

# Enforcement Policy

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Scottish Information Commissioner

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Scottish Information  
Commissioner

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## Introduction

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1. This document sets out the Scottish Information Commissioner's (the Commissioner, the SIC) policy on the enforcement of Freedom of Information Legislation<sup>1</sup> in Scotland. The policy states what will be enforced and the outcomes that enforcement aims to achieve.
2. This document is supported by guidance that sets out in greater detail when enforcement should be considered and the procedures that will be followed.<sup>2</sup>

## Values and approach

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3. Our approach is rooted in our Vision and Strategic aims<sup>3</sup> which seek to improve access to information through adding value:
  - (i) to Scotland by having and maintaining a respected and robust FOI regime
  - (ii) for requesters by improving their experience and ensuring they receive information and understandable explanations at the earliest opportunity
  - (iii) for authorities by developing and maintaining FOI knowledge, good practice and efficient request handling.

4. We will be **firm** and **fair**.

### *Firm*

- (i) We will use the full force of the Commissioner's powers to ensure compliance with FOI legislation
- (ii) We will take action when our policy says we should

### *Fair*

- (iii) We enforce in line with our policy and without favour or partiality
- (iv) We will consider informal measures and their effectiveness, based on negotiation and support, before taking formal enforcement action
- (v) We will take objective, evidence-based decisions about enforcement
- (vi) We will explain our decisions
- (vii) Communications will be courteous and professional

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<sup>1</sup> Freedom of Information (Scotland) Act 2002 (FOISA), Environmental Information (Scotland) Regulations 2004 (EIRs) and The INSPIRE (Scotland) Regulations 2009 (INSPIRE)

<sup>2</sup> The detailed guidance is currently under review as part of the wider review of enforcement procedures.

<sup>3</sup> Put in reference to strategic plan on website.

## Reporting and Communication

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5. Reporting on enforcement activity, and issues arising from enforcement activity, is an important part of the Commissioner's policy. The Commissioner will be open in communications, reporting through a variety of means, which include:
  - the annual report (under section 46(1), the Commissioner has a duty to lay an annual report; section 46(2) sets out and what the content must include)
  - special reports (under section 46(3), the Commissioner has powers to lay before the Parliament such other reports with respect to functions under FOISA and the EIRs)
  - publishing decisions, practice recommendations and enforcement notices
  - publicising lessons learned from applications
  - sharing of good practice and learning, in particular through briefings and guidance which authorities (and requesters) are encouraged to follow
  - reports of assessments
  - ad hoc reports, research, consultation, presentations, learning and development materials, and so on.
  
6. The SIC will report on, for example:
  - Statistical information from both the SIC's own organisation, and from across Scotland, including analysis of types, sources and outcomes of applications.
  - The issuing of information, decision and enforcement notices and practice recommendations, including frequency, to which authorities, outcomes and learning points.
  - Practice and subject areas of note.
  - Example cases.

## What we will enforce and how

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7. The following tables set out the circumstances under which the SIC will enforce FOI legislation.

### Publication Schemes

Approach (publication schemes)		Publication Schemes Enforcement		
Context	The Authority	The SIC		Relevant sections
<p>Section 23 of FOISA sets out the duties of a Scottish Public Authority to have a publication scheme and on the SIC to approve publication schemes. This is augmented by the Ministers' Section 60/62 Code of Practice<sup>4</sup>.</p> <p>The SIC will monitor authorities to ensure that they have an approved</p>	<p>An authority:</p> <ol style="list-style-type: none"> <li>1. does not have an approved publication scheme and refuses after discussion with the Commissioner to adopt a publication scheme or model publication scheme, or</li> <li>2. refuses to engage with the Commissioner about the lack of a scheme</li> </ol>	<p>The SIC:</p> <p>Will give the authority a notice that it has failed to comply with a provision of Part 1 of FOISA and enforce that notice as required.</p>		<p><b>FOISA</b> S23 S24 S51(1) S53(1)</p>

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<sup>4</sup> The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs

