefore you are advised to understand the concepts introduced in this module thoroughly before looking at the exemptions in more detail. This should help you to understand how each specific exemption applies.

Once you have worked through this module you should understand

- Some of the reasons for exemptions
- The difference between absolute and non-absolute exemptions
- What substantial prejudice means
- What to think about when applying the public interest test
- How to refuse a request in reliance on an exemption
- How historical records are affected

SUGGESTED TIME ALLOCATION: 1 hour

12.2 LEARNING MATERIALS

12.2.1 Why are there exemptions?

However open a government or a public authority may wish to be, there will be some information which it cannot make public and therefore every access law contains exemptions. When considering exemptions it can sometimes be helpful to think first about why the exemption is there. Exemptions may be necessary for a number of reasons.

First, they may be necessary because information is already available by other means and so it would be inconsistent or unnecessarily complicated to have information available both under FOISA and elsewhere. An example of this is the exemption for personal data under the Data Protection Act 1998 – an individual already has a right of access to their own information so they do not need this right under FOISA.

Conversely, an exemption may be necessary because access is prohibited by other legislation and so it would again be inconsistent if an applicant were prohibited from accessing information elsewhere, only to be given it under FOISA. There is therefore an exemption in FOISA for information disclosure of which is prohibited by other legislation or where this would be incompatible with a European Community obligation or would be a contempt of court.

Exemptions are also necessary to protect particular interests. These may be the interests of the country as a whole, for example the exemption that relates to national security, or they may be the interests of a particular type of public authority, for example those that deal with law enforcement, or they may be the interests of third parties, for example the exemption that protects confidential information.

12.2.2 The difference between absolute and non-absolute exemptions

As we have seen above, information can be exempt from the obligation to give access on request because it is available under other rules or the authority is not legally entitled to give access. In those cases the exemption is an absolute exemption. This means that, as long as the information falls into the exempt category, the public authority does not have to disclose the information, nor does it have to consider the public interest test. The absolute exemptions are:

- section 25 – information otherwise accessible;
- section 26 – prohibitions on disclosure;
- section 36(2) – confidential information obtained from another person;
- section 37 – court records;
- parts of section 38 – in relation to personal data, for example where the applicant asks for personal data about themselves.

However, most exemptions are non absolute. In these cases the authority has to apply a two-stage test before it refuses the request:

- Does the information fall into an exempt class?

If the answer is yes
 - Is the public interest in keeping it secret stronger than the public interest in making it public?

Modules 13 and 14 go through the exemptions in order and, for each one, state whether it is an absolute exemption or a non-absolute exemption. Remember that if it is a non-absolute exemption, the public interest test must be applied.

12.2.3 What does substantial prejudice mean?

Many of the exemptions only apply if the disclosure of the information would "**prejudice substantially**" some particular interest.

The term is not defined but it is clear that there must be some real possibility of serious harm arising to the interest to be protected before the test of substantial prejudice is met. The Freedom of Information Act 2000 that applies in the rest of the UK only refers to "prejudice" and therefore the test in Scotland for withholding information may be harder to meet, the result being that the scales are further tipped in favour of openness.

The draft section 60 Code suggests that the authority should consider disclosing the information unless the prejudice caused would be "real, actual and of significant substance".

12.2.4 What is the public interest test?

When a non-absolute exemption applies, the authority must apply the public interest test. It must decide whether the public interest in disclosing the information is outweighed by the public interest in withholding the information by claiming the exemption. Only then can it withhold.

There are a number of factors that can be considered of general application when considering what is in the public interest. Some suggestions are set out in the draft section 60 Code. These include:

- "• The general public interest that information is accessible i.e. whether disclosure would enhance the scrutiny of decision making processes and thereby improve accountability and participation;
- Whether disclosure would contribute to the administration of justice and enforcement of the law or would prejudice the prevention or detection of crime or the apprehension or prosecution of offenders;
- Whether disclosure would affect the economic interests of the whole or part of the United Kingdom;
- Whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money;
- Whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment;
- Whether disclosure would impact adversely on safeguarding national security or international relations; and
- Whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
- Whether disclosure would contribute to a debate on a matter of public interest;
- Whether disclosure would prejudice the protection of an individual's right to privacy."

This list is not exhaustive. When thinking about the public interest, think about issues of democracy and of openness – the public is entitled to know what is being done in their name by those who govern them and to see that appropriate standards are being met.

Other considerations may apply to specific types of information. For example, it may be in the public interest to have access to figures relating to the treatment of cancer or the incidence of heart disease.

What is in the public interest is not static, it can change over time and in some cases, one consideration may be more important than others. It is for each authority to work out, on the facts of the case, whether the public interest favours disclosure or withholding of information.

There are some things that an authority should not take into account, for example, possible embarrassment to officials, possible loss of confidence in a public authority, seniority of persons involved and the risk of the applicant misinterpreting the information.

12.2.5 What a refusal notice should include

People do not always have a clear idea of what information public authorities hold and it will probably be quite common for authorities to be asked to supply information which they do not have. If an authority receives a request for information, which it does not have, it usually has to notify the applicant, in writing, within the 20 working day period.

If an authority decides that it does not have to provide information because an exemption applies it must give the applicant a written notice of refusal. This will trigger the right of the applicant to apply to the authority for a review of the decision and then to make a complaint to the Scottish Information Commissioner. The first step in the appeal process is always for the applicant to ask the authority to review its own decision as is described in Module 19.

The refusal notice will explain that the authority holds the information but that it does not consider that it has any obligation to disclose because a particular exemption applies. The authority must explain which exemption applies and why. If the exemption includes a public interest test the authority must explain why it considers that the public interest is best served by withholding the information.

In any response refusing information the authority has to tell the applicant of his or her rights to apply for a review of the decision or to make a complaint to the Scottish Information Commissioner.

The position can be more complicated where certain types of exempt information are concerned. A request for information could be made to find out what the authority actually knows about something, for example about something sensitive which could affect national security and be of use to terrorists. It could be detrimental to the public interest if the authority had to write back and admit that it held no information. In such cases the authority can respond without having to say whether it holds particular information.

Such a response is available for the following exemptions:

- sections 28 to 35 – for example relations within the UK, international relations and national security;
- section 39(1) – health and safety;
- section 41 – communications with Her Majesty.

In addition, an authority does not have to explain why an exemption applies if to do so would itself disclose exempt information.

12.2.6 **Historical records**

Exemptions will not continue to apply forever. Part 5 of the Act deals with **historical records** and provides the means for the falling away of certain exemptions under the Act. A record becomes an historical record at the end of a 30 year period which starts at the beginning of the calendar year after the record was created. If there is a file of documents kept together but created at different dates then the file becomes a historical record at the date that the last created document in the file becomes a historical record. This avoids an authority having to segregate individual documents artificially.

Once information becomes an historic record, certain exemptions can no longer be claimed. These are the exemptions for:

- relations within the UK (section 28);
- formulation of Scottish Administration policy (section 29);
- prejudice to the effective conduct of public affairs (section 30);
- safeguarding national security (section 33(1));
- confidentiality (section 36);
- court records (section 37);
- audit functions (section 40); and
- communications with the Royal Family (section 41(a)).

Until the point that information becomes an historical record, these exemptions may apply in the usual way, after the 30 year period they can never be claimed.

Other exemptions fall away after longer periods. After sixty years the exemption that relates to the exercise by the Queen of her prerogative of honour (for example relating to knighting people) no longer applies (section 41(b)). After 100 years information relating to inquiries under the fatal accidents legislation (section 34(2)(b)), law enforcement (section 35), personal census information (section 38(1)(c)) and deceased persons' health records (section 38(1)(d)) can no longer be exempt.

The Scottish Ministers can, by order, only reduce these time periods.

12.3 THE STRATEGIC VIEW

Authorities should consider which exemptions may be most relevant to their organisation and develop a policy on how key exemptions will be approached. It will be important to apply exemptions consistently although there should be scope for the application of exemptions to change over time if necessary.

Authorities should in particular consider their approach to the substantial prejudice test and the public interest test, remembering that the starting point is that information should be disclosed where possible.

12.4 SUMMARY

The aim of the Act is to provide access to information held by public authorities. However, some information will not necessarily have to be made available as it will be covered by an exemption. There are two types of exemptions: absolute and non-absolute. If an absolute exemption applies, the authority will not have to release the information. Absolute exemptions may apply to information which is available via another route, for example if information is contained in an authority's publication scheme, as well as to information that is not available elsewhere, for example where there is a prohibition on disclosure. If a non-absolute exemption applies then the authority will have to apply a public interest test to establish whether the information should be disclosed or withheld.

12.5 KEYWORDS

Historical records	A record becomes an historical record at the end of a 30 year period which starts at the beginning of the calendar year after the record was created or, with a file, at the end of 30 years from the date on which the last document in a file becomes an historical record. (Section 57 – 59 FOISA).
Prejudice	Prejudice is not defined but means a real negative impact upon a circumstance or on an individual. Prejudice is more than mere inconvenience or embarrassment and would amount to a potential interference with properly carrying out a public function or a proper specified interest.
Substantial Prejudice	This is not defined in the Act but would mean a serious interference with a matter of public interest. (See section 60 Code).

12.6 REFERENCES

Section 2 FOISA	Effect of exemptions
Section 16 FOISA	Refusal of requests
Section 17 FOISA	Notice that information is not held
Section 18 FOISA	Responses to requests

Section 20 FOISA

Requirement for review of a refusal

Sections 57 – 59 FOISA

Historical Records

12.7 RESOURCES

Section 60 Code:

www.scotland.gov.uk/about/FCSD/MCG-NW/00018022/Code60.pdf**12.8 SELF ASSESSMENT CHECKLIST**

1. Where a file consists of documents created at different times, the file becomes an historical record at the date at which the most-recently created document becomes an historical record. TRUE or FALSE ?
2. Where information would be exempt but in fact a public authority does not hold the information requested, the authority cannot serve a refusal notice on the applicant as the authority does not have the information. TRUE or FALSE ?
3. The test of "substantial prejudice" is not defined but in determining whether it would apply, authorities should consider in the first instance disclosing the information unless the prejudice caused would be real, actual and of significant substance. TRUE or FALSE ?
4. In determining what is in the public interest, authorities should take into account the following :
 - the seniority of persons involved in the subject matter;
 - possible loss of confidence in government or other public authority; and
 - the risk of the applicant misinterpreting the information.TRUE or FALSE ?
5. If an authority serves a refusal notice in respect of a request for information that is exempt, the authority is not necessarily required to give reasons as to why the exemption applies. TRUE or FALSE?

[Click here for answers](#)**12.9 WHAT THEY SAID**

"....where does the greater public interest lie? Does it lie in telling the information or keeping it back". (Gordon Jackson – MSP)

"Harm that is claimed to be caused should be real, actual and of significant substance. One does not need to be a lawyer to know that this is a pretty substantial test. There must be a probability of significant prejudice". (Brian Fitzpatrick – MSP)

12.10 CASE STUDY

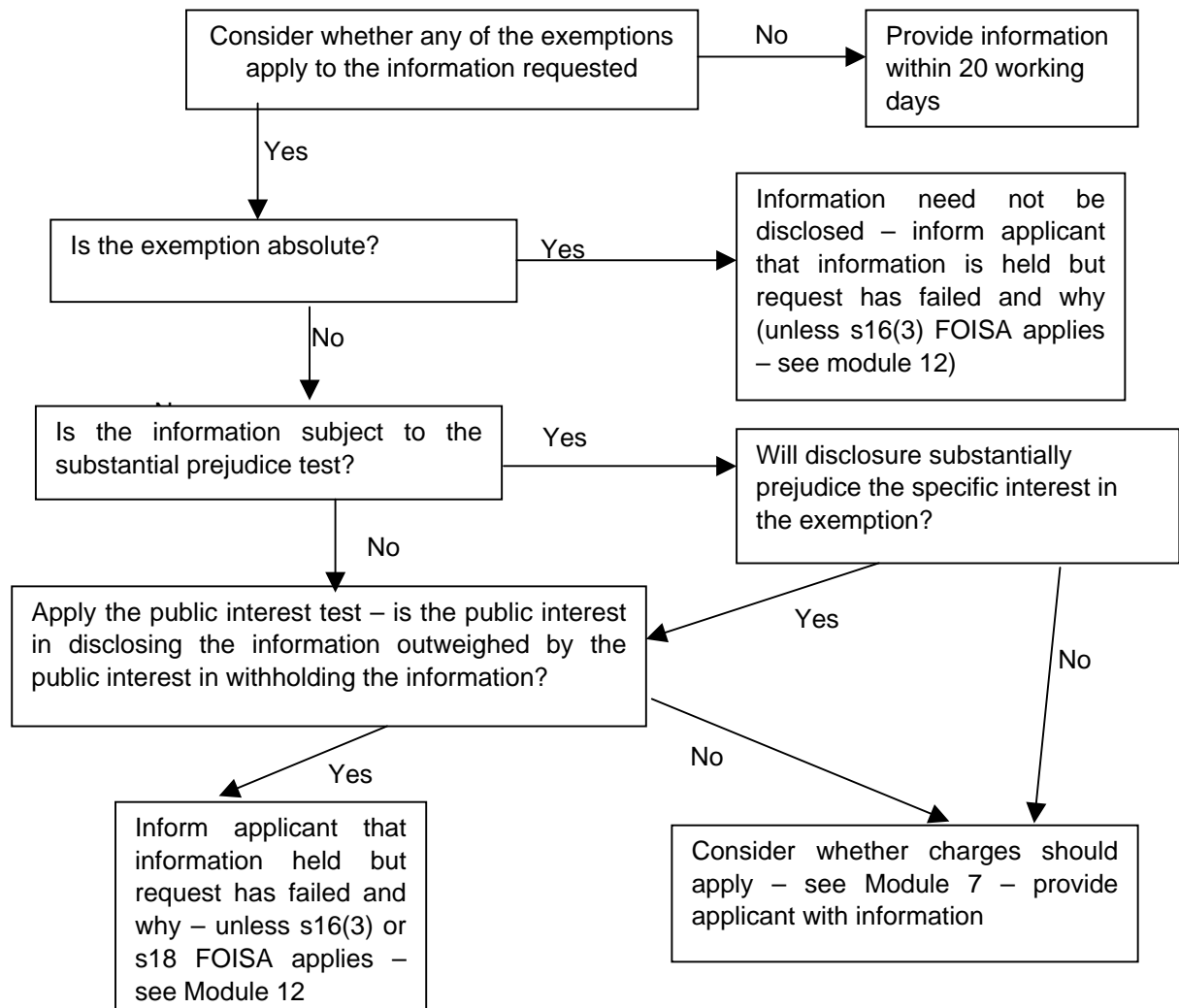
"The "public interest" has been described as something that itself is of serious concern or benefit to the public not merely of individual interest. It has also been stated that public interest does not mean "of interest to the public" but "in the interest of the public". The term is not defined in the Act and may change over time and according to the circumstances of each situation. Because of this, authorities will need to make a subjective judgement based on the circumstances of each case and in the light of any emerging guidance or best practice".

draft Section 60 Code of Practice

Task

Make a list of 5 things that a public authority may wish to take into account when determining whether to disclose in the public interest. Make a list of 5 things that an authority should not take into account when deciding whether a disclosure is in the public interest.

MODULE 12 – EXEMPTIONS (Continued from Module 7 flowchart)



MODULE 13

EXEMPTIONS FROM THE RIGHT OF ACCESS – CAN INFORMATION ALWAYS BE ACCESSED? PART 2

13.1 CONTENT AND LEARNING OBJECTIVES

This module and the next module describe the exemptions in the Act and whether these are absolute or non-absolute. When you go through the exemptions in this module and the next module, remember the issues that were raised in Module 12.

Once you have worked through this module you should understand the exemptions for:

- Information otherwise accessible
- Prohibitions on disclosure
- Information intended for future publication
- Relations within the UK
- Formulation of Scottish Administration policy
- Prejudice to the effective conduct of public affairs
- National security and defence
- International relations
- Commercial interests and the economy

SUGGESTED TIME ALLOCATION: 1 hour

13.2 LEARNING MATERIALS

The following is a list of exemptions contained in FOISA. It is continued in the next module. Remember that information may also not need to be disclosed under FOISA because it is held by the authority on behalf of another person or it is held in confidence having been supplied by a Minister of the Crown or by a department of the Government of the UK. This relates to the definition of what is "held" by a public authority, as discussed in Module 2 rather than being an exemption but the effect is the same as information does not have to be released.

13.2.1 Section 25 – Information otherwise accessible

This is an absolute exemption. It relates to information which an applicant can reasonably obtain elsewhere, even if the applicant would have to pay a fee to obtain it. For example, information may already be available in a publication scheme, it may be available under other legislation or it may be available from the National Archives of Scotland.

13.2.2 **Section 26 – Prohibitions on disclosure**

This is an absolute exemption. It applies where disclosure of information is prohibited by other legislation, it would involve a contempt of court or it would be incompatible with a European Community obligation.

13.2.3 **Section 27 - Information intended for future publication**

This is a non-absolute exemption and so the public interest test must be applied. The exemption applies where a Scottish public authority holds information with a view to it being published, either by the authority itself or another person, within 12 weeks of the date of the request and it is reasonable in the circumstances to withhold disclosure until **publication**.

There is guidance on this in the draft section 60 Code as to what to do if an authority becomes aware of a delay in the publication date – it should contact the applicant and explain the reason for the delay and where possible the revised publication date.

There is also an exemption for programmes of research where it is intended that a report will be published and early disclosure would, or would be likely to, prejudice substantially either the programme itself or the interests of an individual participant or an authority.

13.2.4 **Section 28 - Relations within the United Kingdom**

This is a non-absolute exemption and so the public interest test must be applied. This applies to information which would, or would be likely to, prejudice substantially relations between any administration in the UK and any other such administration, for example the Scottish Executive and the Welsh Assembly.

13.2.5 **Section 29 – Formulation of Scottish Administration policy etc.**

This is a non-absolute exemption and so the public interest test must be applied. This applies to information held by the Scottish Administration which relates to the formulation and development of government policy, Ministerial communications, requests for or the provision of legal advice or the operation of any Ministerial private office. Once a decision has been taken, the statistical information used as background to inform the decision is no longer exempt under this section. When considering this exemption, the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the decision.

13.2.6 **Section 30 – Prejudice to effective conduct of public affairs**

This is a non-absolute exemption and so the public interest test must be applied. This exemption applies to information which would, or would be likely to, prejudice substantially the collective responsibility of the Scottish Ministers or inhibit substantially the exchange of views or provision of advice or would otherwise substantially prejudice the effective conduct of public affairs.

