Investigations Handbook

Procedure for investigations under FOISA, the EIRs and the INSPIRE (Scotland) Regulations

Scottish Information Commissioner

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Acronyms and abbreviations

The table below sets out the abbreviations used in this document:

Abbreviation	Meaning
APP	The Applicant
CST	Corporate Services Team
DHOE	Deputy Head of Enforcement
EIRs	Environmental Information (Scotland) Regulations 2004
EMF	Equalities Monitoring Form
ETSA	Enforcement Team Support Assistant
FOISA	Freedom of Information (Scotland) Act 2002
HOE	Head of Enforcement
HOCS	Head of Corporate Services
HOPI	Head of Policy and Information
IA	Invalid Application
INSPIRE	The INSPIRE (Scotland) Regulations
IO	Investigating Officer
P&I	The Policy and Information Team
PA	Public Authority
SIC, The Commissioner	Scottish Information Commissioner, Commissioner's staff or office (context dependent)
SL	Standard Letter
TO	Technical Officer
VO	Validation Officer
WP	WorkPro – the case handling system

Introduction

1. This document sets out the procedures that the Scottish Information Commissioner (SIC) will follow for dealing with investigations under:

   (i) The Freedom of Information (Scotland) Act 2002(FOISA)

   (ii) The Environmental Information (Scotland) Regulations 2004 (the EIRs) and;

   (iii) The INSPIRE (Scotland) Regulations 2009

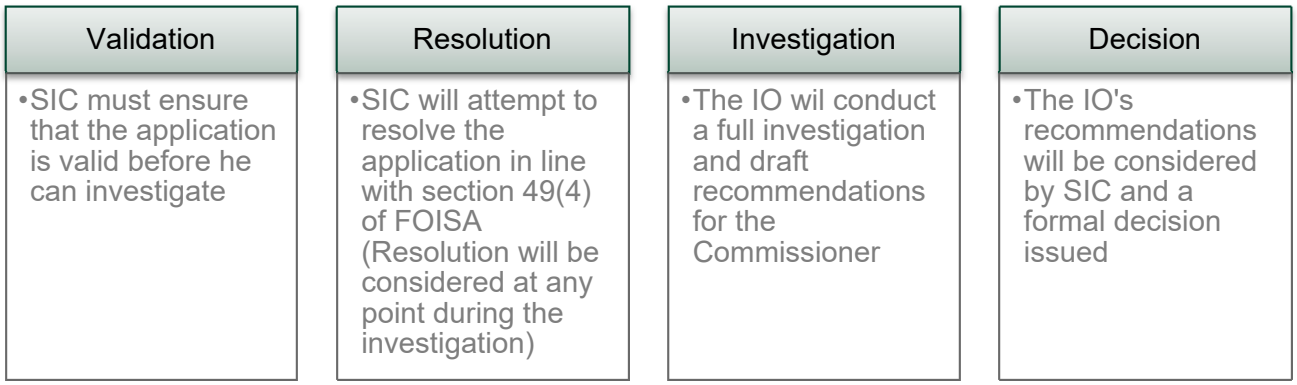
2. Requesters can appeal to SIC if they are unhappy with the outcome of an authority's review. SIC cannot take action until the requester has asked the authority to review its decision.

3. SIC is not responsible for compliance with the Data Protection Act 1998, except when considering whether the exemption in section 38 of FOISA or the exception in regulation 11 of the EIRs has been applied properly. Data Protection matters are the responsibility of the UK Information Commissioner.

The application stages

4. There are four main strands to the SIC's consideration of applications made to him.

Figure 1: Application stages



Validation

5. There are various requirements which must be fulfilled before SIC has the power to conduct an investigation. If an application is wrongly validated, then it could mean that the SIC would have no power to investigate or to enforce a decision.

6. If SIC decides that an application is invalid, he will explain to the applicant why it is invalid and offer guidance, where possible, to help them make a new valid application.

Resolution

7. SIC takes a resolution based approach to applications. This means that SIC will, where appropriate, and at any point during the investigation, attempt to resolve the application (in line with section 49(4) of FOISA) without the need for a formal decision. If early resolution is not possible, the IO will move to drafting a formal decision notice.

Investigation

8. In carrying out investigations in response to applications made under the above legislation/regulations, SIC and his staff will:

   (i) work in an impartial, independent and objective manner

   (ii) communicate with both parties in a clear and courteous manner

   (iii) wherever possible seek to mediate between the parties and seek to resolve applications without recourse to a decision

   (iv) issue well-reasoned and argued decisions, which clearly set out the Commissioner's conclusions and the reasons for coming to those conclusions

   (v) issue decisions as quickly as possible, in line with the targets set by the Commissioner in the Operational Plan.

Decision

9. Where resolution is not possible, the Commissioner will investigate the application and issue a formal decision notice.

Section 1: Receipt and validation of applications

10. All correspondence received by the Commissioner which expresses a dissatisfaction with the manner in which a request for review has been handled, will be treated as a new application.

11. An application can be received in any form which is capable of being used for subsequent reference e.g. writing, email, fax or visual/audio recording.

12. There is a **single point of entry for all new applications received by email**; consequently any correspondence received directly by ANY member of staff likely to be a new application should be forwarded to the 'applications' inbox (applications@itspublicknowledge.info) for handling by the ETSA.

13. The 'applications' inbox is for internal purposes only; this email address should not be circulated externally.

14. **Applications can also be received directly into WorkPro via the Applications Portal**. When an application is submitted via the Portal, the Portal will automatically acknowledge the application and send a copy of the acknowledgement to the 'applications' inbox. ETSA should also check WorkPro once a day to check for new applications made via the Portal (WorkPro > Office Overview > Pending cases).

15. A WP report of all new applications to SIC is automatically circulated weekly to SMT, DHOEs and P&I.

File Opening

16. The ETSA must create WP and hard copy files for **all** correspondence which appears to be a new application. See below for instructions for WP files where applications have been received via the Portal. (New cases should always be assigned to ETSA, even when absent.)

17. All hard copy correspondence relating to applications will be opened, scanned and transferred to the ETSA's scanning folder.

18. All new correspondence received by email which appears to be a new application received by any member of staff must be forwarded to the "Applications" inbox as a new application and handled the same manner as hard copy mail.

19. Where an application has been made via the Portal, WP will automatically open a file for the case.

20. In all cases, ETSA to complete the following fields in the WP file:

    (i) Applicant

    (ii) Public Authority

    (iii) Any special requirements highlighted by the applicant (e.g. regarding anonymity)

Applications received via the Portal

21. It is possible, although unlikely, that spam will be received via the Portal. ETSA must check the file to ensure that it is not spam. To do this, go into the Document Summary in the file and check the Appeal Raw Data file. This contains all of the information provided by the applicant.