Approach (publication schemes)	Publication Schemes Enforcement		
Context	The Authority	The SIC	Relevant sections
<p>publication scheme in place, that it is fit for purpose and is reviewed to ensure it remains fit for purpose.</p> <p>The primary way the SIC will promote compliance with section 23 is through encouraging authorities to adopt model publication schemes (section 24(1) refers), which are subject to periodic review.</p>	<p>An authority:</p> <ol style="list-style-type: none"> <li>1. fails to review if needed an approved publication scheme, and/or</li> <li>2. modifies an approved publication scheme without seeking and obtaining SIC approval, and/or</li> <li>3. fails to keep its publication scheme up-to-date in line with changes to the model publication scheme or the Section 60/62 Code of Practice and/or</li> <li>4. fails to make information available in the manner stated in its publication scheme (including in the supporting guide to information) and/or</li> <li>5. refuses to engage with the SIC about its publication scheme</li> </ol>	<p>The SIC:</p> <p>Will revoke the approval.</p> <p>If the authority subsequently fails to put in place an approved publication scheme, the SIC will enforce as above.</p> <p>Will assess the authority's FOISA practice in relation to publication schemes where considered appropriate to the circumstances.</p>	<p><b>FOISA</b> S23(5) S24(3) S43(3) S51(1) S53(1)</p>
	<p>An authority refuses to provide information to the SIC required to determine (in relation to publication schemes):</p> <ol style="list-style-type: none"> <li>1. compliance with FOISA, or</li> <li>2. whether practice conforms with the Section 60/62 Code of Practice</li> </ol>	<p>The SIC will give the authority notice in writing (an information notice) requiring it to give the SIC information relating to compliance with FOISA, or with the Section 60/62 Code of Practice, as required.</p> <p>The SIC will only normally cancel an information notice if the information is provided to the SIC's satisfaction in advance of the deadline in the notice. In exceptional circumstances the SIC may cancel it for other reasons but it is a matter for the authority to set out the circumstances and why they are exceptional.</p> <p>Where an authority has failed to comply with an information notice, the SIC will certify in writing to the Court of Session that the authority has failed to comply.</p> <p>Will assess the authority's FOISA practice in relation to publication schemes where considered appropriate to the circumstances.</p>	<p><b>FOISA</b> S43(3) S50(1) S50(8) S53(1)</p>

## Good practice

Approach (good practice)	Good Practice Enforcement		
Context	The Authority	The SIC	Relevant sections
<p>Under section 43(1), the SIC has a duty to promote the following of good practice (and, in particular, compliance with FOISA and the Codes of Practice (the Section 60/62 Code and the Section 61 Code<sup>5</sup>) by authorities.)</p> <p>Good practice encompasses how requests are responded to, the giving of advice and assistance by authorities, proactive publication and records management.</p> <p>The SIC's general approach is to work with parties e.g., through the giving of advice, providing guidance and so on.</p>	<p>An authority approaches the SIC for assistance, information about the application of FOI or advice about practice (circumstances may range, e.g., from an initiative driven by the authority, through to a response to a decision issued by the SIC).</p>	<p>Will work with the authority to identify and resolve the challenges facing the authority, within the restrictions of the resources available. The aim will be to enable the authority to achieve and/or maintain good practice. The approach will be based on a mutually agreed set of actions, or an improvement plan, and may include:</p> <ol style="list-style-type: none"> <li>1. assessment of all or any part of the authority's practice and procedures</li> <li>2. training, or advice about training</li> <li>3. development activities such as seminars</li> <li>4. sharing of good practice from/with other authorities</li> <li>5. consultation</li> </ol> <p>Formal measures will not normally be engaged unless relations break down and/or the authority's actions are ineffective.</p>	<p><b>FOISA</b> S43(2)(b) S43(3)</p> <p><b>EIRs</b> Reg17 Reg18</p>

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<sup>5</sup> The Scottish Ministers' Code of Practice on Records Management