13.2.7 **Section 31 – National security and defence**

This is a non-absolute exemption and so the public interest test must be applied. Information which is required for the purpose of safeguarding national security is covered and a certificate signed by a member of the Scottish Executive in relation to any information or type of information is conclusive to satisfy this exemption. There is then no right of appeal to the Scottish Information Commissioner although it is possible that an action for judicial review could be taken and that a specific appeals procedure for such certificates will be introduced.

Information whose disclosure would or would be likely to prejudice substantially the defence of the British Isles or any colony or the capability and effectiveness of the armed forces or those co-operating with them is also covered.

13.2.8 **Section 32 – International relations**

This is a non-absolute exemption and so the public interest test must be applied. This exemption relates to information which would prejudice or be likely to prejudice substantially:

- Relations between the UK and any other State;
- Relations between the UK and any international organisation or international court;
- The interests of the UK abroad or the promotion or protection by the UK of its interests abroad;
- Confidential information obtained from a State other than the UK or an international organisation or international court.

13.2.9 **Section 33 – Commercial interests and the economy**

This is a non-absolute exemption and so the public interest test must be applied. This exemption covers:

- information which constitutes a **trade secret** (a trade secret is a business-related fact that the court will protect as being essential to an enterprise);
- information which would, or would be likely to, prejudice substantially the **commercial interests** of any person including those of a Scottish public authority;
- information whose disclosure would, or would be likely to, prejudice substantially the economic interests of the whole or part of the United Kingdom or the financial interests of an administration in the United Kingdom.

There is guidance in the draft section 60 Code on this exemption in relation to public sector contracts.

13.3 THE STRATEGIC VIEW

Consider which members of staff will be authorised to determine whether an exemption should be relied on.

Monitor the application of exemptions to ensure consistency. Consider the information available in the publication scheme so that applicants can be referred to this where appropriate.

13.4 SUMMARY

There are 17 sections in the FOISA dealing with exemptions. The list in this module covers sections 25 – 33 and explains whether each is an absolute or a non-absolute exemption. It also highlights which exemptions the "substantial prejudice" test applies to.

13.5 KEY WORDS

Commercial Interests	This term is not defined. The interest must arise from trade or a relationship of a commercial nature whether contractual or not. A commercial interest does not necessarily have to be a financial one but there should be an interest in the sense that a party has invested something in the transaction or relationship which could be put at jeopardy.
Publication	The term is not defined but means making information available by publishing it. Information is published if an individual is able to find that information without going through an intermediary. Publication may be on the internet as well as in other forms.
Trade Secret	<p>This term is not defined but the characteristics for a trade secret are generally that:</p> <ul style="list-style-type: none">• it must be used in the course of a trade or business;• the owner must limit the widespread dissemination of it or discourage widespread publication, that is, must make his or her own efforts to protect it;• there must be an economic advantage or value from the fact that it is not generally known; <p>It can include not only secret formulae, patents, techniques, processes or technological secrets but also business information such as marketing studies or lists of customers;</p> <p>The amount of money or effort spent developing the subject matter of a secret and the ease or difficulty with which it could be duplicated by others will be considered.</p>

13.6 REFERENCES

Section 25 FOISA	Information otherwise accessible
Section 26 FOISA	Prohibitions on disclosure
Section 27 FOISA	Information intended for future publication
Section 28 FOISA	Relations within the United Kingdom
Section 29 FOISA	Formulation of Scottish Administration policy
Section 30 FOISA	Prejudice to effective conduct of public affairs
Section 31 FOISA	National security and defence
Section 32 FOISA	International relations
Section 33 FOISA	Commercial interests and the economy

13.7 RESOURCES

Section 60 Code:

www.scotland.gov.uk/about/FCSD/MCG-NW/00018022/Code60.pdf

13.8 SELF ASSESSMENT CHECKLIST

1. An exemption could apply to the following types of information :
 - trade secrets;
 - information disclosure of which would prejudice commercial interests;
 - information prejudicial to the economic interests of any part of the UK; and
 - information prejudicial to the financial interests of an administration in the UK.

TRUE or FALSE ?

2. A non-absolute exemption is available to prevent prejudice to the effective conduct of public affairs. This would cover information disclosure of which could cause personal embarrassment to ministers. TRUE or FALSE?
3. Where an applicant wants access to the Scottish Environmental Protection Agency's prosecution policy documentation, and makes a request under FOISA, the Agency should refuse because the information requested is exempt. TRUE or FALSE?
4. An exemption is available in respect of information which could substantially prejudice the defence of the British Isles but only where the public interest in withholding the information outweighs the public interest in disclosing it. TRUE or FALSE ? [Click here for answers](#)

13.9 WHAT THEY SAID

"We need to encourage them not to take advantage of those exemptions but to have a culture of giving out as much information as possible". (Alastair Morgan – MSP)

"Authorities will be required to give serious consideration to the application of exemptions. It should not be a case of their saying, "How can we withhold this – do any of the exemptions apply?" Instead, the Commissioner will ensure that the default setting is disclosure". (Jim Wallace – MSP)

13.10 CASE STUDY

A specialist section of the NHS Scotland has become part of a consortium to carry out a specific piece of medical research. The aim of the research is to develop software which helps in assessing the likely success of different types of cancer treatment for patients with a different previous history. Other members of the consortium are private companies, research charities and academic institutions. The consortium is not a legal entity in its own right. If the research is successful, the NHS will be able to benefit by using the resulting software at a reduced licence fee.

The tests have been carried out by the NHS which has the possession and use of the software for this purpose. Interim results of the tests are very encouraging and the consortium is going forward with a plan to develop the software commercially. As the output of the research will be software it will not be possible to patent it. However as it is intended to exploit the software commercially the source code will not be made publicly available.

The product is complex and even someone who obtained access to the work carried out so far would not be able to replicate the product before the consortium's product is available in the marketplace.

The NHS organisation receives a request under FOISA for the software. The applicant states that he intends to develop an equivalent product which he will make available at no cost to the NHS.

Task

1. Are there any relevant exemptions which may apply to this situation?
2. Make a list of five key points that the authority may wish to take into account when deciding whether to disclose.

MODULE 14

EXEMPTIONS FROM THE RIGHT OF ACCESS – CAN INFORMATION ALWAYS BE ACCESSED? PART 3

14.1 CONTENT AND LEARNING OBJECTIVES

This module and the previous module describe the exemptions in the Act and whether these are absolute or non-absolute. When you go through the exemptions in this module and the previous module, remember the issues that were raised in Module 12.

Once you have worked through this module you should understand the exemptions for:

- Investigations
- Law enforcement
- Confidentiality
- Court records
- Health, safety and the environment
- Audit functions
- Communications with Her Majesty and honours

The personal data exemptions are dealt with in Modules 16 and 17.

SUGGESTED TIME ALLOCATION: 50 minutes

14.2 LEARNING MATERIALS

14.2.1 **Section 34 – Investigations by Scottish public authorities and proceedings arising out of such investigations**

This is a non-absolute exemption and so the public interest test must be applied. This exemption covers information which has at any time been held by a Scottish public authority for the purpose of an investigation into criminal matters whether the public body is the prosecuting authority or has an obligation to make a report to the Procurator Fiscal.

It also covers information held by a Scottish public authority for the purposes of an inquiry under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 which has not yet been concluded; information held by a Scottish public authority into the cause of death of any person whether by virtue of a duty on the authority or to make a report to the Procurator Fiscal and information held for the purpose of investigations in relation to the regulatory functions listed in section 35(2) of the Act and which relate to the obtaining of information from confidential sources.

14.2.2 **Section 35 – Law enforcement**

This is a non-absolute exemption and so the public interest test should be applied. This covers information which would, or would be likely to, prejudice substantially a list of law enforcement matters. The list includes (among other things) the prevention or detection of crime, the apprehension or prosecution of offenders or the operation of immigration controls. The exemption also covers information which would, or would be likely to, prejudice substantially any civil proceedings brought and arising out of an investigation conducted for the list of regulatory purposes specified in section 35(2) and brought by a public authority under a duty to carry out such an investigation.

14.2.3 **Section 36 – Confidentiality**

This is an exemption that is partially absolute and partially non-absolute.

The non-absolute part of the exemption covers information which attracts confidentiality of communications in legal proceedings.

The absolute exemption relates to **confidential** information which –

- was obtained by the authority from another person (which can be another public authority) and
- where that person could successfully take the authority to court to stop it disclosing the material.

This means that an authority cannot argue that its own information or material produced by its staff for it, is confidential.

There will be guidance on this exemption in the section 60 Code.

14.2.4 **Section 37 – Court Records, etc.**

This is an absolute exemption. It relates to court records. If a court is handling a case, or has handled one, it is up to the court to decide whether to allow public access to the information lodged with the court for the proceedings. In many cases courts do allow open access to pleadings and hearings.

14.2.5 **Section 38 – Personal information**

This exemption is part absolute and part non-absolute. It relates to information which comprises personal data under the Data Protection Act 1998. This is discussed in Modules 16 and 17.

14.2.6 **Section 39 – Health, safety and the environment**

This is a non-absolute exemption and so the public interest test must be applied. It relates to information whose disclosure would, or would be likely to, endanger the physical or mental health or the safety of an individual.

It also relates to information which will be disclosed under new regulations to be made to implement the international convention on access to

information about the environment, the Aarhus Convention. This is covered in Module 11.

14.2.7 **Section 40 – Audit functions**

This is a non-absolute exemption and so the public interest test must be applied. This covers information the disclosure of which would, or would be likely to, prejudice substantially the exercise of a Scottish public authority's functions into the audit of other public authorities or an examination of their efficiency.

14.2.8 **Section 41 – Communications with Her Majesty etc. and honours**

This is a non-absolute exemption and so the public interest test must be applied. It covers information which relates to communications with the Royal Family or Household or relates to the grant of honours by the Crown.

14.3 **THE STRATEGIC VIEW**

Authorities should consider how the confidentiality exemption will affect relationships with third parties and how this can be dealt with. It may be appropriate to build this into tender procedures and to have standard contractual clauses that deal with confidential information in relation to FOISA.

14.4 **SUMMARY**

There are 17 sections in the FOISA dealing with exemptions. The list in this module covers sections 34 – 41 and explains whether each is an absolute or a non-absolute exemption. It also highlights which exemptions the "substantial prejudice" test applies to.

14.5 **KEYWORDS**

Confidential	Information is confidential if one party, usually the party who discloses the information, would be able to take the holder of the information to court to stop them telling anybody else. The circumstances in which an obligation of confidence can be overridden are where the person consents, where there is a legal obligation to disclose or where there is overriding public interest in the disclosure.
---------------------	--

14.6 **REFERENCES**

Section 34 FOISA	Investigations by Scottish public authorities and proceedings arising out of such investigations
Section 35 FOISA	Law enforcement
Section 36 FOISA	Confidentiality

Section 37 FOISA	Court records
Section 38 FOISA	Personal information
Section 39 FOISA	Health, safety and the environment
Section 40 FOISA	Audit functions
Section 41 FOISA	Communications with Her Majesty and honours
Section 37 FOISA	Court records
Section 36 FOISA	Confidentiality

14.7 RESOURCES

Section 60 Code:

www.scotland.gov.uk/about/FCSD/MCG-NW/00018022/Code60.pdf

14.8 SELF ASSESSMENT CHECKLIST

1. An absolute exemption exists in respect of confidential information but in certain circumstances this exemption can be overridden. TRUE or FALSE?
2. There is an absolute exemption in respect of court records which means that in no circumstances can information, such as pleadings lodged with the court for the purposes of proceedings, be made publicly available. TRUE or FALSE?
3. Where the release of information could endanger the physical or mental health, or safety of an individual, such information will always be exempt. TRUE or FALSE?
4. Where there is an absolute exemption on information, the public will be denied access to that information in all circumstances. TRUE or FALSE?

[Click here for answers](#)

14.9 WHAT THEY SAID

"Those of us with council and parliamentary experience know that the excuse of commercial confidentiality is used constantly to block legitimate concerns about expenditure". (Donald Gorrie – MSP)

"On exemptions, many Freedom of Information Acts around the globe have sunset clauses. I would be interested to learn what consideration has been given to that and what systematic review of exemptions will take place" (Brian Fitzpatrick – MSP)

14.10 CASE STUDY

Researchers for a TV station are working on a programme about a local University. The University is long established and has been very successful over its history in attracting wealth and status. It has a history of royal patronage and significant endowments. A member of the Royal Family has attended the institution in living

memory and more recently it has succeeded in attracting modern European money from the EU Commission.

The working title of the programme is **Patronage – Past and Present**. The researchers are looking to compare the position of the institution in the present, 50 years ago, 100 years ago and 200 years ago. Their thesis is that elitism persists but has changed the way it works. They have made a number of access requests for material under FOISA. They have asked for information about:

- Royal connections, both past and present
- Endowments both where these have come from and where they are currently invested – specific requests have been made for any audit reports
- The qualifications required to enter the institution both past and present
- Funding from outside Scotland

Task

1. Considering the material you have examined in Modules 12, 13 and 14, are there any relevant exemptions which may apply?
2. For each exemption you identify, if any, consider whether it is an absolute or a non-absolute exemption and what this means in each case.

MODULE 15

DATA PROTECTION – REFRESHER MODULE ON THE EFFECT OF THE DATA PROTECTION ACT 1998

15.1 CONTENT AND LEARNING OBJECTIVES

This module provides an overview of the main aspects of the Data Protection Act 1998 (the "DPA"). It can be used to refresh your memory before proceeding to Modules 16 and 17 which deal with the interface between freedom of information and data protection. If you have not looked at data protection before, then spend some time working through this module and understanding what the key concepts behind the DPA are and what the key terminology is. This will help you when looking at Modules 16 and 17.

Once you have worked your way through this module you should:

- Be reminded of or learn about the data protection regime
- Understand the key terms used in the DPA
- Be familiar with the main elements of the DPA

SUGGESTED TIME ALLOCATION: 1 hour

15.2 LEARNING MATERIALS

15.2.1 The importance of key terms

The Data Protection Act 1998 uses several **key words** which you may not be familiar with. These terms are highlighted in bold throughout this module. They are listed at the end of the module.

15.2.2 Introduction

The DPA came into force on 1 March 2000. Data protection is not a devolved function so the DPA applies throughout the UK. It comes from a European Directive that the UK was required to implement and so all other member states of the European Union have similar legislation. It also partially implements Article 8 of the Human Rights Act 1998 in relation to privacy. It sets out rules for processing **personal data** and applies to many paper records as well as those held on computer. The idea behind the DPA was to help to secure individuals a right to privacy by protecting the information that is held about them. Under the DPA, the person to whom personal data relate is known as the **data subject**.

The DPA requires **data controllers**, that is those who determine the purpose of and the manner of processing personal data, to comply with the rules of good information handling practice, called the **Data Protection Principles**. These principles require, amongst other things, that personal data are processed fairly and lawfully, are accurate and relevant and are subject to appropriate security. All Scottish public authorities will process personal data and therefore need to respect the data protection principles set out in the DPA.

15.2.3 Information covered by the DPA

In order for information to be fully covered by the DPA it must fall within the definition of **data** and also be personal data.

Data are information which are

- processed by computer or other automatic equipment or recorded on paper with the intention of processing it later by computer;
- recorded as part of a '**relevant filing system**', that is a system which is structured by reference to individuals or by reference to criteria relating to individuals (such as payroll numbers) and has sufficient structure to enable specific information relating to a particular individual to be found easily; or
- held on an **accessible record**.

Accessible records are manual files not otherwise covered by the DPA but to which access was previously available under other legislation. These are certain health records, educational records and housing and social services records.

15.2.4 Personal data

The DPA is concerned with personal data; that is information which falls within the definition of data and is also about a living person. The information may be stored under a particular individual's name but personal data which identifies a person in a different manner, for instance by reference to a payroll number, is also covered by the DPA. As long as the information relates to a living person who can be identified from the data or that and other information in the possession of or likely to come into the possession of the data controller it will be protected by the DPA.

However, this does not mean that mere mention of an individual in a document means that the document is their personal data, a data controller will have to consider whether this relates to them. A number of English and European cases have looked at what is covered by the definition of personal data and authorities should seek advice if required.

15.2.5 Sensitive personal data

Some types of personal data are regarded as particularly sensitive – partly because they may be more liable to cause damage or distress to individuals if the data are misused or disclosed without proper authority. The categories of sensitive personal data are listed in the DPA and include racial or ethnic origin or information about an individual's health or sexual life.

15.2.6 Processing

The main effect of the DPA is to control the way in which data are 'processed' by data controllers. **Processing** is another keyword under the DPA and is given a broad definition. Processing includes obtaining or

recording data, the retrieval, consultation or use of data, the disclosure or otherwise making available of data.

15.2.7 **The Principles**

Anyone processing personal data must comply with the eight enforceable data protection principles. These state, broadly, that personal data must be:

- fairly and lawfully processed;
- processed for limited purposes;
- adequate, relevant and not excessive to the purpose of the processing;
- accurate;
- not kept longer than necessary;
- processed in accordance with the data subject's rights;
- held securely;
- not transferred to countries without adequate protection.

15.2.8 **Notification**

The UK Information Commissioner is responsible for keeping a public register of data controllers. All data controllers have to notify the Commissioner of the data they process and the purposes for which they do so unless they fall into an exempt category. The exempt categories cover basic business processing which is unlikely to have a detrimental effect on individuals.

15.2.9 **Grounds for processing data**

In order to carry out any processing of personal data a data controller must have a lawful justification for carrying out the processing. These grounds on which processing can be justified are set out in the DPA. They are reasonably generous. A data controller should be able to find a ground for most processing. The grounds include that the data subject has consented to the data being processed or that the controller is justified in processing for the purpose of his business where there is no damage to the legitimate interests of the individual data subject.

Where the data controller wishes to process sensitive personal data he has to be able to show an additional ground. The grounds for processing sensitive personal data are more stringent and it can be more difficult for the controller to justify the processing of such data.

15.2.10 **Individual rights**

The DPA gives individuals considerable power to influence the actions of data controllers. They are entitled to:

- Access the data held about them (see '**subject access rights**' below);
- prevent processing likely to cause damage or distress;
- prevent processing for the purposes of direct marketing;
- object to automated decisions being taken about them;
- claim compensation for damage or distress caused by a breach of the DPA;
- apply for rectification, blocking or erasure of inaccurate data.

However, there are some limitations and exceptions to these rights which are set out in the DPA.