22. If the application is clearly spam (and so does not require further action), ETSA will reject the appeal (Case Actions > Approve Case > Reject case). The case status will then change to "Void at Validation" and will not be counted as an application for reporting purposes.

23. If the application is not spam, ETSA must approve the case. Go to Case actions > Approve case > Approve Case. (N.b. – the option to send an email to the applicant must not be used.)

24. If ETSA is unsure whether something received via the portal is spam, ask the HOE/DHOE for guidance.

25. Where cases are approved, ETSA should do the following:

    (i) go to Case Properties and update the current owner (i.e. the ETSA) and the file location

    (ii) complete the "Type" field in the Applicant tab

Acknowledgement of applications

26. ETSA to acknowledge all new applications (including those received through the Portal) (SL01) within two working days of receipt of the application. Where application has not been received through the Portal, ETSA will send an Equalities Monitoring Form (EMF). ETSA also to acknowledge receipt of other correspondence received in relation to the application at this stage.

27. A copy of the automatic acknowledgement from the Portal should be in the 'applications' inbox. ETSA will add this to the WorkPro file.

Electronic files

28. ETSA will set up the following folders in the WP file for each new case:

    (i) Validation

    (ii) Public Authority (for all correspondence with PA during investigation)

    (iii) Applicant (for all correspondence with Applicant during investigation)

    (iv) Internal (e.g. triage notes, discussions around approval)

    (v) Research & Background (e.g. copies of legislation, other relevant information)

    (vi) Withheld Info

    (vii) DN (correspondence etc. relating to decision notice)

29. ETSA will file application and associated correspondence in the Validation folder (scanned copies of paper documents or the electronic documents sent to us). All key documents to be filed separately and renamed (see below).

30. As a rule, only the key documents required for validation should be separated out and/or renamed. Where possible, this should be done by ETSA (or anyone covering ETSA role). If the application is too complex for the key documents to be identified, refer to VO or DHOE.

31. When applications are received through the Portal, ETSA will rename the attachments in the Document Summary in line with guidance below.

32. Key documents should be appropriately renamed e.g.:

    (i) "YEAR_MONTH_DATE Initial Request"

    (ii) "YEAR_MONTH_DATE Initial Response"

    (iii) "YEAR_MONTH_DATE Request for Review"

    (iv) "YEAR_MONTH_DATE Review Outcome"

    (v) "YEAR_MONTH_DATE Application"

33. Other documents submitted with an application are not separated and renamed, but saved together under "Additional validation correspondence".

Hard copy files

34. ETSA must open a new file for each new application.

35. All hard copy files have the following sub dividers:

    (i) Validation

    (ii) Public Authority (all correspondence with PA during investigation)

    (iii) Applicant (all correspondence with Applicant during investigation)

    (iv) Internal (e.g. triage notes, discussions around approval)

    (v) Research and Background (e.g. copies of legislation and other background information located by the IO)

    (vi) Withheld Information

36. All documentation relevant to the validation of the case to be placed in the hard copy file.

37. Once the WP and hard copy files have been opened, the case should be filed in the VO cupboard straight away. The case remains in ETSA's caseload until the VO transfers the case to their own workload.

38. VO will complete the synopsis and categorisation fields in WP.

Collation of documents by VO

39. Documentation should be collated by the VO and placed in the hard copy file in reverse chronological order and, where possible, the following tags added:

    (i) Initial Request

    (ii) Initial Response

    (iii) Request for Review

    (iv) Review outcome

    (v) Application

40. Only key documents pertinent to the validation of the case should appear in the "Validation" section of the hard copy file. Duplicates/general acknowledgments/administrative documentation and all other documentation NOT pertinent to the validation of the case should be removed from the "Validation" section of the hard copy file. Duplicates should be securely destroyed. General acknowledgements and administrative documentation should be placed into the "Internal Communications" or "Background" sections of the file, as appropriate.

41. WP case "summary" to be printed and stapled to the inside cover of the hard copy case file.

42. Any application/correspondence which raises a section 65 allegation should be passed **immediately** to HOE or in their absence a DHOE.

Documents received via the Appeals Portal

43. Applicants using the Appeals Portal may either submit documents via the Portal or send them separately. Where no documents are submitted via the Portal or the applicant has made it clear that they intend to submit them later, three (working) days should be allowed to pass before we contact the applicant.

44. In the event that the applicant does not respond to our correspondence or does not supply the documents we require to proceed with the validation, we should follow the usual procedure regarding abandoned or withdrawn applications.

Initial assessment by VO: cases incapable of validation

Examples of applications clearly not capable of validation:
1. No request for review made
2. Body not a Scottish public authority
3. No grounds for dissatisfaction expressed in application or request for review
4. Application made too early
5. Request anonymous

45. If the application has been made under INSPIRE, or questions whether a body is subject to the EIRs, the VO will pass the case to the DHOE as the case will be validated by an IO.

46. In all other cases, the VO will assess whether the case is capable of validation (see Appendix 1 and tables above and below for guidance and examples). Where the VO has assessed the case as not capable of validation, or is unsure whether a case is capable of being validated, the VO will pass the case to the HOE/DHOE for review. The file must contain a note from the VO setting out why the case is not considered to be capable of validation. When cases are being validated by IOs, the application must still be reviewed by the HOE/DHOE.

HOE/DHOE review

47. The HOE/DHOE may either review the application or ask an IO to review the application on their behalf. If, following the review, the HOE/DHOE agrees that the case is not capable of validation, the HOE/DHOE will instruct the VO in writing to close the case and inform the APP that the application is invalid. A full response must be issued within 10 working days informing the APP that their application is not valid; the VO should provide the APP with

reasoning and appropriate advice and close the case in WP. The VO should use the appropriate template letter.

48. All supporting documentation supplied should be returned to the applicant at this point and the application securely destroyed.

49. If the HOE/DHOE considers that the case is valid or appears capable of validation, he/she will instruct the VO in writing to take the file through the validation process.

Initial assessment by VO: cases capable of validation

Examples of applications which may be capable of validation:
• Suspect pseudonym may have been used • Dates of request, etc. need to be checked • RFR may have been made, but unclear • Applicant is a solicitor – unclear if they are acting on behalf of a client

50. Where the VO considers that a case may be capable of validation (see Appendix 1), but needs additional documentation, the VO should seek further information from the APP using (SL03)..