<b>Approach</b> (good practice)	<b>Good Practice Enforcement</b>		
<b>Context</b>	<b>The Authority</b>	<b>The SIC</b>	<b>Relevant sections</b>
<p>The SIC will also monitor practice, through a variety of means including:</p> <ul style="list-style-type: none"> <li>• lessons learned from applications</li> <li>• intelligence gleaned from applications, decisions, enquiries and complaints (that do not constitute applications for an appeal)</li> <li>• analysis of statistical information</li> <li>• assessments of authority practice</li> </ul> <p>If poor FOI practice is the result of requesters' actions, the SIC will engage as far as possible with them (and where appropriate the authority) to provide the support and guidance to achieve improvement (section 43(2)).</p>	<p>Monitoring suggests that an authority's practice does not conform to the Codes of Practice.</p>	<p>The SIC will initially engage with an authority to clarify what its practice is, and whether it can be improved through an agreed improvement plan (as above).</p> <p>If an authority's practice fails conform to the Codes of Practice, where these are less serious breaches, the SIC will normally issue a practice recommendation.</p> <p>If the authority's practice concerns conformity with the Section 61 Code of Practice, the SIC will consult the Keeper of the Records of Scotland before giving a practice recommendation (other than where it concerns the Keeper).</p> <p>If practice continues to fail to conform, and the failure constitutes a failure to comply with Part 1 of FOISA or with the EIRs, the SIC will, normally issue an enforcement notice.</p> <p>If the authority fails to comply with an enforcement notice, the SIC will certify in writing to the Court of Session that the authority has failed to comply.</p> <p>The SIC will only normally cancel an enforcement notice if evidence of a change in practice leading to compliance with the Part 1 of FOISA/the EIRs and the Codes of Practice is provided to the SIC's satisfaction in advance of the deadline in the notice. In exceptional circumstances the SIC may cancel it for other reasons but it is a matter for the authority to set out the circumstances and why they are exceptional.</p>	<p><b>FOISA</b> S44(1) S44(3) S51(1) S51(4) S53(1)</p> <p><b>EIRs</b> Reg17 Reg18</p>



<b>Approach</b> (good practice)	<b>Good Practice Enforcement</b>		
<b>Context</b>	<b>The Authority</b>	<b>The SIC</b>	<b>Relevant sections</b>
	<p>Monitoring suggests that an authority's practice does not conform to Part 1 of FOISA.</p>	<p>The SIC will initially engage with an authority to clarify what its practice is, and whether it can be improved through an agreed improvement plan (as above).</p> <p>If an authority's practice fails conform to FOISA, the SIC will either, depending on the circumstances:</p> <ol style="list-style-type: none"> <li>1. issue a practice recommendation (for less serious breaches), or</li> <li>2. issue an enforcement notice (for more serious, and/ or persistent breaches).</li> </ol> <p>If the authority's practice concerns conformity with the S61 code of practice, the SIC will consult the Keeper of the Records of Scotland before giving a practice recommendation (other than where it concerns the Keeper).</p> <p>If practice continues to fail to conform after issuing a practice recommendation, the SIC will, depending on the circumstances, issue an enforcement notice.</p> <p>If the authority fails to comply with an enforcement notice, the SIC will certify in writing to the Court of Session that the authority has failed to comply.</p>	<p><b>FOISA</b> S44(1) S51(1) S51(4) S53(1)</p> <p><b>EIRs</b> S17 S18</p> <p><b>INSPIRE</b> S12</p>
	<p>An authority refuses to engage with the SIC and/or provide information to establish what the authority's practice is.</p>	<p>The SIC will give the authority notice in writing (an information notice) requiring it to give the SIC information relating to compliance with FOISA, or with the Codes of Practice, as required.</p> <p>The SIC will only normally cancel an information notice if the information is provided to the SIC's satisfaction in advance of the deadline in the notice.</p> <p>In exceptional circumstances the SIC may cancel it for other reasons but it is a matter for the authority to set out the circumstances and why they are exceptional.</p> <p>Where an authority fails to comply with an information notice, the SIC will certify in writing to the Court of Session that the authority has failed to comply.</p>	<p><b>FOISA</b> S44(1) S50(1) S50(8) S53(1)</p> <p><b>EIRs</b> Reg17 Reg18</p>