15.2.11 **The right of subject access**

This is dealt with in more detail as it is the right which will be extended by the changes brought about by the UK Freedom of Information Act 2000 (and which will be brought in in Scotland by way of further legislation). The subject access right gives an individual the right to

- require a data controller to provide a description of the personal data held about them, the purposes for which that data are processed and the classes or types of persons to whom the data are disclosed;
- have the data communicated to them in an intelligible form together with information about the source of the data (where this information is held by the controller);
- be given information about the logic behind any automated decision making.

The data must be supplied in permanent form by way of a copy, except where the supply of a copy in permanent form is not possible or would involve disproportionate effort. The fee for subject access is set in Regulations. It is £10.00 although it may be more if medical or education records are accessed or less for credit reference files. When the right of access is extended by way of further legislation in Scotland there will be different fees for some manual information, these being likely to be those set out in the FOISA fees regulations (which are expected later in 2004).

The changes to the right of subject access are discussed in Modules 16 and 17 but basically, individuals will be able to apply for all information held about them by a public authority rather than previously where they were restricted to computerised data and data falling within a relevant system.

15.2.12 **Exemptions under the DPA**

There are some exemptions to the obligations under the DPA. There are several different kinds of exemption, for example information may be exempt from the right of access or from the restrictions on disclosure. There are a considerable number of subject access exemptions, for

example information may be exempt from access in the interests of national security or because the prevention or detection of crime would be prejudiced by providing access.

15.2.13 **Enforcement**

The DPA is enforced by the UK Information Commissioner. The UK Commissioner has obligations to give advice and assistance to data controllers and to deal with complaints of breach of the principles. He has powers to take formal action to require data controllers to obey the DPA or to prosecute for serious breaches. The UK Information Commissioner is different from the Scottish Information Commissioner. The UK Information Commissioner has responsibility throughout the UK for data protection and has responsibility for freedom of information in England, Wales and Northern Ireland. One of his Assistant Commissioners specifically deals with data protection as it relates to Scotland. The Scottish Information Commissioner only has responsibility for freedom of information in Scotland, not for data protection, although he will liaise closely with the UK Information Commissioner.

15.2.14 **Conclusion**

It is clear that there can be a conflict between the rights to privacy afforded by the Data Protection Act and the rights of access to information which the Freedom of Information (Scotland) Act provide – the interfaces between these two pieces of legislation are dealt with in the following two modules.

15.3 **THE STRATEGIC VIEW**

Authorities should consider staff awareness of data protection issues and whether refresher training or general awareness training would be appropriate.

Staff should be aware how subject access requests are to be handled – whether by referring this to a dedicated member of staff or by staff members direct.

Staff should be aware of the difference between a subject access request and a FOISA request and understand how the different requests should be treated.

15.4 **SUMMARY**

The Data Protection Act 1998 aims to secure individuals' right to privacy by protecting information that is held about them. Any authority that handles personal data must comply with the data protection principles which control how such data are processed. These principles require, amongst others, that personal data should be fairly and lawfully processed, accurate, not kept longer than necessary, held securely and processed in accordance with the data subject's rights. Individuals have the right to ask for a description of the personal data held about them, this is known as a subject access request, and to receive a copy of the information. The DPA only relates to information processed by a computer and to some manual files, such as files which relate to specific individuals.

15.5 KEYWORDS

Accessible Records	These are health, education and some records about local authority tenancies and social services. (Section 68 DPA).
Data Controller	This is a person who, whether on his own or jointly or in common with others, decides the purposes for which personal data are processed and the manner in which they are processed. (Section 1 DPA).
Data Protection Principles	These are the standards of good information handling practice set out in Schedule 1 of the Data Protection Act 1998.
Data Subject	This means an individual who is the subject of personal data. (Section 1 DPA).
Personal Data	This is defined in the Data Protection Act 1998 and means information which relates to a living individual who can be identified from that information or other information in the possession of or likely to come into the possession of the holder of the data. (Section 1 DPA).
Relevant Filing System	This is the term which defines those sets of manual information which are covered by the Data Protection Act 1998. (Section 1 DPA).

15.6 REFERENCES

Section 38 (1) FOISA Exemption for personal information

15.7 RESOURCES

UK Information Commissioner:
www.informationcommissioner.gov.uk

15.8 SELF-ASSESSMENT CHECKLIST

1. The Data Protection Act 1998 requires data controllers to comply with following Data Protection Principles :

- personal data must be processed fairly and lawfully;
- personal data must be adequate, relevant and not excessive;
- personal data must be accurate and secure; and
- personal data must not be kept for longer than is necessary.

TRUE or FALSE ?

2. A data controller stores personal data about its employees under a series of employee code numbers so that the files can be accessed anonymously. However, human resources staff and the payroll manager can identify employees by their code numbers, so this data will still be covered by the Data Protection Act 1998. TRUE or FALSE ?
3. Where a data controller wishes to process sensitive personal data he has to be able to show that either the data subject has consented or that there will be no damage to the legitimate interests of the data subject as a result of the processing. TRUE or FALSE?
4. A student who wants to discover what information about himself is held by the Scottish Higher Education Funding Council may use the Data Protection Act 1998 as the basis for his enquiries. TRUE or FALSE ?

[Click here for answers](#)

15.9 WHAT THEY SAID

"An Act to make new provision for the regulation of the processing of information relating to individuals, including the obtaining, holding, use, or disclosure of such information". (Data Protection Act 1998)

"This is an important area of law. Those advising on it need to understand its context and recognise that there remains areas where there are different interpretations, as yet untested by the courts. But they also need to take a step back every now and again and look at the big picture. The law is there to protect one aspect of a fundamental right and to balance that with others. If we forget that then all we see is regulatory burden". (Elizabeth France CBE, Telecommunications Ombudsman)

15.10 CASE STUDY

COMPARATIVE RIGHTS OF ACCESS UNDER THE DATA PROTECTION ACT 1998 AND FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

The Table of comparative rights of access follows:

COMPARATIVE RIGHTS OF ACCESS UNDER THE DATA PROTECTION ACT 1998 AND FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

Note – In relation to the Data Protection Act these notes do not deal with the special rules which apply for access to accessible records. The DPA will change post 1 January 2005. The provisions that will only apply post January 2005 in the DPA are shown in bold.

ISSUE		DATA PROTECTION	FREEDOM OF INFORMATION
1.	Who can apply for information?	Only the data subject, that is the living individual to whom the particular data relate.	Anyone anywhere can apply for information. This can include limited companies or persons who are overseas.
2.	Who can a request be made to?	Any data controller that is a person or organisation within the public or private sector who determines the manner and purpose of the processing as long as the controller is subject to UK law.	Any Scottish public authority listed in the FOISA.
3.	Can the organisation ask for proof of the identity of the applicant?	Yes, it must do so as the data controller is under an obligation not to disclose information to an unauthorised third party.	No, the applicant must give a name and an address for correspondence but in most cases the identity of the applicant is irrelevant. However if special circumstances apply for example the applicant is suspected of making vexatious or repeat applications then the identity of the applicant may be relevant. Also, the identity of the applicant may be relevant when making a request for a review to a public authority.
4.	How must an application be made?	In writing, this means in a form which gives rise to a permanent record although this may be by e-mail or other electronic mechanism.	In writing, this means in a form which gives rise to a permanent record although this may be by e-mail or other electronic mechanism.
5.	What information can be requested?	All the information which relates to the data subject and which falls with the definition of data in the DPA, that is broadly information held on a computer or in a filing system in which specific information	Any recorded information held by or on behalf of the authority.

ISSUE		DATA PROTECTION	FREEDOM OF INFORMATION
		about the individual can be readily found. It also covers structured files in which specific information cannot be readily accessed and unstructured information.	
6.	Can a fee be charged?	Yes. Generally a fee of up to £10 can be charged.	Yes. Authorities will be able to charge a fee in accordance with Fees Regulations.
7.	When is the fee payable?	When the request is made or prior to the information being provided.	If it wishes to charge a fee once an authority has received a request, it must give the applicant a fees notice. The specified fee must be paid before the authority actions the request for information.
8.	How specific does the request have to be?	The request must enable the authority to locate the information requested. If this is not possible the authority can ask the subject to provide further information and does not have to respond until it has received enough information to handle the request.	The request must enable the authority to locate the information requested. If this is not possible the authority can ask the subject to provide further information and does not have to respond until it has received enough information to handle the request.
9.	Is there a limit to the amount of information that can be requested?	No. The individual is entitled to all the personal data held about him unless it is exempt.	Yes. There is a limit to the searching which an authority must carry out to provide the information. This is set as the appropriate limit.
10.	Does the organisation always have to answer a request for information?	It should always send a reply but in some circumstances it does not have to acknowledge that it holds information.	It should always send a reply but in some circumstances it does not have to acknowledge that it holds information.
11.	Must original documents be provided?	No. The individual is entitled to the information constituting the data not a copy of the actual data.	No. The obligation is to provide information not to provide copy documents.

ISSUE		DATA PROTECTION	FREEDOM OF INFORMATION
12.	Can the applicant insist on having the information in a particular form or format?	No. However, codes must be explained. If it is not possible to provide the information in permanent form without disproportionate effort the information can be provided by other means e.g. inspection.	No. The applicant cannot insist but can specify a preferred form when making the request. An authority must accommodate the request if practicable and if it is not practicable explain why.
13.	How long does the organisation have to respond to a request?	The organisation must respond as soon as possible and in any event within 40 days of receiving a valid request and fee.	The authority must respond within 20 working days.
14.	Are there any exemptions from the obligation to provide information?	Yes. There are a range of exemptions set out in the Act. These are usually applied on a case by case basis.	Yes. There are exemptions set out in the Act.
15.	Can information be excluded or blacked out ("redacted") from documents supplied in response to a request?	Yes, if the information relates to another individual and it is not reasonable to give it or an exemption applies. Where information can be redacted that should be done rather than withholding information.	Yes. Information can be redacted if it is exempt. Information should be redacted rather than access being refused.
16.	What recourse or remedy is there if the authority does not provide the information it should?	The individual can either complain to the Information Commissioner's Office (UK Commissioner) or can go to court.	The complainant must make a request for review to the authority which will reconsider the application. If not satisfied it can be referred to the Scottish Information Commissioner. The Scottish Information Commissioner's decision can then be appealed to the Court of Session.

Task

Without looking back at the comparison table fill in the name of the relevant Act in the right hand box below. When you have finished go back and check your answers against the table.

Rule	DPA or FOISA or BOTH
An aggrieved complainant can take a case to court	
Only the individual to whom the information relates can apply for access to it	
Exemptions may be applicable	
An application must be made in writing	
There is no limit to the amount of information that can be requested	
A response must be provided in 20 working days	

MODULE 16

INTERFACE WITH DATA PROTECTION - HOW DOES FREEDOM OF INFORMATION FIT WITH DATA PROTECTION? APPLICATIONS FOR INFORMATION BY DATA SUBJECTS

16.1 CONTENT AND LEARNING OBJECTIVES

This module and the following one deal with the rules that apply when requests are made for information about people rather than, for example, information about policies or financial information. This module explains how the authority should deal with those cases where people make requests for information about themselves; the previous module (15) provides some further material about the Data Protection Act 1998 ("DPA") and the following module (17) explains how the authority should handle cases where requests are received for information about others. These are referred to as "third party" requests.

This module explains how the rights of individuals to access information about themselves will be changed after FOISA comes into effect. Once you have worked your way through this module you should understand:

- What information individuals will be able to see which they were not able to see before
- The new subject access exemption for certain personnel information
- The requirements on applicants to describe some kinds of information

It will help if you have a basic understanding of data protection to start with. If you do not or are unsure whether your knowledge in this area is sufficiently up to date work through Module 15 before you start this module. Module 15 is a refresher module on the DPA.

NB. As at January 2004 the changes to the DPA have yet to be made for Scotland. The Freedom of Information Act 2000 that applies in England, Wales and Northern Ireland makes the changes in those countries and further legislation will be required to extend these changes to Scottish public authorities. For the purposes of this module we have treated the changes to the DPA as having been made in the same way for Scotland as for the rest of the UK.

SUGGESTED TIME ALLOCATION: 50 minutes

16.2 LEARNING MATERIALS

16.2.1 Introduction

Individuals already have a right of access to information about themselves under the DPA. This is known as the subject access right. It applies to personal data (as covered by the DPA) that are computerised and personal data held in some manual files. (This will be extended under further legislation – discussed below). A request by an individual for access to information about themselves, where this is personal data as covered by the DPA, will be exempt from the right of access under the

Freedom of Information (Scotland) Act and will continue to be handled as a subject access request under the DPA.

Data protection is not a devolved matter although freedom of information in relation to information held by Scottish public authorities is. Public authorities operating in Scotland which are not subject to the FOISA will be subject to the (UK) Freedom of Information Act 2000.

The (UK) Freedom of Information Act 2000 makes a number of amendments to the Data Protection Act 1998 however these will only apply to public authorities which are subject to the UK Act. It is intended that these amendments to the DPA will be applied to Scottish public authorities by further legislation. The changes will extend the definition of "data" in the DPA to cover all information held by a Scottish public authority. The new category of data will be divided into structured and unstructured records. The rights of access, rectification and limited rights of compensation under the DPA will be applied to the new category of data.

16.2.2 Main points

- The definition of data will be applied to cover information held by Scottish public authorities by the addition of a new category of data which will cover all manual records not currently covered by the DPA;
- The DPA will have limited application to this new category of information;
- Subject access will be extended to cover this new category of information;
- There will be special rules to deal with subject access requests relating to the new category of information;
- A new subject access exemption for personnel data in the new category will be introduced.

16.2.3 New Category of Data

At present the DPA only covers personal data in computerised format and in some limited types of manual records. It will be extended for public authorities subject to the FOISA to cover a new category of data. The new category is "recorded information held by a public authority" which does not fall within any of the other categories. This recorded information is broken down into two types:

- Structured – this is information structured by reference to individuals or criteria relating to individuals but that does not fall within a relevant filing system (key word Module 15) (i.e. specific information on individuals is not readily accessible).
- Unstructured – this is all other data and may include notebooks, files not structured by reference to individuals, papers etc.

The right of access will be extended to cover both types of this new category of information. The result will be that ALL recorded information about individuals held by a public authority subject to the FOISA potentially will be covered by the DPA for the purposes of access by the data subject and correction.

16.2.4 **Exemption under FOISA**

Information will be exempt under the FOISA if it is personal data and the applicant is the data subject. Any such application should be dealt with under the subject access rules in the DPA . There is no mechanism under the legislation to transfer a request made under the FOISA and to treat it as a subject access request so the FOISA request should technically be refused and the applicant should be advised to make a subject access request instead. In practice, authorities are likely to have policies in place for dealing with this but they should not simply provide the information as if it were a subject access request unless they are confident that they have enough information to ensure the identity of the applicant, an important issue under the DPA.

16.2.5 **Handling Requests**

A subject access request can be made for both new types of data but under the extended rights of subject access a data subject who wants access to the "unstructured" data has to describe the information so that the public authority can find it. The public authority has no obligation to answer a request for access to unstructured data unless the request contains a description of the information which the data subject seeks. Where the authority needs further information in order to find the information which is requested then it does not have to deal with the request until that information is provided.

Even where the request contains a description sufficient to find the data then the authority does not have to comply if the cost of finding the data would exceed the costs stated in regulations. The authority must however respond to the request and let the applicant know whether the information is held (unless this in itself would exceed the costs limit).

16.2.6 **Application**

The DPA will be of limited application to the new category of data. Such information will not be covered by the DPA for most purposes, including the first principle, requiring fairness, lawfulness and imposing grounds for processing personal data. The provisions which **do** apply are:

- the right of subject access;
- the right to rectification, blocking, erasure or destruction of data where it is inaccurate;
- the right to compensation where the damage is as a result of a breach of the above;
- the powers of the UK Information Commissioner to enforce access rights and accuracy.

None of the other provisions of the DPA apply to this type of data.

16.2.7 Subject Access new exemption

The existing subject access exemptions under the DPA apply to all the data.

There will be a new subject access exemption which applies to the new category of data. The exemption relates to personnel matters concerning service in the armed forces, service in any public office or employment or service under a contract of a public nature. Such information is exempt from most of the DPA principles. However, remember that an applicant will still be able to get personnel information about themselves where it is computerised or forms part of a relevant filing system.

16.3 THE STRATEGIC VIEW

Authorities should consider whether any changes are required to their subject access procedures. In particular, how they will ask applicants to describe information and how they will calculate fees where the information requested under a subject access request falls within the new category of data.

16.4 SUMMARY

When the Freedom of Information (Scotland) Act 2002 comes into force people will be able to make a request for all sorts of information from authorities, but a request by an individual for information about themselves will be exempt under freedom of information and will continue to be handled under data protection. However, certain amendments to the Data Protection Act will be made. At present the Data Protection Act only covers computerised information and some manual files. This will be changed so that all recorded information held by an authority concerning an individual will be covered by the right of access, including information in unstructured files. If individuals want access to unstructured data they must describe the information so that the authority can find it and they may be required to pay a higher fee.

16.5 KEYWORDS

None

16.6 REFERENCES

Section 38 FOISA Personal Information

16.7 RESOURCES

UK Information Commissioner:
www.informationcommissioner.gov.uk

16.8 SELF ASSESSMENT CHECKLIST

1. After January 2005 an individual requesting information about himself will be able to rely on either the FOISA or the Data Protection Act 1998 as the basis for the request. TRUE or FALSE ?
2. After January 2005 the right of access to personal data will be extended to cover records that are not part of a relevant filing system and are not accessible records. TRUE or FALSE ?
3. A public authority that receives a request under the FOISA for access to personal data should deal with the request as a subject access request under the Data Protection Act 1998. TRUE or FALSE ?
4. If a public authority holds a file entitled "Staff Suggestions" in which suggestions are filed on the basis of the function of the employee making the suggestion, after January 2005 an employee would be able to make a subject access request under the Data Protection Act 1998. TRUE or FALSE?
5. Once the new category of data to be covered by the Data Protection Act 1998 is in force, individuals will have greater rights in respect of access to information about themselves than a third party would have about that same individual. TRUE or FALSE ? [Click here for answers](#)

16.9 WHAT THEY SAID

"A wide range of information must be provided to the individual. The definition of personal data is a broad one and the information which must be disclosed will include personal information contained in manual files. Information about the processing must also be provided, not just a copy of the information itself. Third party data must be provided in appropriate circumstances and a set of rules deals with when that will apply". (Jay & Hamilton, Data Protection Law and Practice, Sweet and Maxwell, 2003)

16.10 CASE STUDY

Paul Hammond sees a job advertised which is based in another department of his authority. It would mean a promotion and so he decides to apply for it. He finds out from a colleague that the other people who have applied for the job have less experience and so he is pretty confident of his chances.