51. Following a reminder (SL04) if no response is received from the applicant, the case should be closed (outcome code: insufficient information).

52. Once/if the VO is satisfied that there is sufficient information to determine whether the application is valid, the case should be passed to HOE/DHOE for review. The file must contain a note from the VO setting out whether the case is considered to be valid and, if not, why not. The note must also raise any issues which the VO wishes to bring to the attention of the HOE/DHOE.

HOE/DHOE Review

53. The HOE/DHOE will review each application which has been through the validation procedure.

Where application is valid

54. Where the HOE/DHOE is satisfied that the application is valid, he/she will confirm that SIC has remit to consider the application.

55. The HOE/DHOE will create **a note in the WP file** setting out preliminary observations on the following (if no issues arise, the note from the HOE/DHOE need only note that there are no issues with the application):

    (i) Whether the case is a substantive application/FTR

    (ii) Cases where section 48 of FOISA applies

    (iii) Whether application is potentially frivolous or vexatious (section 49(1)(a))

    (iv) Media sensitive or otherwise sensitive cases, with an indication of the relevant category.

(v) Cases suitable for attempted resolution e.g. request for personal data

(vi) Any other obvious validation concerns or matter that should be raised with the applicant at an early stage

(vii) Whether any text needs to be redacted from the copy of the application to be sent to the PA

(viii) Whether the case is one where we will not need to see the withheld information before coming to a decision.

56. For each, the HOE/DHOE will check the **categorisation** and **synopsis** fields in WP. (The synopsis field appears in SIC's published list of investigations and is used for the automatic population of template letters at later stages so it is important that it is appropriately worded.)

57. Where the HOE/DHOE, determines that the application is valid, the following tasks must be completed by the VO:

(i) With the exception of FTR applications, the applicant must be advised that their application is valid using the SL7 and provided with a copy of the Applicant's guide.

(ii) Where appropriate, the public authority must be asked to provide the information which is subject to investigation (the withheld information). Where no withheld information is to be provided, the VO will issue SL06a or b (as appropriate), confirming that a valid application has been received and giving the authority a copy of that application (subject to any comments made by the HOE/DHOE).

(iii) The VO must update the validation date on the WP and hard copy files and the WP case updated as to the cases status and location.

Where application is not valid

58. Where the HOE/DHOE is satisfied that the application is not valid, he/she will add a note to the WorkPro file confirming the basis on which the case is invalid.

59. The VO must issue the SL02a, b or c as appropriate, to APP. This letter must provide APP with clear reasons why their application cannot be legally accepted and (where possible) advise APP how to make a valid request to the authority/application to the Commissioner. Where appropriate, APP should be provided with our template application form, to help them make a valid application to the Commissioner.

The validation date is the date on which a valid application is RECEIVED by the Commissioner, not the date on which we determine it is valid.

Where the applicant significantly changes the grounds of their application to the Commissioner, the IO or VO, in consultation with the HOE/DHOE should consider whether this is a new application and the validation date changed accordingly.

Validation in VO's absence

60. In the VO's absence, the HOE/DHOE will pass cases to IOs for validation. IOs must ensure that they complete the Validation checklist, which can be obtained from the WP templates. When a case is allocated to an IO, the IO is responsible for taking the case through the whole validation process. On allocation, the IO should therefore transfer the case into their caseload in WorkPro.

Requests for anonymity

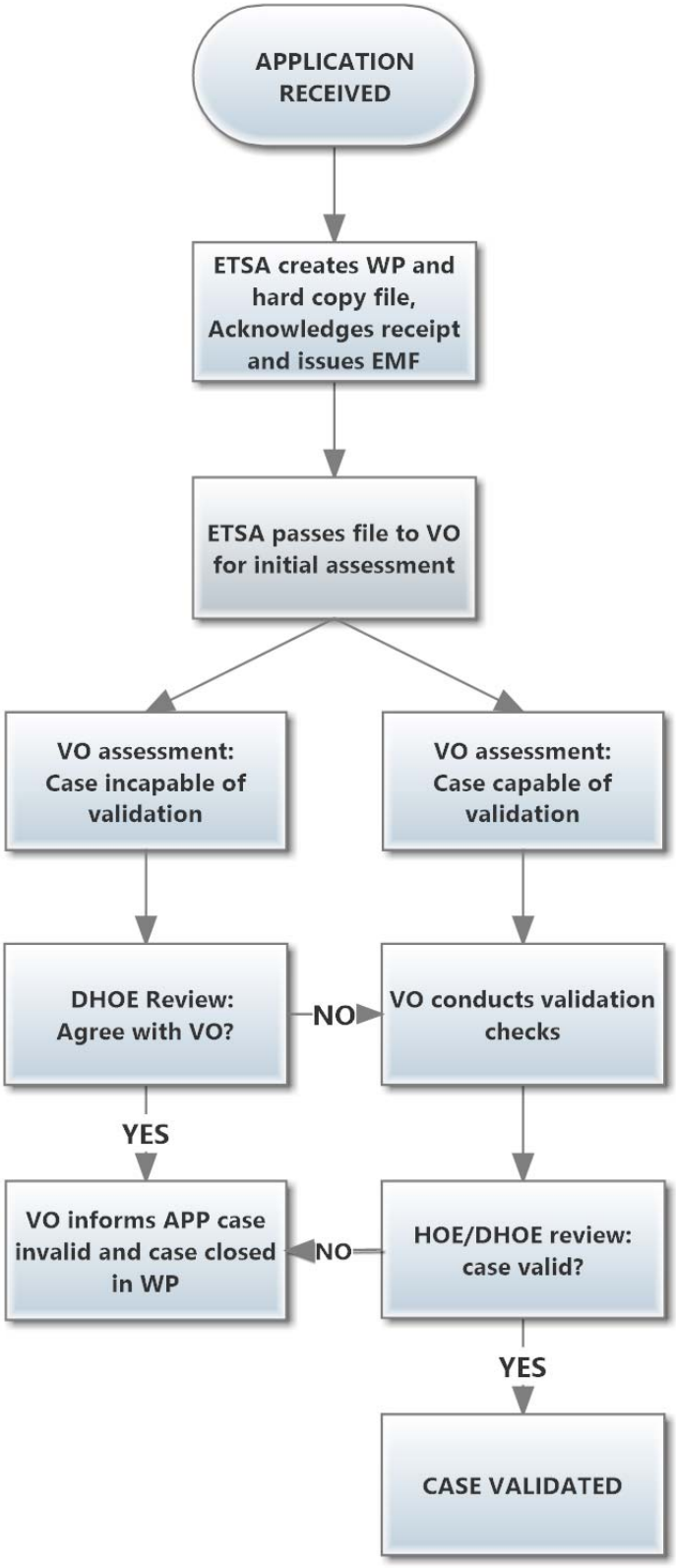
61. The SL7 contains a statement relating to the disclosure of information about the applicant and the application, either on SIC's website or in response to request for information. Where the applicant wishes to remain anonymous, the VO will flag the case in WP that the applicant's name is to be anonymised on the website.