## Applications to the Scottish Information Commissioner

Approach (applications)	Applications Enforcement		
Context	The Authority	The SIC	Relevant sections
<p>Under section 49(1), the SIC is required to make a decision in relation to an application which is not excluded by section 48 (see below) unless, in the opinion of the SIC, the application is frivolous or vexatious or appears to have been withdrawn or abandoned (i.e. it is 'valid').<sup>6</sup></p> <p>The underlying principle is that requesters should receive information to which they are entitled, or be able to understand why information is withheld, at the earliest possible time.</p> <p>The SIC will investigate each valid application. Where possible and appropriate, the SIC will endeavour to settle applications so they are withdrawn. If that is not appropriate the SIC will issue a decision notice.</p>	<p>An authority discloses <b>some</b> of the withheld information during the investigation but maintains reliance on exemptions/exceptions for some of it.</p> <p>or</p> <p>An authority discloses <b>all</b> the withheld information during the SIC's investigation.</p>	<p>The SIC will discuss the options for settlement with the applicant, with an aim to achieving settlement and withdrawal where appropriate. This will take account of the following:</p> <ol style="list-style-type: none"> <li>1. whether the applicant is content with the outcome; and/ or</li> <li>2. whether the SIC considers more information <b>should</b> be disclosed (as opposed to could be disclosed), and/ or</li> <li>3. whether there are practice matters that should be raised with the authority (whether raised by the applicant or resulting from the investigation) and whether this needs to be through advice and assistance or through an enforceable decision, and/ or</li> <li>4. whether the case is likely to be a precedent that requires an enforceable decision, and/ or</li> <li>5. whether a decision notice would be the most efficient way of resolving the case.</li> </ol> <p>Settlement of cases will always be the result of a SIC management decision.</p>	<p><b>FOISA</b> S49(4)</p> <p><b>EIRs</b> Reg17</p> <p><b>INSPIRE</b> Reg12</p>
	<p>An authority fails to deal with a request in accordance with Part 1 of FOISA (and/ or the EIRs where appropriate), and settlement is not reached.</p>	<p>The SIC will issue a decision notice specifying:</p> <ol style="list-style-type: none"> <li>1. the provision with which the authority failed to comply, and</li> <li>2. the steps which, in the opinion of the SIC, the authority must take to comply with the provision, and</li> <li>3. the time within those steps must be taken</li> </ol>	<p><b>FOISA</b> S49(6)</p> <p><b>EIRs</b> Reg17</p> <p><b>INSPIRE</b> Reg12</p>

<sup>6</sup> Applications may be made to the Commissioner for a decision as to whether a Scottish public authority has failed to respond to an information request in line with the requirements of Part 1 of FOISA or of the EIRs. An application may also be made to the Commissioner for a decision as to whether a Scottish public authority has acted or is acting in a way which is not compatible with regulations 8(4)(c) or 10 of the INSPIRE (Scotland) Regulations 2009

Approach (applications)	Applications Enforcement		
Context	The Authority	The SIC	Relevant sections
	An authority fails to comply with a decision notice.	The SIC will certify in writing to the Court of Session that the authority has failed to comply	<b>FOISA</b> S53(1)  <b>EIRs</b> Reg17  <b>INSPIRE</b> Reg12
	An authority refuses/fails to provide information to the SIC required to determine (in relation to applications): <ol style="list-style-type: none"> <li>1. compliance with FOISA or the EIRs, or</li> <li>2. whether practice conforms with Codes of Practice</li> </ol>	<p>The SIC will give the authority notice in writing (an information notice) requiring it to give the SIC information relating to compliance with FOISA, or with the Codes of practice, as required.</p> <p>The SIC will only normally cancel an information notice if the information is provided to the SIC's satisfaction in advance of the deadline in the notice.</p> <p>In exceptional circumstances the SIC may cancel it for other reasons but it is a matter for the authority to set out the circumstances and why they are exceptional.</p> <p>Where an authority has failed to comply with an information notice, the SIC will certify in writing to the Court of Session that the authority has failed to comply.</p>	<b>FOISA</b> S50(1) S50(8) S53(1)  <b>EIRs</b> Reg17 Reg18  <b>INSPIRE</b> Reg12
<p>"Excluded applications": under section 48, the Commissioner cannot accept an application for decision as respects a request for review made to a procurator fiscal (PF) or the Lord Advocate, to the extent that the Lord Advocate holds the information as head of the systems of criminal prosecution and investigation of deaths in</p>	<p>Following a request for review, COPFS has refused to disclose information in full and it is unclear whether the information is subject to the exclusion in section 48(b) or (c) of FOISA.</p>	<p>The SIC will ask COPFS to provide the information to allow her to determine whether the exclusion applies.</p> <p>If COPFS refuses to provide the information and the SIC reasonably requires the information in order to determine whether the exclusion applies, she will issue an information notice under section 50(1)(b)(i) of FOISA, requiring COPFS to provide the information.</p>	<b>FOISA</b> S50(1)  <b>EIRs</b> Reg17 Reg18  <b>INSPIRE</b> Reg12