During the interview things seem to go really well, until he is asked why he took time off the previous year. Paul responds that his wife had to go into hospital and it took him a few days to sort out childcare arrangements and so he was late for work a couple of times. He had informed his manager and made sure that he made up the time. His wife came home after two weeks and things returned to normal. The interview panel don't look convinced.

Paul finds out a few days later that one of the less qualified applicants was successful. He decides it must have had something to do with the strange discussion about his absence during his wife's illness. He decides to make a request for a copy of his personnel records to see if they say anything damaging about him in connection with this incident.

Task

1. What type of request will Paul need to make to obtain his records?
2. You are the personnel manager at Paul's authority and have to respond to his request. If Paul makes a request after the Freedom of Information (Scotland) Act comes into effect what information will you provide him with?
3. It turns out that Paul's files incorrectly state that he took two months off when his wife was ill. What advice would you give him on his rights in connection with this error?

MODULE 17

INTERFACE WITH DATA PROTECTION - HOW DOES FREEDOM OF INFORMATION FIT WITH DATA PROTECTION? APPLICATION FOR INFORMATION BY THOSE OTHER THAN THE SUBJECT OF THE DATA

17.1 CONTENT AND LEARNING OBJECTIVES

This module explains how personal privacy is protected so that the right of access under freedom of information does not jeopardise people's privacy. It sets out the issues which have to be reconciled when dealing with access rights and the privacy of individuals. It explains the way this is being handled in the legislation and the reasoning behind the decision to do it in this way. The module follows on from 15 and 16. Once you have worked your way through this module you should understand:

- How there can be tensions between the rights of access and privacy
- The exemption which is applied to protect the right of privacy
- Why the exemption takes the form of a set of rules to decide whether the right of privacy or the right of access takes precedence
- How those rules apply

In this module requests which are made for information about another individual are referred to as "third party requests" for information.

SUGGESTED TIME ALLOCATION: 1 hour

17.2 LEARNING MATERIALS

Personal information the disclosure of which would interfere with the legitimate privacy of another person is exempt from the right of access. Although the aim and effect of this exemption is to protect the personal privacy of living individuals it does not refer to the protection of privacy. The exemption is set out in a rather technical way. There are three aspects to the exemption. One aspect of the exemption is absolute and the other two are non-absolute.

17.2.1 What information about people is covered?

Personal data as defined in the DPA (as extended by further legislation) are covered by this exemption. Companies or public bodies do not have a right of privacy protected by this exemption, although the confidentiality of their information may be protected under other exemptions.

17.2.2 What about information about those who have died?

In the Freedom of Information (Scotland) Act 2002 there are some specific rules which allow the public authority to protect the privacy of those who have died. This applies to the health records of those who have died and to personal information from past censuses.

These are records consisting of information relating to the physical or mental health of an individual that have been made by or on behalf of a health professional in connection with the care of that individual. It must

be possible for the holder of the health record to be able to identify the individual to which it relates either from the record alone or from the record and other information held by them. **Personal census information** is information which relates to an identifiable person or household and was acquired as part of a census.

In both cases the information will remain unobtainable for 100 years after the relevant record was created.

Otherwise the Access to Health Records Act 1990 provides that the deceased patient's personal representative and any person who may have a claim arising out of the patient's death, may apply for that patient's health records. In Scotland, this would usually be done by the executor of the deceased person's estate. However in many cases such information will also relate to others who are still living, for example family members and their privacy rights should be borne in mind.

17.2.3 Why is the exemption arranged in such a technical way?

It reflects the protection given to personal data by the Data Protection Act 1998. There is a European Directive on data protection so the UK has to have a Data Protection Act which complies with the Directive. If the protection given to personal data was reduced because of rights of access under freedom of information, the UK could be taken to the European Court. The exemption has therefore been framed to make sure that this should not happen.

17.2.4 Is personal information exempt from all of the requirements of the FOISA?

No. Apart from the access exemption the usual rules apply such as the provision of advice and assistance, charging provisions, locating the information sought, refusals and the inclusion of information in publication schemes.

17.2.5 What are the three aspects of the exemption?

1. Personal data will be exempt if the disclosure of the information to a member of the public would breach the standards for protection of personal data in the data protection principles (See module 15 for an overview of the principles).
2. Personal data will be exempt if the authority would not provide it to the person themselves if he or she made a subject access request under the DPA. (This means that all the subject access exemptions come into consideration, including the new exemption in relation to personnel information). (See module 15 for an overview of the subject access exemptions).
3. Personal data will be exempt where the individual has lodged an objection under the Data Protection Act and that objection has been accepted by the public authority.

17.2.6 Are these absolute or non-absolute exemptions?

Where the authority is considering withholding information because it would be a breach of the principles to provide it, the exemption is absolute. However this does not mean that the authority can ignore the question of the public interest in making a disclosure. This is because under the principles the authority has to consider the fairness of any disclosure. However the presumption under the principles will be to protect privacy rather than to provide access.

Where the authority is considering withholding information on the grounds that the information would not be given to the subject or that the authority has already accepted an objection to the processing, these exemptions are non-absolute and the authority has to consider the public interest before refusing access.

17.2.7 Does the authority have to tell the applicant whether they hold the information?

Generally where a third party request is made, even if the information itself is exempt, the authority must still tell the applicant whether it holds it by serving a refusal notice.

17.2.8 If this exemption applies do I still need to look at the other exemptions?

The FOISA exemptions must also be considered as the exemption to protect personal privacy is not an exclusive one.

17.2.9 Applying the principles

It will not always be easy to decide whether a disclosure of personal information under the FOISA will be in breach of the principles. The disclosure should be regarded as being a disclosure into the public domain. The identity of the applicant or the applicant's reasons for wanting the information are not relevant to the decision whether to disclose.

The following issues should be considered when making a decision on disclosure:

- is the information subject to a legal obligation of confidence in the hands of the authority?
- does the information fall into one or more of the categories of sensitive personal data under the Data Protection Act?
- in what circumstances was the information obtained or collected? In particular was the individual made aware that the authority might be asked to disclose the information under the FOISA?
- is the individual a public figure or a private person?
- is the information concerned with the person's private life or his or her public or professional life?

- is the information to be transferred overseas?
- is the data information that the individual might object to being disclosed?
- are there strong reasons in the public interest that would make it fair to disclose even if the individual raised objections?

Overall would it be unfair to the individual in all the circumstances of the case to disclose the information?

If the authority considers that it wishes to disclose or that disclosure is a possibility it should notify the individual and take account of his or her wishes. The authority does not have to be bound by the individual's wishes but should take them into account.

17.2.10 Applying the subject access exemptions

This is a non-absolute part of the exemption, so even though an authority would be able to refuse to provide the information to the individual, it may choose to disclose under FOISA if it considers that the public interest in providing the information is sufficiently strong.

The subject access exemptions cover a wide range of circumstances ranging from cases where the provision of information would prejudice the prevention or detection of crime to withholding examination marks until the results of public examinations are announced.

Several of the exemptions are similar to ones found in the FOISA. Authorities should ensure that they are familiar with the range of subject access exemptions in the DPA.

17.2.11 Applying the right of objection

An individual who is the subject of personal data has a right under the DPA to lodge a formal objection to processing under section 10 DPA. The individual has to specify the processing in question and assert that the continued processing would cause substantial unwarranted damage or distress to him or another. A data controller must consider any such objection and notify the individual whether he is prepared to accept the notice. If the data controller is not prepared to do so the individual can apply to a court for an order requiring the controller to accept the notice.

Where there has been a gap of time between the acceptance of a notice by the authority and a request, the authority should check with the individual that the objection still stands before refusing an access request in reliance on such a notice.

17.3 THE STRATEGIC VIEW

Consider how freedom of information access rights impact on confidentiality and data protection obligations with respect to employees and agents and how freedom of information disclosure procedures will balance the interests of applicants for information with the interests of data subjects.

Authorities should consider monitoring and reporting procedures that track the different types of request.

17.4 SUMMARY

If someone makes a request for information about another living individual, this will be handled under the Freedom of Information (Scotland) Act, but data protection considerations will still apply. The authority will not have to provide the information

- if the disclosure would breach the data protection principles;
- if the authority would not provide the information to the data subject themselves if they requested it or if the individual has lodged an objection under the Data Protection Act which has been accepted by the authority;

If the authority decides that it may wish to disclose the information after applying these considerations, it should notify the individual and take account of their wishes. The authority does not have to be bound by the views of the individual.

17.5 KEYWORDS

Personal Census Information	This is information collected under the Census which relates to an identifiable person or household. (Section 38 FOISA).
------------------------------------	--

17.6 REFERENCES

Section 38 FOISA Personal Information

17.7 RESOURCES

UK Information Commissioner:
www.informationcommissioner.gov.uk

17.8 SELF ASSESSMENT CHECKLIST

1. Data under the Data Protection Act 1998 is defined as information relating to any living individual who can be identified by that information, so the privacy of those who have died is not protected. TRUE or FALSE ?
2. Information acquired as part of a census is only protected from the right of access where the information relates to an identifiable person or household. TRUE or FALSE ?

3. If an individual makes a request for information about a third party under the FOISA, a public authority must consider the exemptions to subject access requests under the Data Protection Act 1998. TRUE or FALSE ?
4. If an individual lodges an objection to disclosure of information under the Data Protection Act 1998 the public authority is obliged to withhold that information if such information becomes the subject of a FOISA request. TRUE or FALSE?
5. If a request is made for information that is the subject of a section 10 objection, the authority should notify the data subject that a request has been made. TRUE or FALSE ? [Click here for answers](#)

17.9 WHAT THEY SAID?

"When freedom of information regimes are discussed exemptions always get a lot of attention and they are perhaps, understandably, seldom popular. There is no doubt that the right of access must be carefully balanced against the right to privacy and confidentiality and the need to ensure that sensitive information is properly protected. We have sought to find the right balance and, in doing so have tipped the scales decisively in favour of openness" (Jim Wallace - MSP)

17.10 CASE STUDY

(this continues from the story in Module 16)

When Paul Hammond's wife, Mandy, was in hospital she underwent surgery which involved the use of a new technique. The technique seemed to solve her problems at the time, but over the year the problems have reoccurred, but much worse and she is now in a great deal of pain as a consequence of the operation.

One day Mandy opens the post and there is a letter from a research student asking if he can come and interview her about how the operation went and her subsequent recovery. Mandy is very upset and cannot believe that the hospital has given her details to the researcher.

Task

1. When the student contacted the hospital asking for information about third parties, what sort of request would he have made?
2. Should the hospital have contacted Mandy before it gave her details to the researcher?
3. It turns out that Mandy was given a standard document before her operation advising her that her records might be made available to researchers who might want to contact her in the future. Mandy had totally forgotten about this document. Does she have any rights to object? Was the hospital allowed to give her such a document?
4. Could the hospital have given the researcher Mandy's records after removing all references to her?

MODULE 18

HUMAN RIGHTS

18.1 CONTENT AND LEARNING OBJECTIVES

This module explains the scope of the relationship with the Human Rights Act 1998. Once you have worked your way through this module you should understand:

- How the Human Rights Act 1998 applies in the UK
- The two Convention Rights that have most bearing on access to information, that is the right to privacy and the right to freedom of expression
- The balance between these two Convention Rights

This module is included as the Human Rights Act 1998 has a fundamental impact on everything that public authorities do, including on the provision of information. It is important to understand the human rights background when considering FOISA.

SUGGESTED TIME ALLOCATION: 50 minutes

18.2 LEARNING MATERIALS

18.2.1 Human Rights Act 1998 ("HRA")

The HRA applies throughout the UK. Because of the Scotland Act 1998, members of the Scottish Executive were restricted from acting in a manner incompatible with Convention Rights from 6 May 1999. For the rest of the UK the HRA came into force on 2nd October 2000. All **public authorities** in the United Kingdom are subject to it.

18.2.2 What are the rights protected by the HRA?

The rights are set out in a schedule to the HRA and are called the **Convention Rights**. There are over a dozen Convention Rights. Each right is set out in a separate **Article**. The Articles are taken from the European Convention on which the HRA is based. The Convention Rights can look a bit old fashioned to modern eyes because attitudes towards society and authority have changed since the 1950s and some of the things that we would expect to see are not included. For example there is no separate right to be protected from discrimination on grounds of sex, race or colour. However there have been some additions since the 1950s and, more importantly, the way the rights are applied has been kept up-to-date by the approach of the European Court which rules on cases concerning these rights. The Court will interpret the rights in the light of present day attitudes bearing in mind the underlying purpose of the Convention which is to ensure individual rights in a democracy.

18.2.3 What kind of rights do we have as members of the public?

There are different kinds of rights and the way that they apply varies depending on the right involved.

(a) Is there a right to privacy?

There is no general right that can be enforced against anybody who interferes with an individual's privacy. Article 8 protects private and family life, home and correspondence from interference by the **State**. The Article goes on to say that the State can interfere with that privacy but only where the interfering behaviour passes three tests. The three tests are set out below.

- is the interference intended to protect another important public interest, listed in Article 8 as "...the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"?
- is the public authority that is interfering entitled to do so legally? – In other words, there must be a law or proper set of rules governing its behaviour.
- is the interference reasonable and proportionate? In other words, the degree and nature of the interference can be justified in the particular case in the light of the public interest being protected.

For example the police cannot arbitrarily enter and search private premises, or open people's letters without proper justification and authority.

(b) Is there a right of access to information?

There is no general right of access to information under the HRA.

Article 10 protects freedom of expression. This includes the right to hold opinions and receive and impart ideas. As with the right to privacy the State can interfere with this right but the interfering behaviour must pass the three tests set out below.

- is the interference intended to protect another important public interest, listed in Article 10 (2) as "... the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others..."?
- is the public authority that is doing the interfering entitled to do so legally? – In other words, there must be a law or proper set of rules governing its behaviour; and

- is the interference reasonable and proportionate? In other words, the degree and nature of the interference can be justified in the particular case in the light of the public interest being protected.

So the right of freedom of information is not one of the Convention Rights.

18.2.4 The Human Rights Act and the devolution settlement

The powers of the Scottish Parliament are limited to dealing with devolved matters. An Act of the Scottish Parliament cannot be passed which is incompatible with the Convention rights. Members of the Scottish Executive cannot do any act or make any subordinate legislation if it would be incompatible with any of the Convention rights.

18.2.5 Convention Rights, Privacy and Freedom of Information

We have seen earlier in this module that the right to private and family life and the right to freedom of expression are Convention Rights. The Scottish Parliament and Scottish public authorities have to comply with these and make sure that people's rights are not interfered with. We have also seen that the right to freedom of expression does not include a right to access to information.

Does this mean that there is a stronger legal protection for the right to privacy than for the right to have access to information?

As the law stands at present the privacy of personal information is protected by the Data Protection Act 1998 (the "DPA"). The DPA was passed because of a requirement by the European Union that all Member States in the Union have laws that meet a set of European standards set out in a Directive. The UK cannot reduce the privacy protection provided by the DPA. In effect this may mean that if there is a conflict between rights of privacy and rights of access the right of privacy will be the stronger.

18.3 THE STRATEGIC VIEW

Authorities should already have a procedure for considering the impact of the Human Rights Act on their processes.

It would also be helpful for staff to have a general understanding of human rights issues and how this might affect their relationship with the public.

18.4 SUMMARY

Public authorities have various powers over the lives of citizens and over businesses. In a democracy ordinary citizens and businesses are entitled to a number of rights and freedoms, like the right to free elections. The Human Rights Act 1998 sets limits on how public authorities can behave when they are exercising those powers; another way of putting this is that it gives people a guarantee that their fundamental rights will be respected by the State.

18.5 KEYWORDS

Article	The Convention Rights are set out in articles, for example, Article 8 deals with the right to respect for private and family life. In UK legislation we more usually refer to sections. (European Convention of Human Rights).
Convention Rights	This term is defined in the Human Rights Act 1998. The Convention Rights mean the rights and fundamental freedoms set out at particular articles of the Convention on Human Rights and Fundamental Freedoms. These Rights cover the right to life, a prohibition on torture, a prohibition on slavery and forced labour, a right to liberty and security of person, a right to a fair trial, the right not to be punished without law, the right to respect for private and family life, the right to freedom of thought, conscience and religion, the right to freedom of expression, the right to freedom of assembly and association, the right to marry, the right to education, the right to free elections and rights to protection of property. (European Convention of Human Rights).
Directive	A Directive is a law passed by the European Union binding upon countries which are part of the European Union. It does not have direct effect in countries in the Union but each country has to pass a national law which meets the standards in the Directive.
European Court of Human Rights	This court administers the European Convention on Human Rights. It sits in Strasbourg. It operates within the framework of the Council of Europe. It is different from the European Court of Justice which is the court of the European Union and is based in Luxembourg.
Public Authorities	These are organisations which carry out public functions. A public function is something which is carried out by or on behalf of the State, for example the provision of publicly funded health care.
State	This is not defined in the Human Rights Act or the Freedom of Information (Scotland) Act. It is a general term used for the organisations that exercise public powers. It does not only cover central government; any public authority is part of the State. The action of any public authority is an action of the State.

18.6 REFERENCES

Section 1 Human Rights Act 1998 The Convention Rights

18.7 RESOURCES

Human Rights Act 1998:

www.hmsso.gov.uk

18.8 SELF ASSESSMENT CHECKLIST

1. The Scottish Parliament cannot pass legislation which is incompatible with the Convention because compliance with the obligations of the European Convention is a reserved matter. TRUE or FALSE ?
2. Article 8 of the European Convention, the right to privacy, is an absolute right. TRUE or FALSE ?
3. If your local football club refuses your application for a season ticket because you are female and not of Scottish descent, you can bring a court action under the Human Rights Act 1998 against the club for discrimination on grounds of sex and race. TRUE or FALSE ?
4. The right of freedom of information is not one of the Convention Rights. TRUE or FALSE ? [Click here for answers](#)

18.9 WHAT THEY SAID

"The full effect of the Human Rights Act on our legal system, and on society as a whole, has yet to be felt. It is, however, clear that the role of information in our society makes it increasingly important to develop respect among data controllers for the private lives of individuals and to ensure good information handling practice". (Office of the Information Commissioner, Data Protection Act 1998, Legal Guidance.)