62. All prisoners should have their WP files marked as anonymous.

Remember that, if the application identifies a potential failure on the part of the public authority, the IO must complete the "Issues/Non-compliance" section using the drop down list to indicate the relevant compliance issue. Comments can be added if necessary.

If an IO is carrying out a level 1 intervention (in line with the Commissioner's Intervention Procedures), this should be recorded in the relevant fields in the right hand side of the "Issues/non-compliance" page in WorkPro.

Figure 2: Receipt & Initial Assessment



Section 2: Seeking the withheld information

63. In limited cases, it will not be necessary for the Commissioner to obtain a copy of the withheld information in order to come to a decision e.g. if the information is clearly sensitive personal data of a third party. In such cases, it is the responsibility of the HOE/DHOE to advise the VO that there is no need to obtain the withheld information.

64. The VO should issue the SLO6 to the public authority. A copy of the application (subject to any comments made by the HOE/DHOE) must be provided to the PA with this letter. Where there is likely to be more than one document, a copy of our pro-forma document schedule must also be sent with the letter. (The schedule is in **VC45917**.) Before sending the schedule, the VO must complete the following information in the schedule: name of public authority; public authority reference (if known); name of requester and our reference.

65. The SL06 (and schedule) ask public authorities to:

    (i) Provide copies of the documents rather than originals (unless there are exceptional circumstances)

    (ii) Remove all duplicates and avoid providing large chain emails where the same information appears a number of times

    (iii) Ensure that all documents/information provided is clearly labelled to correspond with the schedule

    (iv) Clearly mark-up documents/information showing what has been disclosed and what remains withheld

    (v) Ensure that all attachments to emails/documents, which fall within the scope, are provided.

    (vi) Complete the pro-forma schedule provided. The schedule requires the public authority to confirm what information is being withheld under which exemption.

66. It is not necessary to send the SL6 where the case concerns a failure to respond (FTR) or is wholly concerned with sections 8, 9,12,14, 17, 18 or 25 (or the EIR equivalents); such cases should be passed immediately to HOE for weighting and allocation, following issue of SL06a/b.

67. If the information is not provided within 10 working days, ETSA will call the public authority to remind them that we are waiting on the information and, where necessary (a delay of more than 1 week), discuss the case with the DHOE to determine whether an Information Notice is required.

68. ETSA will ensure that the withheld information is in the appropriate form. ETSA will also create hard copies of the information for the case file, if appropriate.

69. ETSA will check the document schedule against what has been received from the public authority. If the schedule does not list everything provided or there are documents which appear to be missing from the information supplied, ETSA will contact the public authority.

70. The document schedule must be scanned and/or saved as a separate entry in the WP file. This will form the basis of a working document, throughout the investigation. The schedule, etc. must be named in the following way:

(i) Year/Month/Date WITHHELD INFORMATION UNDER CONSIDERATION

(ii) Year/Month/Date Document Schedule

(iii) Year/Month/Date Cover email or letter.

71. When the withheld information has been received from the public authority and checked against the document schedule, ETSA will prepare the hard copy file and pass the case to HOE for weighting and allocation.

72. ETSA will also update the WP file to reflect the case's status as "awaiting allocation" and "with HOE".

73. Where ETSA believes we have been provided with original documentation, ETSA must consult the HOE/DHOE and log the receipt of the original documents.

74. A register for this purpose will be maintained in the form of a notebook kept with the mail book. The receipt of original evidence must be noted in the WP file. All original evidence must be stored in the secure store.

75. In any case where the public authority is claiming section 18 of FOISA or regulation 10(8) of the EIRs ("neither confirm nor deny"), it will be for the IO (following allocation) to ascertain whether the authority holds any relevant information and confirm whether it is required for the purposes of the investigation. No such enquiries should be made at any earlier stage.

76. When a public authority advises that the withheld information is classified as 'Top Secret' the VO will consult the HOE/DHOE. Whenever possible, arrangements will be made to go to the public authority to view the information. When this is not possible the HOE/DHOE will consider alternative approaches, in consultation with the public authority as appropriate.

Section 3: Weighting and Allocation

77. Once validated and the withheld information has been supplied (where appropriate), the case must be passed to the HOE for weighting.

Weighting

78. All cases are "weighted" by the HOE before allocation to particular teams. Weighting allows for an equitable distribution of workload between the teams and individual IOs.

79. Each new case will be given a weighting of 1, 2 or 3. The weighting will also make it clear which manager (SIC/HOE/DHOE) will approve the decision.

Weighting options	Criteria
1 SIC 1 HOE 1 DHOE	• Failure to Respond (FTR) applications • Straightforward cases, e.g. applications for information which is clearly subject to an absolute exemption; "information not held" cases where it is apparent that the information sought by the applicant is not held by the authority or where the cost of complying would clearly exceed £600.
2 SIC 2 HOE	• Straightforward cases which involve a certain amount of judgement, but which do not involve new issues will usually be weighted 2. It is possible that cases weighted 2 will involve a large amount of information – consideration will also be given as to whether the information is likely to be subject to one exemption or whether multiple exemptions
3 SIC	• Cases likely to involve complex arguments or legal points which have not been considered in previous cases, or which involve complex public interest arguments, will be weighted 3. • Cases which are likely to receive much media attention and those which are of a sensitive subject matter will also be weighted 3.

80. A weekly report of all cases which have been weighted and allocated is provided to the Commissioner. Where the case is to be approved by the Commissioner, the Commissioner will contact the relevant IO direct, should he wish to consider/comment on the case early in the process.

81. At this stage, the Commissioner may also decide to amend the weighting and/or approver. If he does, the Commissioner will alert the HOE.)

82. Weighting is not to be taken as an indication of prioritisation, unless advised by the Commissioner/HOE or DHOE.

83. The weighting of a case also provides an indication of the overall workload of an IO. Weighting can be altered both up and down during the course of the investigation (see Triage). Complex validations which are allocated to IOs will also be taken into account for the overall weighting of an IO's caseload.