<b>Approach (applications)</b>	<b>Applications Enforcement</b>		
<b>Context</b>	<b>The Authority</b>	<b>The SIC</b>	<b>Relevant sections</b>
Scotland <sup>7</sup> . The SIC may use her other enforcement powers in relation to a procurator fiscal or the Lord Advocate.	COPFS has failed to respond to a requirement for review.	The SIC will contact COPFS and ask them to confirm whether a response has been made. Where there is evidence of an unacceptable level of failure to comply with timescales, the SIC may issue an enforcement notice under section 51 of FOISA.	<b>FOISA</b> S51  <b>EIRs</b> Reg17 Reg18  <b>INSPIRE</b> Reg12

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<sup>7</sup> All references to the Lord Advocate in this section are to the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland.

## Miscellaneous

Approach		Miscellaneous Enforcement	
Context	The Authority	The SIC	Relevant sections
Schedule 3, para 1, gives the SIC powers of entry and inspection. These permit the SIC to apply to a sheriff for a warrant authorising the SIC or a member of her staff to enter and search premises; inspect and seize documents and inspect, examine, operate and test equipment in the premises in which information held by the authority may be recorded.	<p>The types of activity that might lead to 'entry and inspection' are, where generally, negotiation has failed and (this list is illustrative and not exhaustive):</p> <ol style="list-style-type: none"> <li>1. where the authority has failed to explain properly its actions and activities, for example, how searches are carried out or records accessed</li> <li>2. where it is expedient to obtain withheld information because of a real threat to the integrity of the information</li> <li>3. where it is necessary to obtain information or explanations sooner than issuing an information or enforcement notice would provide for.</li> </ol>	<p>The SIC will apply these powers sparingly and only when necessary, depending on the particular circumstances of a situation.</p> <p>The SIC will normally give the authority notice of applying to the sheriff for a warrant, except where the case is urgent or giving such notice would defeat the object of the entry.</p>	<p><b>FOISA</b> Schedule 3</p> <p><b>EIRs</b> S17</p> <p><b>INSPIRE</b> Reg12</p>
Under section 65 (and regulation 19 of the EIRs) it is an offence to alter, destroy conceal etc. records with intent to prevent disclosure.		<p>The SIC has a Memorandum of Understanding with the Police Service of Scotland and the Crown Office and Procurator Fiscal Service. If the SIC has reason to believe an offence has, or is likely to have, been committed, the case will be reported to the police and a joint investigation will be carried out by the SIC and the police.</p> <p>Similarly, where an offence is reported directly to the police, a joint investigation will be carried out by the SIC and the police.</p>	<p><b>FOISA</b> S65</p> <p><b>EIRs</b> Reg19</p>

## Document Control Sheet

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Summary of changes to document				
Date	Action by <i>(initials)</i>	Version updated <i>(e.g. 01.25-36)</i>	New version number <i>(e.g. 01.27, or 02.03)</i>	Brief description <i>(e.g. updated paras 1-8, updated HOPI to HOCS, reviewed whole section on PI test, whole document updated, corrected typos, reformatted to new branding)</i>
16/09/13	MK		01.01	Approved by SMT
16/09/13	CMS	01.01 – 01.06	01.07	Final approved version in INVU
30/10/13	JAW	01.07 – 01.09	01.10	Formatted final approved version for publication
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30/09/14	KB	01.16	01.17	DCS updated; revised version uploaded to Gtl
17/11/16	KB	01.17	01.18	New format DCS added, changed reference from INVU to VC, published on website.
18/11/16	LB	01.18	01.19	RM (from MK to HOE) changed on DCS and document republished
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