18.10 CASE STUDY

Traditional sports such as boxing and wrestling have increased in popularity over the last few years along with newer forms of martial arts such as sumo wrestling, judo and karate which have many followers.

In a small town in mid-Scotland, all the local martial arts team have open championships and lists of participants and rankings are routinely published in the local newspaper and put up in clubs and leisure centres. There is a very popular youth culture in these activities and many competitions.

The competitions have always given rise to some policing concerns which have in the past been centred around links to gambling. However, more recently research by the local university has pinpointed a statistically very strong link between participation in martial arts as a competitive sport and participation in a type of criminal behaviour which is also very popular with local youths – joyriding.

Joyriding raises a number of serious issues for the police. Not only is it a criminal activity in itself and a cause of danger and nuisance to others but it is also a cause of significant injury to children who are involved in the activity.

It has been suggested that it would be sensible to build a record of those youngsters who take part in martial sports and to use it as a basis for an intelligence database when incidents of joyriding come up. After some discussion it is agreed that this will take place. The material is gathered quietly from published sources, for

example, local newspapers, lists put up in sports clubs, material gathered at local competitions and is held by the police on a computer. Increasingly whenever a juvenile is pulled in for any occurrence, not merely joyriding or even necessarily criminal behaviour, a check is made of this record.

One of the parents discovers this and is incensed that the police are keeping a record of his son's interest in martial arts, the competitions he has entered and his location. On behalf of the child he launches an action under the Human Rights Act to require the police to remove this record.

Task

Consider the issues here and build up a list of a few bullet points in argument either for or against the retention of these records under the Human Rights Act 1998.

MODULE 19

REVIEWS, DECISIONS AND ENFORCEMENT

19.1 CONTENT AND LEARNING OBJECTIVES

This module explains more about the requirement for reviews and the work of the Scottish Information Commissioner. When you have worked your way through this module you should understand:

- the requirement for reviews
- the role and powers of the Scottish Information Commissioner
- obligations of the Commissioner in relation to complaints
- decision notices
- information notices
- enforcement notices
- warrants
- powers of the First Minister to override the Commissioner
- consequences of failure to comply with a notice
- the offence of destroying existing information once a request has been received

SUGGESTED TIME ALLOCATION: 1 hour

19.2 LEARNING MATERIALS

19.2.1 Requirement for review

There will be cases where an applicant for information is dissatisfied with the response by the authority. For example the applicant may consider that the fee the authority wants is too high, or that the authority has not given the advice and assistance that it should have done, or may be unhappy that the authority has refused to provide the information which the applicant requested. If the applicant is dissatisfied in any way he or she can require the authority to review the way it has handled the request or the decision that it has reached.

The applicant has 40 days in which to lodge this **requirement for review**. Like a request under the Act a requirement for review must be in writing or other permanent form and give an address for correspondence. The applicant must describe the original request and explain how he or she is dissatisfied.

The 40 days is counted either from:

- the end of the time when the authority should have answered the request – this means that an applicant can apply for a review where the authority has not responded to the request; or
- the date that the applicant received a response from the authority, for example a notice of refusal, if the authority has not managed to respond within the time it should have done – this means that the applicant still has 40 days, even if it takes the authority longer than it should do to respond.

The authority does not have to carry out a review if it has decided that it did not have to answer the request because it was one it has already dealt with (a repeated request) or was a vexatious request. However it cannot ignore the requirement for a review and must write and tell the applicant of its decision. Otherwise the authority has to review its original actions. It may decide to stick with its original decision or may decide to modify it or provide more information.

The authority must handle the requirement for a review within 20 working days after it receives the request, unless the request involves material which has been transferred to the Keeper of the Records of Scotland in which case the period is 30 working days.

Whatever it decides to do it must tell the applicant and explain why it has decided to act as it has. It must also tell the applicant about his or her rights to complain to the Scottish Information Commissioner.

The Code to be issued under section 60 deals with the obligation to carry out reviews:

It gives the following advice:

- A requirement for a review is likely to be distinct from other complaints handling procedures that exist in an authority.
- An authority must have an appropriate and accessible procedure for handling reviews which should be fair and impartial and enable different decisions to be made if appropriate.
- Review procedures should be straightforward and capable of producing prompt determinations.
- Review procedures should address the access needs of disabled applicants.
- The matter should be considered afresh, preferably by those who did not handle the original decision.
- Where the decision is that information should be disclosed then this must be disclosed promptly and no later than the 20 working day period for carrying out the review.

- An authority should apologise to an applicant if the review finds that procedures have not been followed and consider how to prevent this happening again.

19.2.2 **Role and powers of the Scottish Information Commissioner**

The Commissioner is a crucial figure in the FOISA regime. The Commissioner has an important role in dealing with complaints about the responses of public authorities but his role is much wider than handling complaints. The Commissioner must:

- promote good practice with a view to ensuring that public authorities comply with the Act and follow the Codes of Practice;
- disseminate information to the public about the operation of the Act, good practice and other matters to do with FOISA;
- give advice to the public;
- assess whether a Scottish public authority is following good practice; and
- report annually to the Scottish Parliament on the exercise of his functions.

The Commissioner also has various powers to investigate and enforce which are covered in the remainder of this module.

The Commissioner and his staff have obligations to keep information which is disclosed to them as confidential.

19.2.3 **Obligations of the Commissioner in relation to complaints**

An applicant who is dissatisfied with his or her treatment at the hands of the public authority can make a request for a decision to the Commissioner. However the applicant must have used the review procedure and either be dissatisfied with the response or have had no response before he or she can make an application to the Commissioner.

The applicant has a period of 6 months after he or she receives, or should have received, the decision of the authority following the review in which to make an application to the Commissioner. The Commissioner can deal with complaints lodged outside that period if he chooses to do so. The applicant should describe:

- the request for information that was made and what is to be reviewed by the Commissioner;
- the reason for being dissatisfied with the response received from the public authority;
- the reason for being dissatisfied with the outcome of the review or the failure to conduct a review by the public authority.

The Commissioner may decide not to proceed on the grounds that the request to him is frivolous or vexatious and the applicant can withdraw the complaint at any time. If he does not proceed to make a decision then he must tell the applicant and the authority and explain why he is not making a decision in the case.

If the Commissioner decides to handle the application he must notify the authority about it and invite its comments. He may try to resolve the complaint between the applicant and the authority but if he is not able to achieve this he must make a decision on the case and notify both sides. This is a **decision notice**. He generally has four months from the time he received the complaint to do this.

19.2.4 **Decision notices**

The Commissioner may decide that the authority did not have to provide the information requested or that it should have done so or should have handled the application differently. If he decides that the complaint was justified the decision notice must say:

- how the authority has failed in its obligations under the Act;
- what it must do to set that right;
- the length of time allowed it to do so; and
- the authority's rights to appeal to the Court of Session against the ruling on a point of law.

If the notice finds in favour of the authority then the applicant has a right of appeal to the Court of Session, again on a point of law.

19.2.5 **Powers of the Commissioner to require information**

In some cases the Commissioner may require more information than the applicant is able to supply in order to decide on the complaint. He may also require information if he has concerns that an authority is not complying with the Act in other ways or is not meeting the requirements of the codes of practice. In such cases he can serve a notice called an **information notice**.

An information notice must contain:

- a description of the information required;
- a statement that the Commissioner has received an application for a decision if this is the case, or
- a statement that the Commissioner regards the information as reasonably required in order to ascertain whether the authority is complying with the Act or code of practice;
- information that the recipient has a right of appeal to the Court of Session against the notice but only on a point of law.

Once an authority receives an information notice it must respond within the period set out in the notice. An authority does not have to provide material which would be **legally privileged** but otherwise cannot refuse to supply information on the grounds that it is confidential or in any other way restricted.

If an authority makes a statement which is false in response to an information notice and either it knows it to be false or is reckless as to its truth, or the authority fails to respond to the notice the Commissioner can refer the authority to the Court of Session which can take action against the authority for contempt of court.

19.2.6 **The use of enforcement notices**

Decision notices are used where the Commissioner has received a specific complaint from an applicant about a failure to handle a request properly but the Commissioner can also serve notices in other circumstances. The Commissioner may become aware that an authority is not complying with its duties in other ways, for example it may not be providing advice and assistance to applicants or it may not be complying with its publication scheme.

The Commissioner has a general power to serve an **enforcement notice** in any case where he is satisfied that the authority has not complied with the Act. The notice must tell the authority:

- with which provision of the Act it has failed to comply;
- what steps it must take to put things right; and
- the authority's right to appeal to the Court of Session against the ruling on a point of law.

19.2.7 **Warrant powers**

In exceptional cases the Commissioner may need to enter the premises of an authority and seize documents and materials in order to deal with either a complaint or an allegation that the authority has not complied with the Act or is in serious breach of a requirement imposed by a notice. Such incidents are likely to be unusual, but the Act provides for them by allowing the Commissioner to apply for **warrants** of entry without notice in some cases.

19.2.8 **Powers of the First Minister to override the Commissioner**

The First Minister can overrule the decision of the Commissioner where:

- a notice has been served on the Scottish Administration requiring it to provide information;
- the Administration had claimed an exemption on one of the grounds related to public policy, national security, international relations, criminal investigations, confidentiality or Royal honours; and

- the First Minister considers that the information is of exceptional sensitivity.

The First Minister has to consult the other members of the Executive before taking this action and must provide a certificate which is laid before Parliament.

19.2.9 Consequences for the authority if it fails to comply with a ruling of the Commissioner

It is unlikely that any public authority will fail to comply once it has received an information, decision or enforcement notice but if this does occur the Commissioner may bring the authority before the Court of Session. The Court has the power to hold an inquiry and hear witnesses. If it is satisfied that the authority has failed to comply it may deal with it as contempt of court. Under Section 15 of the Contempt of Court Act 1981, the maximum penalty for being found in contempt of court in Scotland, is two years imprisonment or an unlimited fine or both. It would be the public authority itself that was taken to court rather than an individual and so the penalty would most likely be a fine rather than the head or governing board of the authority being imprisoned.

19.2.10 What can happen if information is destroyed or erased after a request has been received?

Where a Scottish public authority receives a request under the Act for information which it would be obliged to disclose, either in whole or in part, the information must not be tampered with in any way. It is a criminal offence to alter, deface, erase, destroy or conceal a record held by an authority after a request has been received unless the authority would not have to provide it to the requester.

The offence can be committed by anyone who works for a Scottish public authority, either as a direct employee or merely under the direction of the authority. The authority itself can also be prosecuted.

Example:

If the superior officer of an authority ordered a subordinate to destroy material in order to evade answering a request, the legal responsibility would rest with the authority and the senior official but not with the junior member of staff who carried out the orders. On the other hand if a junior employee took it upon him or herself to erase or destroy information after receiving a request, the employee would be personally liable to prosecution.

Cases will be brought in the Sheriff court and the punishment for anyone found guilty of such an offence is a fine of up to £5000 in the Sheriff court. However the Scottish Parliament or the Parliamentary Corporation or the Scottish Administration cannot be prosecuted for this offence, although individual members of their staff may be.

19.3 THE STRATEGIC VIEW

Authorities should consider their review and complaints procedures, ensure that these are publicised and that they are effective.

Authorities should learn from any upheld complaints and adapt procedures to take these into account.

Authorities should ensure that any correspondence or enquiry from the Scottish Information Commissioner is dealt with promptly and thoroughly.

It may be useful for authorities to monitor any decisions made by the Commissioner and any enforcement notices that become publicly available so that these can be learnt from.

19.4 SUMMARY

The Scottish Information Commissioner is a fully independent public official. His duties and legal powers should ensure that people get the information from Scottish public authorities to which they are entitled.

Complaints concerning requests can only be made to the Scottish Information Commissioner once an applicant has exhausted the authority's review procedure. If an applicant is dissatisfied with an authority's response to a request, the applicant has 40 days in which to request that the authority reviews its decision. The authority must handle the requirement for review within 20 working days and must notify the applicant of any decisions or actions taken in response.

If an applicant is dissatisfied with the response from the authority, he or she can take their complaint to the Scottish Information Commissioner. The Commissioner will then decide whether to proceed with the complaint. In all cases the Commissioner will notify both the applicant and the authority of his decision.

On occasions the Commissioner will require more information before he can make a decision concerning a complaint and so he may issue the authority with an information notice. The notice will describe what further information is needed and the authority must respond within the deadline set out in the notice.

If the Commissioner becomes aware that an authority is not complying with its duties under the Act, such as the duty to provide advice and assistance, he can issue an enforcement notice, informing the authority which part of the Act it is failing to comply with and what it needs to do to put things right.

Although the Scottish Information Commissioner is responsible for overseeing the Act, there are a small number of occasions when the courts may become involved. It is a criminal offence for anyone to destroy or erase information after a request has been received. This offence can be committed by the authority or its employees. Such cases will be dealt with in the Sheriff court and the offence carries a fine of up to £5000.

If an authority fails to comply with any notice served by the Commissioner, he can bring the authority before the Court of Session. If the Court is satisfied that the authority has failed to comply it may deal with it as a contempt of court. The Court

of Session will also deal with appeals made by authorities or applicants in relation to the Act.

In most cases the Commissioner will make the final decision regarding what information should be released, but there is one exception. The First Minister can overrule the Commissioner when it relates to certain decisions taken by the Scottish Administration.

19.5 KEYWORDS

Decision Notice	The Commissioner has to make a decision about complaints of non-compliance with requests which are made to him. These are embodied in decision notices. (Section 49 FOISA).
Enforcement Notice	This is the written notice which may be served by the Scottish Information Commissioner if he is satisfied that a Scottish public authority has failed to comply with relevant parts of the Act. The notice will require the authority to take specified steps in order to comply. (Section 51 FOISA).
Information Notice	This is a notice in writing which the Scottish Information Commissioner can give in certain circumstances where he requires information to deal with a complaint or check on compliance. (Section 50 FOISA).
Legal Privilege	This describes the right to consult lawyers about one's legal position and to have the privacy of those consultations respected. Such information is privileged from disclosure or being seized by a law enforcement agency in most circumstances.
Requirement for Review	This occurs where an applicant who is not happy with the way in which a Scottish public authority has dealt with a request for information may require the authority to review its actions and decisions. (Section 20 FOISA).
Warrant	A warrant is an order of the court entitling named or specified individuals to access premises and carry out searches without the consent of the occupier.

19.6 REFERENCES

Section 21	Review by Scottish public authority
Section 42	The Scottish Information Commissioner
Section 43	Functions of the Commissioner
Section 45	Confidentiality of information obtained by or furnished to the Commissioner

Section 46	Laying of Report
Section 47	Application for decision by Commissioner
Section 48	When application excluded
Section 49	Commissioner's Decision
Section 50	Information Notices
Section 51	Enforcement Notices
Section 52	Exception from duty to comply with Notices
Section 53	Failure to comply with notice
Section 54	Powers of entry and inspection
Section 55	No civil right of action
Section 56	Appeal against Notices
Section 65	Offence of altering etc records with intent to prevent disclosure.

19.7 RESOURCES

SIC Site:

www.itspublicknowledge.info

19.8 SELF ASSESSMENT CHECKLIST

1. If an applicant is dissatisfied with a public authority's response to a request for information, the applicant may complain to the Scottish Information Commissioner. TRUE or FALSE ?
2. If an authority decides that it was not obliged to respond to a request in the first place, it is not required to carry out a review. TRUE or FALSE ?
3. A solicitor in the legal department of a public authority is caught deliberately destroying a report following a request from a member of a local pressure group for access to the report. Both the solicitor and the authority have committed a criminal offence and can be prosecuted under section 65 of the Act. TRUE or FALSE ?
4. The pressure group that has been unable to gain access to the report destroyed by the misguided in-house solicitor, requests that the authority carries out a review of its handling of the group's access request. After nearly 3 months and no response from the authority, the group can take the authority to court. TRUE or FALSE ?
5. In disgust, the pressure group sends an e-mail to the Commissioner explaining its request to the authority for the report and the authority's failure to respond in any way to the request after 3 months, even though the group is sure the report exists. The Commissioner's Office can reply to the effect that a request by e-mail for a review is not valid. TRUE or FALSE ?

6. Having established from the authority that it is trying to recover a copy of the destroyed report from back-up tapes made of all electronic documents produced by the authority, the Commissioner can serve an Enforcement Notice on the basis that the authority has failed to respond promptly to a request for access to information. TRUE or FALSE ?

[Click here for answers](#)

19.9 WHAT THEY SAID

"The role of the Commissioner is at the heart of the Bill. He or she will be crucial to the development of the legislation and its operation and policing and will make a great deal of difference to how the legislation develops" (Christine Graham – MSP)

"An independent arbiter to supervise the regime" (Jim Wallace – MSP)

"The Commissioner's independence will ensure the integrity and credibility of the regime. Applicants will be reassured that authorities will not be able to stall and stall and stall before responding" (Jim Wallace – MSP)

19.10 CASE STUDY

Myles Hendry was employed by a Scottish Waste Disposal Authority which is responsible for ensuring the decontamination of brownfield sites owned by the public sector. The Authority carries out some projects itself but also lets contracts to external contractors. Myles Hendry worked on the administration of internal projects. He did not deal with the contracts with outside companies but was aware that the Authority held a range of information about its external contracts including material about experts who worked on the various projects.

He left the Authority after a heated disagreement with his supervisor. After he left the Authority he worked for an accountancy firm for 18 months but has recently moved to work for a contractor which specialises in decontamination work. The contractor is considering appointing some expert staff and wants to find out who has been used by the Authority. Myles describes the sorts of information they held when he worked there and the contractor makes an access request specifically asking for material about individual experts.

The Authority responds saying that it does not have any information on individual experts. The Authority has deleted this information following a review of its records management although it does not explain this to the contractor. On the basis of the information provided by Myles, the contractor is convinced that the Authority is concealing the information about individual experts.

The contractor applies to the Waste Disposal Authority for a review stating that it does not believe the statement made by the Authority that it holds no material about individuals. It does not state the basis for its belief that the Authority has information about individual experts.

Task

1. How do you think the Authority should respond? Make a list of points it may consider including in its response.

2. If the contractor is unhappy with your response and refers the issue to the Scottish Information Commissioner, what action may the Commissioner take?
3. What advice would you give the Authority if it subsequently transpires that someone from the Authority has deliberately destroyed the information on individual experts in order to avoid responding to the request?

MODULE 20

FINAL REVIEW

20.1 CONTENT AND LEARNING OBJECTIVES

This module summarises what has been covered in the second part of the workbook. You may also wish to review Module 10 again now, as well as the self assessment questions and case studies from previous modules.