Allocation

84. Case allocations to teams will generally take place twice weekly. Newly weighted cases are discussed between HOE and DHOEs who will agree the most appropriate team (Conan or Doyle) for allocation. This will take account of any potential conflicts of interest, overlapping or linked cases and the overall current workload of the team and particular skill sets.

85. Case allocation to specific IOs will take place as soon as possible after team allocations (within 2 working days). Again, this will take account of the overall workload of a particular IO, their skill set, any potential conflicts of interest and their past dealings with particular requesters/authorities.

86. DHOEs must review the cases and add any pertinent directions as to the investigation onto the WP file; this must include any notes of discussions arising during case allocation meeting e.g. overlapping cases/linked appeals.

87. All cases will be returned to the ETSA for allocation to IO.

88. ETSA will update the WP file accordingly (including case location) and transfer the hard copy case file to the IO as soon as possible.

Section 4: Cases where no decision required

89. Section 49(1) of FOISA set outs the instances in which the Commissioner does not have to reach a decision in respect of a valid application. These are: where (a) the Commissioner takes the view that the application is frivolous or vexatious; or (b) where it appears to the Commissioner that the application has been withdrawn or abandoned.

Section 49(1)(a) Frivolous or vexatious applications

90. Frivolous or vexatious applications may be identified by the DHOE and dealt with during the validation process. However, any IO allocated an application which appears to be potentially frivolous or vexatious must bear in mind that the Commissioner has one month (or such a period he considers reasonable) from receipt of the application to decide whether the application is frivolous or vexatious and thus not requiring a decision.

91. The IO or VO should discuss with the HOE/DHOE what steps require to be taken before determining whether the application is frivolous or vexatious. Comments should be sought from the applicant before such a determination should be made. In some cases, comments should also be sought from the public authority. IOs should take into account the Commissioner's guidance on "Vexatious or repeated requests" when considering how to deal with such an application.

92. Approval from the Commissioner or HOE must be secured before refusing an application on this basis.

93. Where the Commissioner considers the application to be frivolous or vexatious, SL10a will be signed by the Commissioner or the HOE and issued to the applicant (including reasons for the application being so regarded) and SL10b to the public authority.

Section 49(2) Abandoned applications

94. Under section 49(2) of FOISA, the Commissioner has one month, or such other period as he considers reasonable, from receipt of the application to decide whether the application has been withdrawn or abandoned. In practice, an application may be deemed to be abandoned at any time during the investigation if the applicant fails to reply to correspondence from SIC and there is no evidence otherwise that the applicant remains engaged with their application.

95. If an applicant fails to respond to a request for comments etc., this may indicate that they no longer wish to pursue their application for a decision from the Commissioner. Where this appears to be the case, the IO should discuss the case with their DHOE. Where agreed, the IO should write to the applicant to ask them (using SL04) to reply within 10 working days, and to warn them that their application may be regarded as abandoned if they fail to do so. The IO may also attempt to contact the applicant by phone or email.

96. If no reply is received from the applicant, the IO should send the SL5 (recorded delivery), which advises the applicant that the Commissioner has determined that no decision falls to be made as the application has been abandoned, and gives reasons for this determination. This letter must be signed by DHOE/HOE/SIC. Where contact with the applicant has previously been mainly by email, it may be appropriate to email a copy of the letter for information. The IO should also send SL5b to the public authority (the IO should sign this letter).

Disposal of cases closed during investigation

97. The case should be passed to ETSA for destruction once the case has been closed. The hard copy case file should be destroyed three months after the case has been closed, unless there is an appeal. The ETSA will destroy documentary evidence and the contents of the paper file, with the exception of:

    (i) any information either party has asked to be returned (which will include original documents)

    (ii) information provided on media including memory sticks, CDs and DVDs, which will be returned to the relevant party

98. The ETSA will ensure the deletion of any documentary evidence/other information to be destroyed from the WorkPro file. The ETSA will add a note to the WorkPro file recording the destruction of the contents of the file/evidence.

Remember that, if the application identifies a potential failure on the part of the public authority, the IO must complete the “Issues/Non-compliance” section using the drop down list to indicate the relevant compliance issue. Comments can be added if necessary.

If an IO is carrying out a level 1 intervention (in line with the Commissioner’s Intervention Procedures), this should be recorded in the relevant fields in the right hand side of the “Issues/non-compliance” page in WorkPro.

Section 5: Failure to respond

99. Where an applicant has complained about a public authority's failure to respond to an information request or request for review, or their failure to respond to a request for review within timescales laid down in the legislation, this will be treated as a Failure to Respond (FTR) investigation.

100. FTR applications are generally validated, allocated to and investigated by the VO. FTR cases will be allocated to IOs where the VO is absent or where her validation work is too heavy.

101. An FTR investigation will only consider the public authority's compliance with the timescales under FOISA; all other procedural failings will be considered as (or as part of) a substantive investigation and allocated to IOs.

102. FTR investigations will not consider whether the applicant should have received any or all of the information they asked for. If the Commissioner finds that the authority failed to respond to a request or a request for review, the decision notice will require the authority to respond to the applicant's request for review. Depending on the response issued, the applicant may then wish to submit a fresh application for decision from SIC.

103. Following the validation of an FTR application, the VO should send the SL08a to the public authority as soon as possible and, in any event, within one week. The public authority has 10 working days to reply. The letter must be emailed to the authority as well as posting.

104. The VO must also send the SL7a to the applicant to advise them that their application will be treated as a FTR application and explaining that the decision notice will only consider compliance with procedural requirements. On receipt of the SL08a, the public authority may decide to respond immediately to the applicant's request for review.

105. On receipt of submissions, the VO must consider the submissions made and determine whether further submissions are required to reach a conclusion. Where the VO considers there are sufficient submissions to reach a conclusion, a decision should be drafted using the decision templates specific to FTR decisions. The covering letters (SL26a-d) must also be drafted before submitting for approval.

106. Once approved, the VO must follow the procedure as set out in "Issue of decision notice" of this handbook. FTR cases should not usually be closed during investigation. Where the VO wishes to close a case during the investigation, approval should be sought from the DHOE.

107. As with other cases, if no compliance is required, the case should be passed to ETSA for destruction once decision is published on the website, unless compliance is required. Hard copy case file should be destroyed 3 months after the decision is issued, unless we have received a substantive application in that time.