SUGGESTED TIME ALLOCATION: 50 minutes

20.2 LEARNING MATERIALS

20.2.1 Environmental Information

Requests for environmental information are a special case and will not be handled under FOISA, they will be dealt with under the new Environmental Information (Scotland) Regulations. Almost every public authority will hold some environmental information and so should be aware of the rules for handling requests for such information. Under current Environmental Information Regulations 1992 a request for environmental information does not have to be in writing and can be made orally. The authority currently has to respond to the request within 2 months (although this is expected to change under the new regulations which are to come into force to coincide with the FOISA i.e. January 2005) and a reasonable charge can be made for the information. Exemptions exist in relation to some information.

The FOISA provides for revised Environmental Information Regulations to be made. It is intended that once made the new regulations will mirror procedures as far as possible with those under FOISA.

20.2.2 Exemptions

The aim of FOISA is to provide access to information held by public authorities. However, some information will not necessarily have to be made available as it will be covered by an exemption. There are two types of exemptions: absolute and non-absolute. If an absolute exemption applies, the authority will not have to release the information. Absolute exemptions apply to information which is available via another route, for example if information is contained in an authority's publication scheme, as well as to information that is not available elsewhere, for example where there is a statutory basis to prevent disclosure. If a non-absolute exemption applies then the authority will have to apply a public interest test to establish whether the information should be disclosed or withheld.

There are 17 sections in the FOISA dealing with exemptions. Modules 13 and 14 detail each exemption in turn (Module 13 covers sections 25 – 33 and Module 14 covers sections 34 – 41) and explain whether the exemption is an absolute or a non-absolute one. These Modules also highlight to which exemptions the "substantial prejudice" test applies. As a detailed working knowledge of the exemptions is essential for public

authority staff dealing with information requests, revise the relevant Modules and self-assessment questions as appropriate.

The Data Protection Act 1998 aims to secure individuals' right to privacy by protecting information that is held about them. Any authority that handles personal data must comply with the data protection principles which control how such data are processed. These principles require, amongst others, that personal data should be fairly and lawfully processed, accurate, not kept longer than necessary, held securely and processed in accordance with the data subject's rights. Individuals have the right to ask for a description of the personal data held about them, this is known as a subject access request, and to receive a copy of the information. The DPA only relates to information processed by a computer and to some manual files, such as files which relate to specific individuals.

20.2.3 Interface with Data Protection

When the Freedom of Information (Scotland) Act 2002 comes into force people will be able to make a request for all sorts of information from authorities, but a request by an individual for information about themselves will be exempt under freedom of information and will continue to be handled under data protection. However, certain amendments to the Data Protection Act will be made. At present the Data Protection Act only covers computerised information and some manual files. This will be changed so that all recorded information held by an authority concerning an individual will be covered by the right of access, including information in unstructured files. If individuals want access to unstructured data they must describe the information so that the authority can find it.

If someone makes a request for information about another living individual, this will be handled under the Freedom of Information (Scotland) Act, but data protection considerations will still apply. The authority will not have to provide the information:

- if the disclosure would breach the data protection principles;
- if the authority would not provide the information to the data subject themselves if they requested it or if the individual has lodged an objection under the Data Protection Act which has been accepted by the authority.

If the authority decides that it may wish to disclose the information after applying these considerations, it should consider notifying the individual and take account of their wishes. The authority does not have to be bound by the views of the individual.

20.2.4 Human rights

Public authorities have various powers over the lives of citizens and over businesses. In a democracy ordinary citizens and businesses are entitled to a number of rights and freedoms, like the right to free elections. The Human Rights Act 1998 (HRA) sets limits on how public authorities can behave when they are exercising those powers; another way of putting this is that it gives people a guarantee that their fundamental rights will be respected by the State.

20.2.5 **Scottish Information Commissioner**

The Scottish Information Commissioner is a fully independent public official. His duties and legal powers should ensure that people get the information from Scottish public authorities to which they are entitled.

Complaints concerning requests can only be made to the Scottish Information Commissioner once an applicant has exhausted the authority's review procedure. If an applicant is dissatisfied with an authority's response to a request, the applicant has 40 days in which to request that the authority reviews its decision. The authority must handle the requirement for review within 20 working days and must notify the applicant of any decisions or actions taken in response.

If an applicant is dissatisfied with the response from the authority, he or she can take their complaint to the Scottish Information Commissioner. The Commissioner will then decide whether to proceed with the complaint. In all cases the Commissioner will notify both the applicant and the authority of his decision.

On occasions the Commissioner will require more information before he can make a decision concerning a complaint and so he may issue the authority with an information notice. The notice will describe what further information is needed and the authority must respond within the deadline set out in the notice.

If the Commissioner becomes aware that an authority is not complying with its duties under the Act, such as the duty to provide advice and assistance, he can issue an enforcement notice, informing the authority which part of the Act it is failing to comply with and what it needs to do to put things right.

Although the Scottish Information Commissioner is responsible for overseeing the Act, there are a small number of occasions when the courts may become involved. It is a criminal offence for anyone to destroy or erase information after a request has been received. This offence can be committed by the authority or its employees. Such cases will be dealt with in the Sheriff court and the offence carries a fine of up to £5000.

If an authority fails to comply with any notice served by the Commissioner, he can bring the authority before the Court of Session. If the Court is satisfied that the authority has failed to comply it may deal with it as a contempt of court. The Court of Session will also deal with appeals made by authorities or applicants in relation to the Act.

In most cases the Commissioner will make the final decision regarding what information should be released, but there is one exception. The First Minister can overrule the Commissioner when it relates to certain decisions taken by the Scottish Administration.

20.3 **SELF ASSESSMENT CHECKLIST**

1. If an authority receives a request for environmental information under the FOISA which of the following should it NOT do :
 - (a) provide advice and assistance;

- (b) review whether information that is exempt under the Environmental Information Regulations should still be disclosed under the FOISA;
 - (c) automatically make the information available; or
 - (d) advise the applicant how to word the request more appropriately?
2. Where a public authority claims or may claim an exemption :
- (a) it must notify the applicant within 20 working days;
 - (b) it must notify the applicant within 40 working days;
 - (c) it must notify the applicant on request; or
 - (d) it is under no obligation to inform the applicant ?
3. Which of the following is an absolute exemption :
- (a) information whose disclosure would prejudice the economic interests of the UK;
 - (b) information accessible to the applicant by other means;
 - (c) information whose disclosure would prejudice the defence of the British Isles; or
 - (d) information held by the Scottish Administration for the formulation of government policy ?
4. Which of the following is a non-absolute exemption :
- (a) information accessible to the applicant by other means;
 - (b) information contained in any document created by a court;
 - (c) information whose disclosure would prejudice the commercial interests of any person; or
 - (d) information whose disclosure would constitute an actionable breach of confidence ?
5. A request for information is to be treated as a subject access request under the Data Protection Act 1998 if :
- (a) it is a request for personal data about a third party;
 - (b) it is a request for personal data about the applicant;
 - (c) it is a request for non-personal data; or
 - (d) all of the above ?

6. If a public authority receives a subject access request for unstructured data :
- (a) it must respond immediately with the information;
 - (b) it does not have to tell the applicant whether or not it holds the data;
 - (c) it is entitled to be given a description of the data; or
 - (d) it must seek advice from the Information Commissioner ?
7. If a public authority receives a request for disclosure of personal information under the FOISA, it should :
- (a) consider the identity of the applicant;
 - (b) consider the applicant's reasons for making the request;
 - (c) respond to the request within 2 months; or
 - (d) notify the subject of the request and take account of his or her wishes ?
8. Which of the following is a Convention Right for the purposes of the Human Rights Act 1998 :
- (a) the right to freedom of information;
 - (b) the right to freedom of expression;
 - (c) the right to privacy; or
 - (d) the right to freedom from racial discrimination ?
9. An enforcement notice must contain:
- (a) details of the Commissioner's fees for issuing the notice;
 - (b) the name and address of the complainant;
 - (c) a 20 day notice period for compliance; or
 - (d) the relevant part of the Act with which the authority has failed to comply.

[Click here for answers](#)

20.4 WHAT THEY SAID

"...it is important to ensure there is proper coverage....there should be no gaps." (Gordon Jackson - MSP)

"...the Bill applies across the length and breadth of the Scottish public sector" (Jim Wallace – MSP)

"The Bill is an interesting document for finding out how many organisations in Scotland are public bodies. Public servants, ministers and quangos are listed in vast array." (Alastair Morgan – MSP)

"... commercial organisations and voluntary and community bodies should be open to scrutiny when they undertake public work and spend public money." (Roseanna Cunningham – MSP)

"Schemes that are to be built for the public and part-funded with public money should be open enough to ensure the beneficiaries are not mainly the shareholders in the private sector." (John Farquhar Munro – MSP)

20.5 CASE STUDY

Task

1. Review what you have learnt from the modules. Look through the self assessment questions that you have answered and consider whether there are any areas of the modules that you would benefit from re-reading.
2. Make a list for yourself of the 10 most important things you should remember about FOISA.

GLOSSARY

KEYWORDS

(Reference to the Module is to the Module in which the term is first defined, although the term may be used in other modules).

Absolute Exemptions These are exemptions to which no public interest test applies. Where an absolute exemption applies the public authority does not have to consider whether there is any public interest in disclosing the information. Absolute exemptions include the following classes of exempt material:

Information otherwise accessible (Section 25 FOISA)

Prohibitions on disclosure (Section 26) i.e. information which is prevented from being disclosed by other legislation

Certain confidential material (Section 36(2) FOISA)

Court Records (Section 37 FOISA) and

Certain personal information (Section 38(1) FOISA).

Module 8

Accessible Records These are health, education and some records about local authority tenancies and social services. (Section 68 DPA).

Module 15

Applicant Applicant is defined in the Act as a person who makes a request for information from a Scottish public authority. (Section 1 FOISA).

Module 2

Article The Convention Rights are set out in articles, for example, Article 8 deals with the right to respect for private and family life. In UK legislation we more usually refer to sections. (European Convention of Human Rights).

Module 18

Commercial Interests This term is not defined. The interest must arise from trade or a relationship of a commercial nature whether contractual or not. A commercial interest does not necessarily have to be a financial one but there should be an interest in the sense that a party has invested something in the transaction or relationship which could be put at jeopardy.

Module 13

Confidential Information is confidential if one party, usually the party who discloses the information, would be able to take the holder of the information to court to stop them telling anybody else. The circumstances in which an obligation of confidence can be overridden are where the person consents, where there is a legal obligation to disclose or where there is overriding public interest in

the disclosure.

Module 14

Convention Rights

This term is defined in the Human Rights Act 1998. The Convention Rights mean the rights and fundamental freedoms set out at particular articles of the Convention on Human Rights and Fundamental Freedoms. These Rights cover the right to life, a prohibition on torture, a prohibition on slavery and forced labour, a right to liberty and security of person, a right to a fair trial, the right not to be punished without law, the right to respect for private and family life, the right to freedom of thought, conscience and religion, the right to freedom of expression, the right to freedom of assembly and association, the right to marry, the right to education, the right to free elections and rights to protection of property. (European Convention of Human Rights).

Module 18

Data Controller

This is a person who, whether on his own or jointly or in common with others, decides the purposes for which personal data are processed and the manner in which they are processed. (Section 1 DPA).

Module 15

Data Protection Principles

These are the standards of good information handling practice set out in Schedule 1 of the Data Protection Act 1998.

Module 15

Data Subject

This means an individual who is the subject of personal data. (Section 1 DPA).

Module 15

Decision Notice

The Commissioner has to make a decision about complaints of non-compliance with requests which are made to him. These are embodied in decision notices. (Section 49 FOISA).

Module 19

Directive

A Directive is a law passed by the European Union binding upon countries which are part of the European Union. It does not have direct effect in countries in the Union but each country has to pass a national law which meets the standards in the Directive.

Module 18

Enforcement Notice	<p>This is the written notice which may be served by the Scottish Information Commissioner if he is satisfied that a Scottish public authority has failed to comply with relevant parts of the Act. The notice will require the authority to take specified steps in order to comply. (Section 51 FOISA).</p> <p>Module 19</p>
Environmental Information	<p>This term is not defined in the Freedom of Information (Scotland) Act but has a wide definition in the Environmental Information Regulations and the Aarhus Convention.</p> <p>Module 11</p>
European Court of Human Rights	<p>This court administers the European Convention on Human Rights. It sits in Strasbourg. It operates within the framework of the Council of Europe. It is different from the European Court of Justice which is the court of the European Union and is based in Luxembourg.</p> <p>Module 18</p>
Fees Notice	<p>A Scottish public authority must serve a fees notice in writing if it wishes to charge an applicant for requested information. The notice must set out the charges. (Section 9 FOISA).</p> <p>Module 7</p>
Fees Regulations	<p>Fees regulations will set out what Scottish public authorities can charge an applicant for the provision of information. As at January 2004 these are not yet available and are not expected to be finalised until Summer 2004 at the earliest. (Section 9 FOISA).</p> <p>Module 7</p>
Functions of a public nature	<p>Functions are of a public nature where they are concerned with the actions of the State in ordering society rather than purely private rights.</p> <p>Module 3</p>
Held	<p>The term is defined in the Act. Information is held by an authority if it is held by the authority otherwise than on behalf of another person – i.e. it holds the information in its own right or for its own purposes. Information is also held if it is held by another person on behalf of the authority, for example by a storage company or a consultant. Information is not held by an authority where it has been supplied in confidence by a Minister of the Crown or a department of the UK government. (Section 3 FOISA)</p> <p>Module 2</p>
Historical records	<p>A record becomes an historical record at the end of a 30 year period which starts at the beginning of the calendar year after the record was created or, with a file, at the end of 30 years from the</p>

date on which the last document in a file becomes an historical record. (Section 57- 59 FOISA).

Module 12

Information

Where a request is made for information this means information recorded in any form including on CCTV or video. Where the Commissioner seeks information from an authority this can also include information which is not already recorded. (Section 73, Section 50 and Section 64 FOISA).

Module 2

Information Notice

This is a notice in writing which the Scottish Information Commissioner can give in certain circumstances where he requires information to deal with a complaint or check on compliance. (Section 50 FOISA).

Module 19

**Keeper of the
Records of Scotland**

The Keeper is responsible for the preservation of historical records in Scotland.

Module 6

Legal Privilege

This describes the right to consult lawyers about ones legal position and to have the privacy of those consultations respected. Such information is privileged from disclosure or being seized by a law enforcement agency in most circumstances.

Module 19

Member States

These are those countries that belong to the European Union.

Module 11

**National Archives of
Scotland**

The historical records of Scotland are kept in the national archive.

Module 6

**Non-Absolute
Exemptions**

Even if one of these exemptions applies the public authority must still consider whether the public interest in providing the information outweighs the interest served by the application of the exemption. If this is the case the information should still be given.

Examples of non-absolute exemptions are information intended for future publication (Section 27 FOISA) and national security and defence (Section 31 FOISA).

Module 8

Non-statutory	<p>This means a rule or code which is not found in a law but which is adopted by an organisation. Non-statutory arrangements may still have enforcement mechanisms attached to them, which may in some cases lead ultimately to the courts.</p> <p>Module 4</p>
Order	<p>An order is a term for secondary legislation made by the Scottish Parliament to give effect to more detailed areas under the law.</p> <p>Module 3</p>
Personal Census Information	<p>This is information collected under the Census which relates to an identifiable person or household. (Section 38 FOISA).</p> <p>Module 17</p>
Personal Data	<p>This is defined in the Data Protection Act 1998 and means information which relates to a living individual who can be identified from that information or other information in the possession of or likely to come into the possession of the holder of the data. (Section 1 DPA)</p> <p>Module 15</p>
Practice Recommendation	<p>This is a recommendation as to good practice which the Scottish Information Commissioner may give to a public authority if it considers the authority is not following the Codes of Practice. (Section 44 FOISA).</p> <p>Module 5</p>
Prejudice	<p>Prejudice is not defined but means a real negative impact upon a circumstance or on an individual. Prejudice is more than mere inconvenience or embarrassment and would amount to a potential interference with properly carrying out a public function or a proper specified interest.</p> <p>Module 12</p>
Public Authorities	<p>These are organisations which carry out public functions. A public function is something which is carried out by or on behalf of the State, for example the provision of publicly-funded health care.</p> <p>Module 18</p>
Public Interest	<p>There is no exhaustive list of what is in the public interest. However it may include factors such as ensuring the efficient and effective running of public services and an interest in ensuring the administration of justice. (See, for example, draft section 60 code).</p> <p>Module 1</p>
Publication	<p>The term is not defined but means making information available by publishing it. Information is published if an individual is able to find</p>

that information without going through an intermediary. Publication may be on the internet as well as in other forms.

Module 13

Publication Scheme This is a scheme which relates to the proactive publication of information by the authority. The scheme has to be approved by the Scottish Information Commissioner. If an authority makes information available via its publication scheme, it does not have to provide such information in response to a specific request because the information is already available, although advice and assistance should still be provided. (Sections 23 and 24 FOISA).

Module 2

Refusal Notice This is the notice which a Scottish public authority must give to an applicant if it is claiming that information requested is exempt. (Section 16 FOISA).

Module 8

Relevant Filing System This is the term which defines those sets of manual information which are covered by the Data Protection Act 1998. (Section 1 DPA).

Module 15

Requirement for Review This occurs where an applicant who is not happy with the way in which a Scottish public authority has dealt with a request for information may require the authority to review its actions and decisions. (Section 20 FOISA).

Module 19

Scottish Information Commissioner The Scottish Information Commissioner is responsible for enforcing the Act and also for providing guidance on good practice. (Part 3 FOISA).

Module 2

Scottish Ministers Scottish Ministers is the collective term used for the Scottish Executive which is the devolved government for Scotland and is accountable to the Scottish Parliament. It is responsible for most of the issues of day-to-day concern to the people of Scotland, including health, education, justice, rural affairs, transport and local government.