108. The ETSA will destroy documentary evidence and the contents of the paper file, with the exception of:

    (i) any information either party has asked to be returned (which will include original documents)

    (ii) information provided on media including memory sticks, CDs and DVDs, which will be returned to the relevant party

109. The documents should be transferred by ETSA into the new substantive application, if received. A note should be made by ETSA in the FTR case file that the documents have been transferred and the electronic version copied into the new file.

Remember that, if the application identifies a potential failure on the part of the public authority, the IO must complete the “Issues/Non-compliance” section using the drop down list to indicate the relevant compliance issue. Comments can be added if necessary.

If an IO is carrying out a level 1 intervention (in line with the Commissioner’s Intervention Procedures), this should be recorded in the relevant fields in the right hand side of the “Issues/non-compliance” page in WorkPro.

Section 6: Resolution

110. Section 49(3)(b) of FOISA requires SIC to issue decision notices where settlement has not been effected. This suggests that Parliament expects SIC to take reasonable steps to resolve cases informally. SIC encourages the informal resolution of all applications made to him. Resolution may be initiated by either party or the IO (subject to the considerations set out below) at any point during the investigation.

111. Resolution is a process by which one or both parties agree to a course of action, which results in the applicant withdrawing their application for decision.

112. Informal resolution could, for example, include:

- Partial disclosure of information.
- Identification of an alternative/more appropriate route to receive the information e.g. Subject Access Request, access to social work records etc.
- Additional explanation provided by the PA e.g. explaining why certain information is not held, clarification of misunderstandings.
- Submission of a revised request for information by the applicant.

113. Resolution opportunities can be considered at any point, but must be considered at the following stages:

(i) Preliminary Assessment by DHOE (following Receipt)

(ii) Allocation/prior to formal submissions (following Validation)

(iii) Triage (following submissions)

(iv) At approval (either stage), i.e. should we seek resolution rather than go to decision?

114. IOs must consult with their DHOE before resolution/settlement is proposed, and before contacting the applicant to suggest withdrawal of the application.

115. Where the SIC is the case approver, SIC **must** be consulted on the proposed resolution before a settlement is proposed or accepted and SIC's response retained in WorkPro. This is regardless of whether the case is weighted 1, 2 or 3.

116. Resolution/settlement may be proposed by either of the parties or the IO. In all cases where resolution is attempted, it is important that the applicant's right to a decision by SIC is safeguarded.

IO proposes resolution/ settlement

117. IOs may be able to identify opportunities to resolve an application at any point during the investigation.

118. There may be situations where it is appropriate for the IO to suggest that the applicant withdraws their application. This might be where it is apparent that no useful purpose would be served by the issue of a decision notice, perhaps because:

- The IO is satisfied that the PA does not hold the information;

- The IO is satisfied that the information is exempt in its entirety and can point to precedent in previous decision from SIC;
- The request was simply for applicant's own personal data;
- The cost of complying with the request would exceed the section 12 limit.
- The PA accepts that it has handled the request incorrectly and discloses all information.

119. In all cases the IO must consider whether there is an overriding public interest in issuing a decision, for example to set a precedent or make it public knowledge that the SIC has made a finding (for or against an authority)

PA proposes resolution/ settlement

120. If the PA suggests a settlement to the IO, the IO should assess whether it is in the applicant's and the public interest to propose it to the applicant, taking into account the types of issues as at paragraphs 113 and 119.

121. If the PA suggests a settlement directly to the applicant, the IO should make the same assessment and advise the applicant accordingly.

Applicant proposes resolution/ settlement

122. If the applicant informs the IO by letter or email or during a telephone conversation that they wish to withdraw their application, the IO should review the settlement to confirm that it is in the applicant's interest to withdraw, consulting with the DHOE/HOE/SIC as appropriate.

123. If it is not in the applicant's interest, the IO should contact the applicant (ideally by phone) to advise them of this, and to confirm whether they still wish to withdraw their application.

124. If the applicant raises this unexpectedly during a telephone conversation, the IO should offer to review the proposed settlement and arrange further contact as appropriate.

125. If the applicant is adamant about withdrawing the application, then we should take action to close the application.

Action to take

126. If settlement is agreed and the PA is willing to disclose further information or provide further explanation to the applicant to achieve resolution, the IO should agree a date (no later than three weeks from the agreed settlement) by which the PA should have delivered the terms of the settlement.

127. The IO should ensure that they have confirmation that the terms of the settlement have been met before accepting formal withdrawal from the applicant. If this has not been done, the IO should move to decision, informing both parties that this is what is being done.

128. If an applicant confirms that they no longer wish to pursue their application, the IO should send SL5a (recorded delivery) to confirm that no decision will be made and the case file will be closed. This letter must be signed by DHOE/HOE/SIC.

129. The IO should also send SL5b to the PUBLIC AUTHORITY (even if it had not previously been made aware of the application), ensuring that any learning points or practice issues are raised. The letter should, where possible, explain what led to the applicant withdrawing their application (e.g. they may have withdrawn following advice from the IO that the

Commissioner was likely to find that the information was exempt from disclosure). However, the applicant's privacy must be respected. It would not be appropriate, for example, to tell the PA that the applicant no longer wished to proceed because of ill health.

130. The letter to the PA can be signed by the IO or VO.

131. The IO must alert the ETSA that the case has been closed during the course of the investigation.

Section 7: Understanding the application

Contact with APP

132. IOs must ensure that they are clear on the grounds of the application and that these grounds fall within the Commissioner's remit.

133. The investigation must focus on those aspects of the PA's handling of the case with which the applicant is dissatisfied (section 47(1) of FOISA). The applicant may have raised matters in their application which were not included in the request for review and therefore cannot be considered by SIC.

134. If it appears to the IO that the applicant expects the investigation to cover issues which SIC is unable to investigate, this must be made clear to the applicant when sending the SL9.

135. Once identified, it is important that the grounds are confirmed in writing with the applicant using the SL9. If not already provided, this letter should be accompanied with the Applicant Guide.

136. Where the authority has sought to rely on section 38(1)(b) of FOISA, and/or an exemption/exception subject to the public interest test, the IO should invite the applicant to make submissions on the public interest test and/or their legitimate interests if not already provided. The IO should seek these submissions at the point of confirming the scope of the application.

137. If required, the IO should seek clarification of the application, explaining the Commissioner's remit and requesting background to the application. Where the applicant refers to evidence which would lend weight to their application, this should be sought prior to seeking formal submissions from the PA. Depending on the case, IOs might also find it useful to ask the applicant for comments on the exemptions being relied on by the PA.

138. It should be noted that, if as a result of seeking clarification with the applicant, the grounds of the application change, the revised application must be shared with the PA. The validation date should also be changed to reflect the receipt of the revised application.

Section 8: Assessment of the withheld information

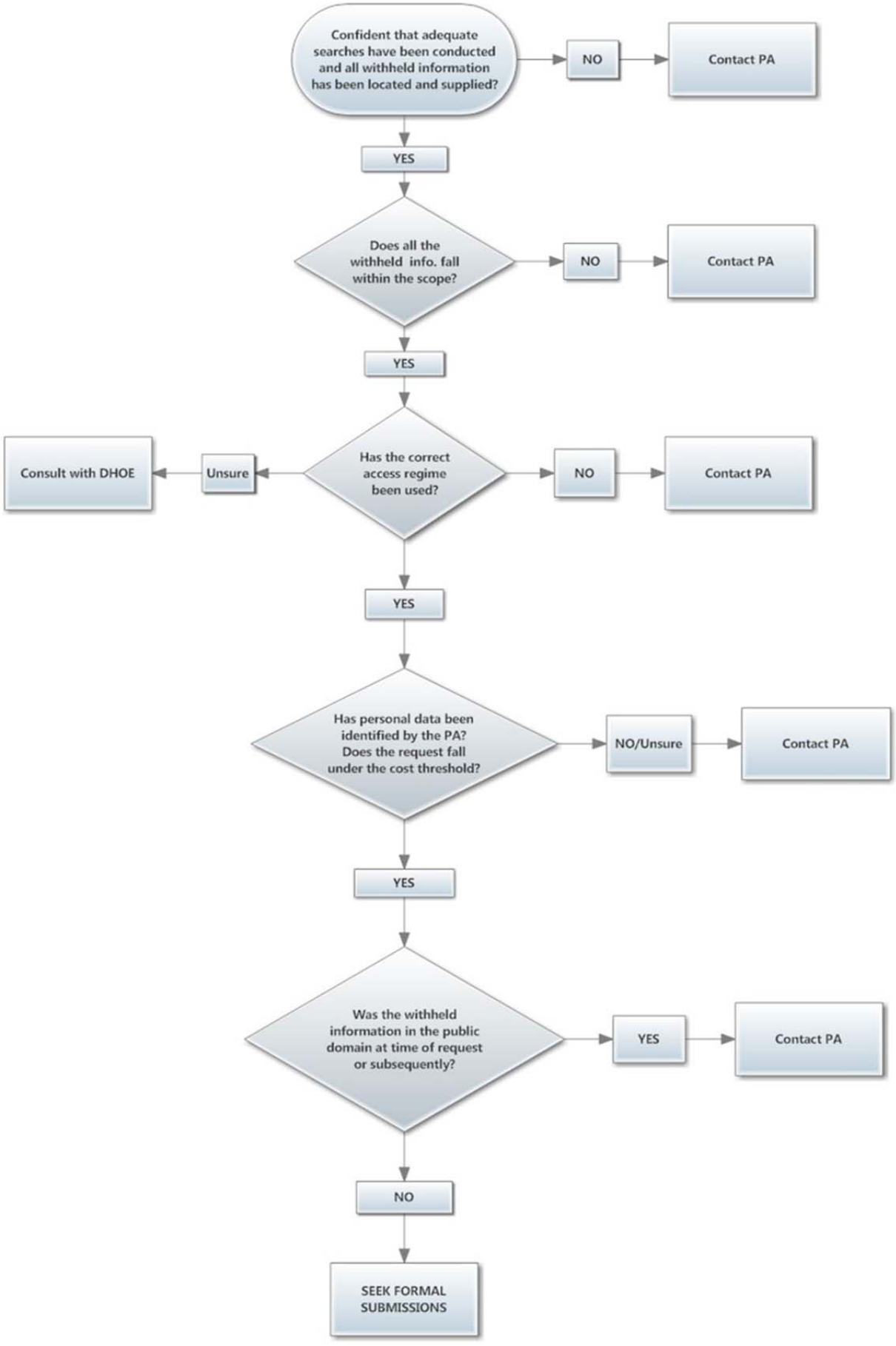
139. Prior to seeking formal submissions from the PA the IO must undertake a preliminary review of the withheld information.

140. The IO should consider the flowchart set out below, before seeking formal submissions from the PA.

> **Where there are ambiguity or queries regarding the withheld information, these must be resolved with the PA prior to seeking formal submissions**.

141. Where the IO is experiencing difficulties establishing what information is being withheld by the PA or which provisions are being relied upon by the PA, the IO should alert their DHOE and consider whether an Information Notice should be issued.

Figure 3: Assessment of information



142. The IO must be satisfied that:

    (i) Information withheld was not, at the time of the request, or subsequently, in the public domain.

    (ii) The cost of dealing with the information would not be likely to have exceeded the prescribed amount in the Fees Regulations – the PA may not have raised this issue, but if the cost did exceed £600 it would be ultra vires for SIC to order disclosure of the information under FOISA (although not under the EIRs).

143. If we know that the information is subject to an absolute exemption which the public authority has not cited, advice should be sought from the DHOE on raising this with the public authority. There may be a legal prohibition on disclosure even in cases where the PA has not recognised this. In some cases it could be a criminal offence for information to be disclosed but the person in the PA dealing with the request is unaware that this is the case.

144. The IO should check whether they agree with the PA's interpretation of the information request: if the IO takes the view that the public authority has interpreted it too narrowly, too broadly or simply unreasonably the PA should be advised of this.

145. Prior to seeking submissions, the IOs must also ensure that they understand the context of the application. The IO should conduct proportionate research to understand the circumstances within which the request was made.

146. The IO should check previous cases and active investigations for overlapping/connected or substantially similar cases.

147. Equally, where it is clear that an exemption/exception does not apply e.g. erroneously cited by the PA or where the exemption/exception has been clearly misunderstood by the PA, the IO should contact the PA prior to seeking submissions to clarify. Nb. The applicant should be advised of any alterations to the exemptions/exceptions relied upon as well as any change to the key reasons why an exemption/exception has been applied.

148. Where additional clarification is required prior to seeking formal submissions, to progress the application as quickly as possible, IOs are encouraged to make telephone contact wherever possible, ensuring that an adequate record of the conversation is kept. IOs should confirm the outcome/action points arising from any conversation with public authorities or applicants in writing.

149. In cases where the public authority is claiming section 18 of FOISA or regulation 10(8) of the EIRs ("neither confirm nor deny"), at this stage the IO should ascertain from the public authority whether it holds any information falling within the scope of the request. If it does, the IO should confirm with their DHOE whether the information is required for the purposes of the investigation. That decision should be recorded in the WP file and, where it is obtained from the authority, the information must be stored in hard copy (only) in the secure store.