Module 4

Scottish public authority	<p>The Act contains a detailed list of who is to be considered as a Scottish public authority. This list is extensive and includes amongst others the Scottish Executive, local authorities, NHS Scotland, colleges, universities and the police. (Sections 3-7 and Schedule 1 FOISA).</p> <p>Module 2</p>
Section 60 Code	<p>This is a code of practice issued by the Scottish Ministers which deals with handling requests for information. At January 2004 the code is still in draft form. It will be issued in finalised form in Spring 2004 following consultation with the Scottish Information Commissioner. (Section 60 FOISA).</p> <p>Module 4</p>
Section 61 Code	<p>This is a code of practice issued by the Scottish Ministers which deals with records management. (Section 61 FOISA).</p> <p>Module 5</p>
State	<p>This is not defined in the Human Rights Act or the Freedom of Information (Scotland) Act. It is a general term used for the organisations that exercise public powers. It does not only cover central government; any public authority is part of the State. The action of any public authority is an action of the State.</p> <p>Module 19</p>
Substantial Prejudice	<p>This is not defined in the Act but would mean a serious interference with a matter of public interest. (See Section 60 Code).</p> <p>Module 12</p>
Trade Secret	<p>This term is not defined but the characteristics for a trade secret are generally that:</p> <ul style="list-style-type: none"> • it must be used in the course of a trade or business; • the owner must limit the widespread dissemination of it or discourage widespread publication, that is, must make his or her own efforts to protect it; • there must be an economic advantage or value from the fact that it is not generally known; <p>It can include not only secret formulae, patents, techniques, processes or technological secrets but also business information such as marketing studies or lists of customers;</p> <p>The amount of money or effort spent developing the subject matter of a secret and the ease or difficult with which it could be duplicated by others will be considered.</p> <p>Module 13</p>

UK Information Commissioner

The UK Information Commissioner is different from the Scottish Information Commissioner. The UK Information Commissioner has responsibility throughout the UK for data protection and has responsibility for freedom of information in England, Wales and Northern Ireland and for cross-border public authorities. One of his Assistant Commissioners specifically deals with data protection as it relates to Scotland. The Scottish Information Commissioner only has responsibility for freedom of information in Scotland, not for data protection, although he will liaise closely with the UK Information Commissioner. (See (UK) Freedom of Information Act 2000).

Module 3

Vexatious

A public authority does not have to comply with requests for information if the request is vexatious. The term is not defined but generally it is expected this would set a high threshold and authorities should not regard a request as vexatious merely because it is inconvenient or troublesome. (Section 14 FOISA)

Module 8

Warrant

A warrant is an order of the court entitling named or specified individuals to access premises and carry out searches without the consent of the occupier.

Module 19

APPENDIX 1

STUDY SKILLS

HINTS AND TIPS FOR STUDYING

These notes are aimed at helping those who would welcome advice on how to study most effectively. This should be read before beginning the Workbook and may be referred to for help as you work through the material.

As far as possible this Workbook has been designed to help and support users. Good study skills will help learners use the material to maximum advantage.

Planning

Studying is most successful when completed as part of routine. The Workbook is broken up into modules. You need to think about how long it will take you to complete the course. Will you do two modules each week for example? Then you need to plan the time spent on each module.

How long will it take?

Obviously some pieces of work will take longer than others. Some exercises offer suggestions on how long should be spent completing them. For time spent reading or working through a module, the options are either to set a period of time in which to get as much done as possible or simply to set a section of work to be completed and spend however long as is needed on it.

Assessing how long should be spent on work will come with experience but when deciding which approach to take, it is important to be realistic, for example a long module cannot be completed in ten minutes (or at least not to a very good standard).

How long to work?

Just because a particular module could take some time does not mean that it has to be done all at once. Smaller tasks often need to be broken up by breaks. Regular breaks either to get a cup of tea or have a short walk around can give your mind a break so that when you return to your work you feel refreshed.

Moreover, certain types of work such as assimilating detailed information, are better when broken up into smaller pieces.

When and where to study?

It is sensible to be realistic when planning when and where to work through the modules. Ideally, work should be completed in a place that doesn't distract from concentration. However, each person has a different set of circumstances and can cope with different surroundings so it is best to assess your own situation and decide which environment is best for **you** to work in.

Assuming that you will carry out the studying during working hours, the following points are worth considering when choosing at which time of day to study.

- People are often tired by the end of the working day.
- When will the office be quieter?
- When are the other commitments that need to be attended to?

When deciding where to study, think about:

- Is it a comfortable working environment?
- Are there many distractions? (i.e. noise, telephones)
- Alone or working in a group?

Other Factors

When embarking on a studying session it is easy to forget various factors that might affect your concentration, frame of mind or performance, either in a positive or negative way. The following are some things to think about.

- Some people need to work in silence whilst others do not mind a certain amount of background noise.
- Similarly, other people in the room you are working can affect your concentration or sometimes help you understand the work (if you are lucky!)
- Lighting is important as while a dark space may be bad for your eyes, bright lights can often be too harsh to work under.
- Though not everybody sits in an office chair to study, it is important to be comfortable and to maintain good posture wherever you are.

Practical Skills

You will not be expected to remember all the details of the material in the Workbook but you should retain the core material from each module as well as understanding the course. Everyone has their own way of learning, but there are some useful methods that everybody should think about.

Written work

Reading: Inevitably, all studying involves reading. In the Workbook we have tried to break the text into manageable sections but there are inevitably some blocks of material to tackle. Possible ways to approach this are:

- Choose a section to read;
- Scan through it to get a general overview of what it is about;
- Read it again or even twice more, but this time much more slowly;
- Put the text away and try to remember what it contained;
- Check if you have covered the main points, if not, re-read it.

Writing Notes: Many people make notes when reading as it provides the opportunity to put the text in different, more understandable, words that can be used for future reference. It is possible to simply choose a piece of text and write brief notes whilst reading. However, to avoid missing important points, it can help to:

- Divide the information into topics and sub-headings;
- Makes notes in a logical order under the headings;
- Underline or highlight those points which seem most relevant;
- Leave space to add more notes.

Visual Methods In the same way pictures or diagrams can work for some people, diagrams and flow charts give ideas a structure whereas certain pictures or images might act as a trigger to things you have read.

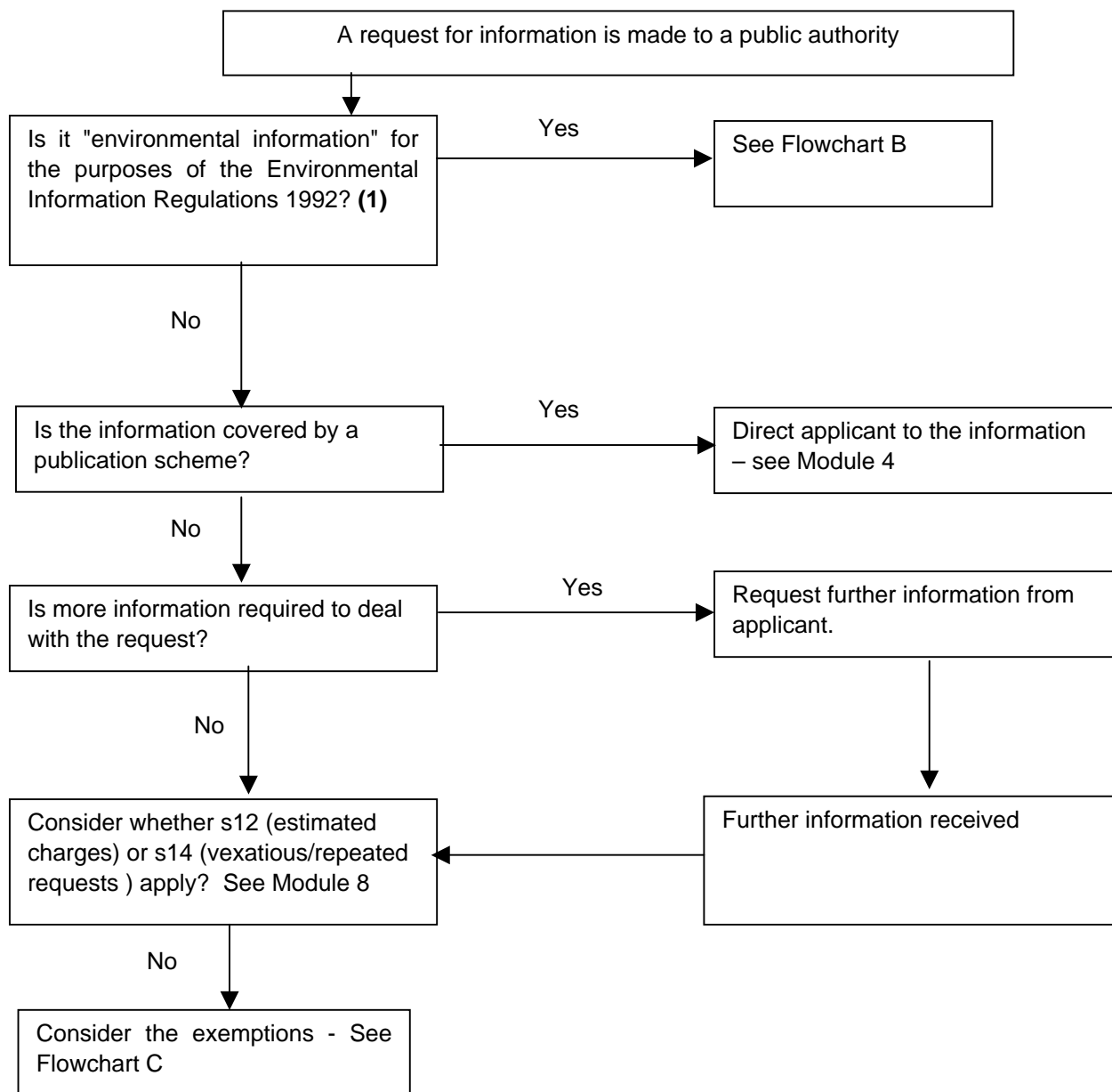
Personal Tests If you want to be confident that you have learnt something properly you can do so by testing yourself. This can be done in a number of ways:

- Complete the activities and exercise in the modules;
- Set yourself similar tasks;
- Get a colleague or even a friend or relative to test you;
- Rewrite notes without looking at the originals;
- Write mock answers to questions;
- Discuss areas of the work with people working on the same course/module as you.

APPENDIX 2

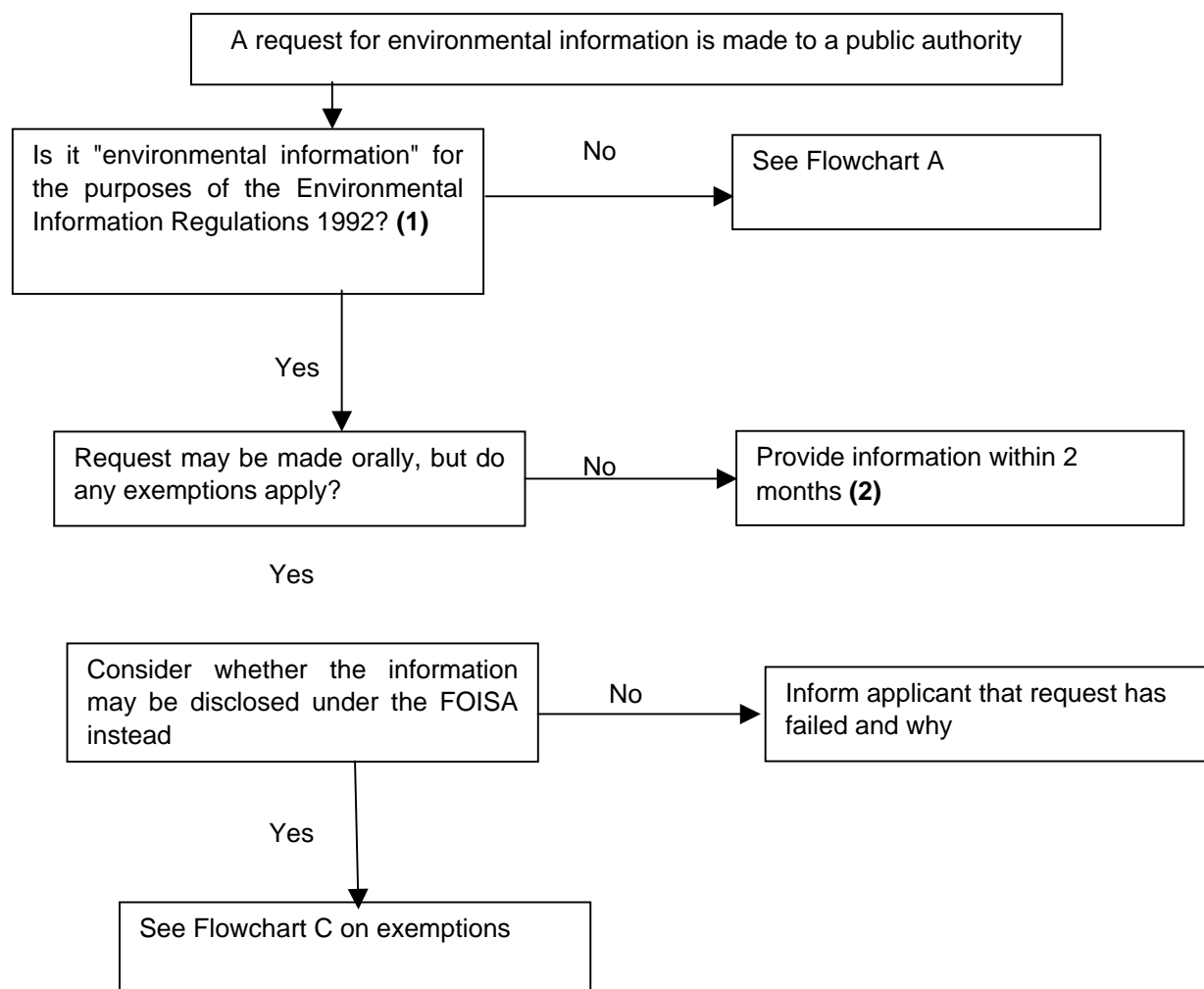
FLOWCHART

FLOWCHART A – HOW A REQUEST IS MADE



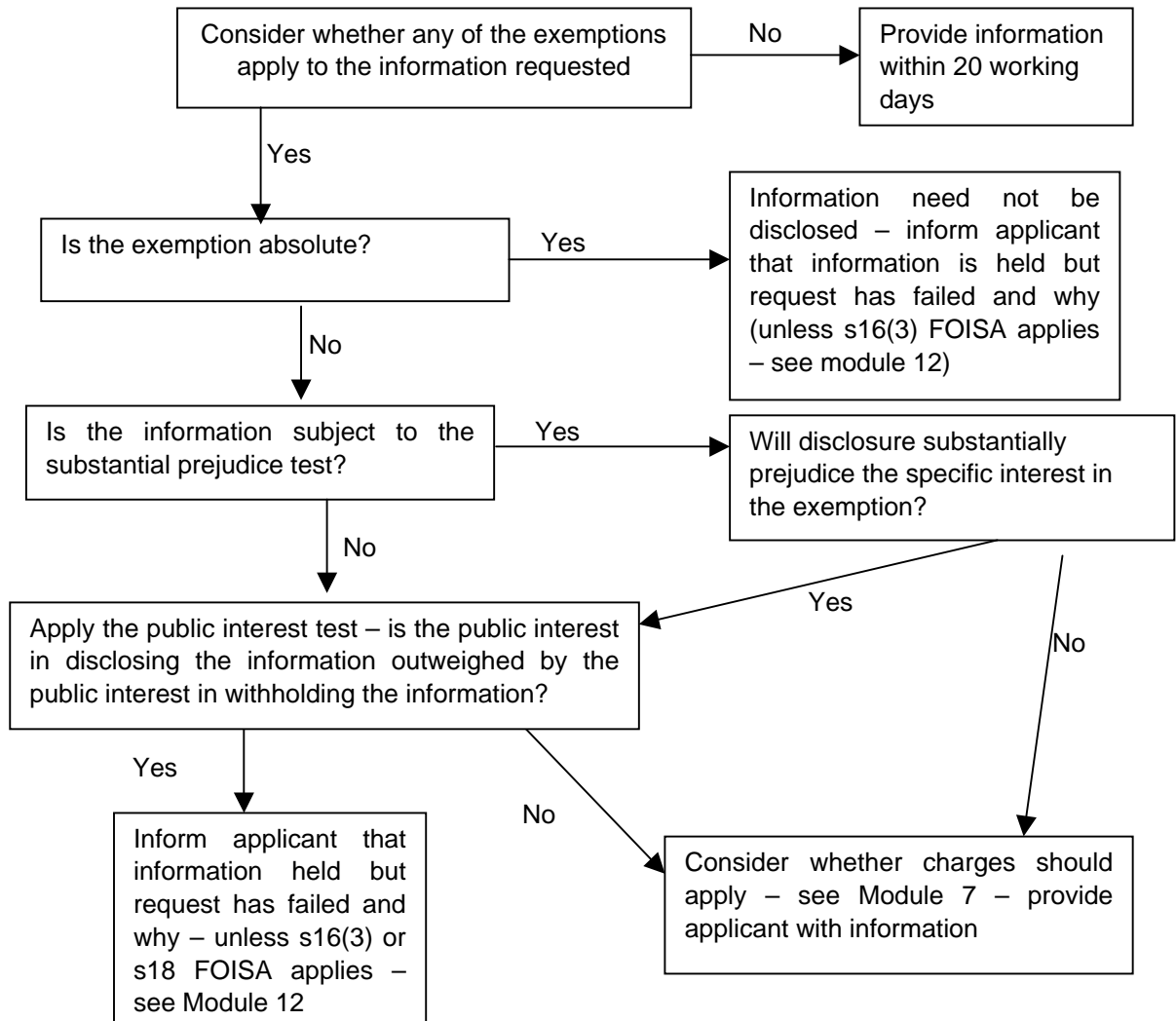
(1) These are the current Regulations in this field but will be replaced by the Environmental Information (Scotland) Regulations by 1st January 2005.

FLOWCHART B – REQUEST FOR ENVIRONMENTAL INFORMATION



- | | |
|------------|---|
| (1) | These are the current Regulations but the Environmental Information (Scotland) Regulations are expected by 1 st January 2005 |
| (2) | Two months is the prescribed period under the Environmental Information Regulations 1992 but new regulations may bring this down to 20 working days in line with the FOISA. |

FLOWCHART C – EXEMPTIONS



APPENDIX 3

ANSWERS TO SELF-ASSESSMENT QUESTIONS

MODULE 1 – Freedom of Information In Context

1. TRUE. There is no specific aim to increase the level of consultation with individuals in respect of new policies although this may in fact be an outcome of the new legislation.
2. TRUE. The vast majority of public bodies are affected by the new Act. Further detail about those affected is provided in module 3.
3. TRUE. The Act contains a series of exemptions to the general right of access. Many of these relate to circumstances in which the release of information would substantially prejudice the purpose to which the exemption relates.
4. FALSE. Many countries around the world have freedom of information legislation, for example the USA, New Zealand, Canada and the rest of the UK.

[Click here to return to module 1](#)

MODULE 2 – Introduction to FOI Scotland

1. FALSE. The rights of access provided by the Freedom of Information (Scotland) Act 2002 do not come into effect until 1 January 2005. However, there are already a number of other powers by which certain types of information can be gleaned from relevant public authorities, for example, under the Environmental Information Regulations 1992, and under the Code of Practice on Access to Scottish Executive Information.
2. FALSE. Anyone will be able to request information under the FOISA once it comes into force, regardless of nationality or domicile.
3. TRUE. Once the FOISA is in force it will apply to all information held by Scottish public bodies, regardless of how old the information is, how long it has been held by the body, or for what purpose it was prepared.
4. FALSE. The Code is non-statutory which means that an authority who breaches it cannot be pursued directly through the courts for that breach. However, breach of the Code may be an indication of a breach of the Act itself, and the courts will have regard to the Code in interpreting the provisions of the Act.
5. TRUE. The Act places a duty on each Scottish public authority to adopt and maintain a publication scheme which sets out the classes of information which the authority publishes and the manner in which the information is published, and details of any charges.

[Click here to return to module 2](#)

MODULE 3 – Scottish Public Authorities

1. TRUE. Even though Scottish Water is structured and managed like a private company it is directly answerable to the Scottish Parliament because its functions are of a public nature.
2. TRUE. A company will *not* be classed as publicly-owned if it is an organisation which is only covered for those of its functions which are of a public nature, and for this reason alone is classed as a public authority for the purposes of the FOISA.
3. TRUE. Scottish Ministers can apply the Act to private sector organisations in limited circumstances using an Order.
4. FALSE. The "reserved matters" are those areas of legislative competence reserved for Westminster, such as defence and international relations. The Scottish Parliament has full legislative competence in respect of the devolved matters, namely those *not* listed in Schedule 5 of the Scotland Act 1998.

[Click here to return to module 3](#)

MODULE 4 – Publication Schemes – Making Information Available

1. FALSE. FOISA does not require a public authority to publish specific documents; it is up to the authority to decide what to publish. However the FOISA states that a publication scheme must set out *classes* of information that are available. Listing specific documents would necessitate frequent revision of the scheme every time a new document were added to the list.
2. TRUE. If the model scheme is adopted in its entirety, further approval is not required. However, any changes made to the model will require approval.
3. FALSE. The publication scheme must indicate whether a fee is charged for a given category of information but there is no statutory requirement to state the level of fee to be charged.
4. TRUE. When revoking approval the Commissioner must give reasons for his decision.
5. FALSE. The guidance states that public authorities do *not* have to do this for the purposes of the FOISA but that they should be aware of what obligations exist under other legislation.
6. FALSE. While it will depend on the nature of the documents, it will not always be necessary to omit the whole class of documents. Authorities should consider options such as deleting exempt material from a document prior to sending it out or creating 2 separate versions of a document, a full version and an edited version which can be made publicly available.

[Click here to return to module 4](#)

MODULE 5 – Records Management – Part 1

1. FALSE. The section 61 Code of Practice is supplementary to the FOISA and as such does not have statutory status, but failure to comply with the Code may lead to breach of the FOISA, so public authorities are strongly advised to give it due weight.
2. TRUE. Records management is to be regarded intrinsic to the effective functioning of an authority, and should therefore be resourced accordingly.
3. TRUE. The Code proposes that a senior member of staff should be designated responsible for the records management system and the authority's overall strategy should be endorsed and enforced by senior management.
4. FALSE. While the disposal of records must be undertaken in accordance with clearly established policies, the Code acknowledges that it is neither appropriate nor realistic to retain every record or file created.
5. TRUE. The Commissioner has a duty to promote observance of the Codes and if he considers that an authority is failing to comply he has the power to issue a practice recommendation, which will specify what steps an authority should take to improve its practice.

[Click here to return to module 5](#)

MODULE 6 – Records Management – Part 2

1. FALSE. While public authorities are strongly advised to give the section 61 Code of Practice due weight, compliance with the Code will not relieve an authority from any additional duties it may have under statutory provisions on record-keeping contained elsewhere, e.g. the Public Records (Scotland) Act 1937 and the Public Registers and Records (Scotland) Act 1948.
2. TRUE. Part Two of the section 61 Code applies to all such transfers, and those authorities affected should establish procedures for regularly reviewing their records to ensure that they become available to the public at the earliest possible time in accordance with the FOISA..
3. TRUE. The Public Records (Scotland) Act 1937 and the Public Registers and Records (Scotland) Act 1948 deal specifically with the transfer of documents to the NAS. The section 61 Code suggests that by agreement with the NAS transfer of records to the Keeper of the Records of Scotland may take place before the records reach 30 years old. In any event, a review of records held should take place before the 30-year period is reached in order to ensure prompt transferral.
4. TRUE. If an authority transfers records other than to the NAS, the authority remains responsible for the records for the purposes of the FOISA as the records are held on behalf of the authority. Where the records are publicly available through the archive in question, and the authority makes this point in its publication scheme, the authority may simply refer applicants to the archive.
5. FALSE. The authority should consider whether parts of records might be released if it is possible to withhold the sensitive information in some way. Any method of blanking out information should not damage the document and should be fully reversible.

[Click here to return to module 6](#)

MODULE 7 – Rights of Access – How is a Request Made?

1. TRUE. Any individual or organisation is entitled to make a request for information.
2. TRUE. An e-mail is in writing and therefore satisfies that formality, although there is an issue about the required address for correspondence. An e-mail address should constitute an address for correspondence if the information requested is in electronic form and can be sent to the applicant's e-mail account. Where the information requested is not available in an electronic form, the authority still has a duty to provide advice and assistance (s.15 FOISA) and so should therefore respond to the e-mail request and advise the applicant of the need for an address to which 'hard' copy information can be sent.
3. FALSE. Despite the applicant's use of a fictitious name, the authority is obliged to provide advice and assistance. However where the request for access involves personal data the authority will not be able to judge whether the request is a subject access request and give it the appropriate protection without knowing the real identity of the applicant. In these circumstances the authority would not have to respond to the request, although if the Tooth Fairy's request did not involve personal data, the authority would be expected to respond. An authority does not have to comply with vexatious requests for information (see Module 8).
4. FALSE. Authorities are not required to charge for providing information, but if they do so they cannot set their own fees, they are obliged to comply with the Fees Regulations (not yet published). If authorities have separate statutory power to charge fees for the provision of information (e.g. the Land Registry) they may continue to do so using this power.

[Click here to return to module 7](#)

MODULE 8 – How Should an Authority Handle a Request? Part 1

1. FALSE. Scottish public authorities must comply with requests for information under the Act promptly. The deadline of 20 working days is a longstop and therefore it will not constitute a prompt response where, for example, the request was a straight-forward one requiring minimal effort on the part of the authority.
2. FALSE. The public interest test is only relevant to "non-absolute" exemptions.
3. TRUE. The public interest test relates to whether to waive an exemption where, in all the circumstances of the case, the public interest in disclosing the information outweighs the public interest in maintaining the exemption.
4. FALSE. A refusal notice is served only when the authority is claiming the information requested is exempt. In circumstances where providing the information is too costly or the request is considered vexatious, the authority is only required to write to the applicant and advise him of the grounds for refusal, within the 20 working day timescale.
5. TRUE. A practice recommendation must specify the steps that the Commissioner considers the authority ought to take however it cannot be directly enforced by the Commissioner. Nevertheless, failure to comply with a practice recommendation may lead to a failure to comply with the Act and in these circumstances could result in the Commissioner serving an enforcement notice (see Module 19 for details of enforcement notices).
6. FALSE. The Act protects the authority where the defamatory material was supplied by a third party – a request for information cannot be refused on grounds that the response would disclose defamatory material. However, the authority will be held responsible where the material was written or created by the authority's own staff.

[Click here to return to module 8](#)

MODULE 9 – How Should an Authority Handle a Request? Part 2

1. FALSE. The Code is non-statutory but compliance with it will enable authorities to demonstrate fulfilment of their duty to provide advice and assistance and will also help them to comply with their other obligations under the Act.
2. FALSE. While the first 3 suggestions are genuine, the Parliamentary Ombudsman is not relevant to publication schemes in Scotland. However, you should consider including a point of contact for users wishing to make complaints or suggestions.
3. TRUE. The section 60 Code of Practice states that the most appropriate means of doing this will be by notice under section 17 of the Act (i.e. a notice that information is not held). The Act does not include procedures for transferring requests from one authority to another and it will not generally be appropriate for authorities to do so. However, where the authority considers that it would be helpful to the applicant to redirect his request to another authority, the section 60 Code of Practice provides further guidance on what to do in these circumstances - see paragraphs 28 – 32.
4. FALSE. Even though a third party may want its information to be protected, public authorities should only withhold such information where there is a genuinely appropriate exemption e.g. the information constitutes a trade secret or sensitive personal information.

[Click here to return to module 9](#)

MODULE 10 – Midway Review

1. d).
2. c).
3. b).
4. c). Where a public authority wishes to modify the classes of information within the publication scheme, the scheme must be re-submitted to the Commissioner for approval. However, where the authority is proposing to add an additional class of information which does not involve a charge, the Commissioner should be notified of the addition being made, but the authority may make the additional information available under its publication scheme immediately. If the overall class description remains the same, it is not necessary to re-submit the scheme for approval.
5. d). The section 61 Code does not deal specifically with action plans; the Records Management Sub-Group of the Scottish Freedom of Information Implementation Group have developed a model action plan to assist public authorities with good records management practice.
6. d).
7. c).
8. a).
9. c).

[Click here to return to module 10](#)

MODULE 11 – Access to Environmental Information

1. FALSE. Access rights to environmental information are embodied in Directive 2003/4/EC which will be implemented by way of the Environmental Information (Scotland) Regulations, currently in draft form. This regime is more wide-ranging than that in respect of requests for non-environmental information.
2. TRUE. Any record held by a public authority which has any bearing on the environment comes within the scope of the Regulations, subject to certain exemptions.
3. TRUE. Every "natural or legal person" regardless of citizenship, nationality or domicile, has a right of access to environmental information held by or produced by public authorities. There is no requirement to show a specific interest in the information requested.
4. FALSE. A request does not have to be in writing, but it can be refused by the public authority if it is formulated in too general a manner or is manifestly unreasonable.
5. TRUE. An applicant should be informed about the appropriate review procedure in any refusal letter.

[Click here to return to module 11](#)

MODULE 12 – Exemptions – Part 1 Overview

1. TRUE. This is to avoid an authority having to segregate artificially individual documents; the whole file only becomes available once the newest document on the file meets the criteria for an historical record.
2. FALSE. Where the information requested would be exempt but the authority considers that to reveal whether or not it is held by that authority would be contrary to the public interest, it may (regardless of whether the information exists and is held by it) serve the applicant with a refusal notice (s.18(1) FOISA).
3. TRUE. The section 60 Code of Practice suggests that this approach be adopted.
4. FALSE. The "public interest" has been described as something that is of serious concern or benefit to the public, not merely of individual interest. See the section 60 Code for factors that authorities are advised to take into account and those that they are not when determining whether a disclosure is in the public interest.
5. TRUE. Section 16(3) of the Act states that the authority is not obliged to make a statement as to why the exemption applies if such a statement would disclose information which would itself be exempt information.

[Click here to return to module 12](#)

MODULE 13 – Exemptions – Part 2 Can Information Always be Accessed?

1. TRUE. A non-absolute exemption is available in order to protect certain types of commercial interest (s. 33 FOISA).
2. FALSE. A non-absolute exemption is available in respect of information which could prejudice the effective conduct of public affairs (s.30 FOISA). However, this is intended to mean information that could prejudice substantially the collective responsibility of Scottish Ministers or inhibit substantially the exchange of views or provision of advice; it is not about covering up ministerial blunders.
3. TRUE. The information would be subject to an absolute exemption because it should be obtainable by another means (Section 25 FOISA), namely the Environmental Information Regulations 1992.
4. TRUE. The Section 31 exemption in respect of national security and defence is a non-absolute exemption and so the public interest test must be applied.

[Click here to return to module 13](#)

MODULE 14 – Exemptions – Part 3 Can Information Always be Accessed?

1. TRUE. An absolute exemption applies to confidential information that is actionable. However, an obligation of confidence can be overridden where the third party consents, a court orders it, or where there is an overriding public interest in the disclosure. In such circumstances the information would no longer be confidential and as such it would not be covered by an absolute exemption any longer.
2. FALSE. Although section 37 is an absolute exemption, public access to court records in Scotland is generally open; nonetheless in some circumstances it will be at the discretion of the court.
3. FALSE. Section 39 which relates to information concerning health, safety and the environment is a non-absolute exemption and therefore the public interest test must be applied before a public body takes a decision about whether or not such information should be disclosed.
4. FALSE. Much information is subject to an absolute exemption because it is already publicly available by some other means; for example, environmental information under the Environmental Information Regulations.

[Click here to return to module 14](#)

MODULE 15 – Effect of the Data Protection Act 1998

1. TRUE. The bullet points listed cover five of the eight Data Protection Principles. The remaining three Principles are that the data must be processed for limited purposes and not in any manner incompatible with those purposes; they must be processed in line with the data subject's rights, and third, they must not be transferred to countries without adequate protection.
2. TRUE. If the data controller has the means to identify individuals from the anonymised data, then the information held will be covered by the Data Protection Act 1998.
3. FALSE. These are grounds for processing ordinary personal data. Where a data controller wishes to process sensitive personal data the grounds are more stringent, e.g. he must have the *explicit* consent of the individual, or he must be required by law to process the data for employment purposes, or he needs to do so in order to protect the vital interests of the data subject or another. There are other grounds listed in Schedule 3 of the FOISA.
4. TRUE. The Data Protection Act 1998 gives an individual the right to require a data controller, such as the Scottish Higher Education Funding Council, to provide a description of the personal data held about that individual, the purposes for which the data are processed and the classes or types of persons to whom the data are disclosed (a subject access request).

[Click here to return to module 15](#)

MODULE 16 – Applications for Information by Data Subjects

1. FALSE. A request by an individual for information about himself will be exempt under the FOISA and will continue to be handled under the Data Protection Act 1998. However, the range of information that may be requested under the Data Protection Act will be extended after January 2005 when the FOISA comes into force.
2. TRUE. All recorded information about individuals held by a public authority subject to the FOISA will potentially be covered by the Data Protection Act for the purposes of access and correction. It is intended that these changes are made to the Data Protection Act by an Order made under the Scotland Act 1998 before January 2005.
3. FALSE. There is no legislative mechanism whereby a request under the FOISA can be translated into a subject access request, so the FOISA request should be refused, but in view of the authority's obligation to provide advice and assistance, the applicant should be told how to make a subject access request instead.
4. TRUE. The new category of data that will be covered by the Data Protection Act 1998 after January 2003 covers "structured" and "unstructured" data. On the facts, the staff suggestions file appears to be "structured" data in that it has an internal filing system which allows information to be readily retrieved, but is not part of a filing system structured by reference to the individual, which would have rendered it a relevant filing system and already covered by the Data Protection Act 1998.
5. TRUE. the Data Protection Act 1998 has been extended to cover the same range of data to which third parties would have access under the FOISA and under the DPA an individual is likely to obtain more information about himself than a third party under the FOISA.

[Click here to return to module 16](#)

MODULE 17 – Applications for Information by those other than the Data Subject

1. TRUE. The information must fit the definition of personal census information to qualify for the exemption.
2. TRUE. If information requested about a third party would not be available to that third party were s/he to make a subject access request under the Data Protection Act 1998, then the information is exempt under the FOISA. This means that the DPA exemptions *are* relevant to a request for third party information made under the FOISA.
3. FALSE. If an individual lodges an objection under the Data Protection Act 1998, the objection must be accepted by the public authority for it to have any effect. Even if the authority has accepted the objection, this is a non-absolute exemption and the authority is still required to consider the public interest before refusing access.
4. TRUE. The section 60 Code of Practice (Paragraph 35) advises consultation in these circumstances as the authority should be looking to disclose information where possible. This is particularly relevant where an interval of time has elapsed between the acceptance of the objection notice by the authority and the time of the request for information; the authority should check that the objection still stands before refusing an access request in reliance on it.

[Click here to return to module 17](#)

MODULE 18 - Human Rights

1. FALSE. Observing and implementing international obligations, such as obligations under the European Convention on Human Rights is not a reserved matter. However, the Scottish Parliament and Administration is specifically bound to obey and comply with Convention rights pursuant to the Human Rights Act 1998.
2. FALSE. It is a qualified right as it is one that has to be balanced against the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals or the protection of rights and freedoms of others.
3. FALSE. The European Convention on Human Rights and the Human Rights Act relate to the exercise of power by public bodies. Your local football club is not a public body because it does not act on behalf of the State or fulfil a public function. In limited circumstances the Convention may be applied "horizontally", i.e. between two private parties, but as the Convention does not contain a specific right to be protected from discrimination on grounds of sex or race, you would probably have to rely on other legislation in this area, such as the Race Relations Act 1976 (as amended) and the Sex Discrimination Act 1975 (as amended).
4. TRUE. Article 10 of the ECHR states that everyone has the right to freedom of expression but this does not give people the right to demand information from the State.

[Click here to return to module 18](#)

MODULE 19 – Reviews, decisions and enforcement

1. FALSE. In the first instance the disappointed applicant should ask the authority to conduct a review of its decision within 40 days of the refusal. Only when the applicant has received a further unsatisfactory response from the authority is the applicant entitled to complain to the Commissioner.
2. TRUE. However, it cannot ignore the requirement for a review entirely and therefore must write to tell the applicant of its decision – this is only likely to be the case where the original request had already been dealt with or was a vexatious request.
3. TRUE. Section 65 creates an offence of altering records etc. with intent to prevent disclosure; both the individual employee and the employer authority can be guilty of the offence and liable on conviction to a fine of up to £5000.
4. FALSE. At this stage, if the pressure group wants to take the matter further, it must channel its complaint through the Commissioner; it has no statutory right to take the matter before the court.
5. FALSE. An e-mail is regarded as a permanent form for the purposes of making the request for a review.
6. TRUE. The Commissioner can serve an Enforcement Notice in any case where he is satisfied that the authority has failed to comply with the Act. In this case there have clearly been a number of failures on the part of the authority; these should be detailed in the Enforcement Notice, together with steps needed to remedy the situation in future.

[Click here to return to module 19](#)

MODULE 20 – Final Review

1. c).
2. a).
3. b).
4. c).
5. b).
6. c).
7. d).
8. b).
9. d).

[Click here to return to module 20](#)