Section 9: Seeking formal submissions

Formal submissions from the authority

In order to comply with section 49(3) of FOISA the PA MUST be provided with an opportunity to comment

150. Once the IO is clear about the grounds of the application and, where relevant, about the withheld information, the IO must draft and issue the formal letter seeking submissions from the PA (SL8).

151. The purpose of the SL8 is to provide the PA with an opportunity to comment on the application, as required by FOISA. A PA is not required to provide comments in response.

152. The PA should be advised that SIC will expect to be able to reach a decision on the basis of the authority's response, and there may not be a further opportunity for comment.

153. Wherever possible, the SL8 should be issued within 15 working days from allocation. If longer is needed to establish the grounds of application and clarity on the withheld information, the IO should alert their DHOE and discuss whether further clarification is required to seek submissions or whether an Information Notice would be appropriate. There may also be cases where the IO needs further information from the applicant before sending the SL8 – e.g. if the IO is unsure about the scope of the application or considers that it would be helpful to know more about the applicant's legitimate interests before contacting the PA.

154. The SL8 should invite comments from the PA on the application and the matters raised by the applicant in line with the requirements for section 49(3)(a), and request any specific information or comment required to produce the recommendations for SIC. This might include questions on whether the public authority has complied with the Section 60 or Section 61 Code.

155. Wherever possible the SL8 should also provide the PA with an opportunity to identify opportunities to resolve the application.

Care should be taken with the SL8. The IO must ensure that it is well drafted to allow the PA to provide all the information and submissions which are required to allow SIC to come to a determination without the need to seek additional submissions from the PA. A poorly drafted SL8 will result in a poor response may be unduly burdensome on the PA and elongate the investigation

156. Any questions posed in the SL8 must be **CLEAR** and **RELEVANT**. Wherever possible, open questions should be used, so that answers are not suggested to the PA.

157. IOs should refer to the 'Key Questions' when preparing the SL8. This document is updated and maintained by DHOEs and HOEs to ensure that the questions posed in relation to exemptions/exceptions are legally accurate and address all the relevant tests. This document is ONLY a guide and therefore the questions **MUST** be altered and supplemented to suit the particular circumstances of the case. In many cases, rather than providing the PA with a long list of questions, it will be appropriate to refer the PA to SIC's exemption briefings and ask them to respond in line with the tests set out in the briefings.

158. Before posing questions in the SL8 the IO should consider whether these tests have been met in the PA's review response. On occasion, it may be sufficient simply to issue a letter providing the PA with an opportunity to provide additional comments and inviting it to rely on the reasoning provided to the applicant in its review outcome.

159. Unless obvious from the nature of the information requested, the searches undertaken to locate information and the information identified, the PA must also be asked to supply details/descriptions of the searches undertaken to locate the information falling within the scope of the request and to explain why it considered them to be sufficient.

160. Where a PA has cited multiple exemptions/exceptions in relation to the same information, it may not always be necessary to fully consider each exemption/exception in reaching a decision. If it is clear that an absolute exemption should be upheld, there is normally no need to consider whether any other exemptions should also be upheld. IO should take this into account when drafting the SL8.

161. Where there are multiple documents, the IO should consider seeking submissions in a tabular form.

162. All questions in the SL8 must be numbered to ensure that a response is made to each point.

163. When referring to the documents/information, IOs must use the numbering/references of the documents/information used by the PA in the schedule of withheld information to identify the information. These references must remain consistent throughout the investigation.

164. Where SIC is investigating a number of connected cases involving the same PA and submissions have already been provided in relation to a connected case, the PA should be provided with the opportunity to rely on submissions already made but care must be taken to ensure, in all cases, that the PA is provided an opportunity to make submissions specific to each application.

165. The SL8 must be issued by hard copy to the PA, with a copy sent by email.

> **The IO should also make contact with the PA on the day of issue by telephone to alert the PA to the requirements of the SL8 and highlighting any possible grounds for resolution**.

166. The PA should be provided with 10 working days to provide formal submissions. Discretion is afforded to the IO to extend this period to 15 working days where the case is considered complex and/or voluminous.

167. In some instances, it may be more appropriate for IOs to seek submissions from the PA in the form of an Information Notice. These cases will generally be identified by the DHOE prior to allocation.

168. In the unlikely event that the PA decides not to provide comments, it will not usually be necessary to issue an Information Notice. Where the review response from the PA is insufficient to allow SIC to come to a determination (e.g. where we are dealing with "information not held" or excessive cost cases), additional submissions may be required. Alternatively, there may be cases where it is possible to find that the PA has failed to satisfy SIC and to issue a decision ordering it to take particular action. IO should alert such cases to their DHOE to discuss the way forward e.g. whether a visit to the PA or an Information Notice is required.

169. If the PA fails to respond within the timescale set out in the SL8, the IO should, within 2 working days, contact the PA noting that no submissions have been received and advising the authority that unless comments are made within one week, SIC will move to a decision

Obtaining further comment from the applicant/PA during course of investigation

170. During the investigation, it may be appropriate, where comment would be material, to give the applicant an opportunity to provide additional comments, e.g. where a public authority relies on a new exemption (or other provision). (In some cases, it will be appropriate to go to decision where a public authority changes its approach to the case requiring it to issue a revised review notice)

171. When contacting the applicant, the IO must bear in mind section 45 of FOISA, which makes it a criminal office in some circumstances for information to be disclosed (in many cases it will be possible to seek additional comments from an applicant without providing a summary of the authority's submissions).

172. Generally, while complying with section 45, the IO should consider whether to seek comments from the applicant on any information which is received from the authority during the course of the investigation which appears to be material to the investigation and of which the applicant is not aware. It will not usually be necessary to summarise a public authority's comments for an applicant to comment on unless it is clear that the applicant has something to add to the investigation. If the IO has any doubt as to whether to ask the applicant for further comment, advice must be sought from DHOE.

> **Section 45**
>
> **(1) A person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner must not disclose any information which-**
>
> **(a) Has been obtained by, or furnished to, the Commissioner under or for the purposes of this Act; and**
>
> **(b) is not at the time of disclosure, and has not previously been, available to the public from another source,**
>
> **unless the disclosure is made with lawful authority.**

173. IOs must indicate a timescale within which the applicant should reply to any request for comment or information (usually a maximum of 10 working days). An investigation should not be unnecessarily delayed simply because an applicant fails to reply. If the applicant fails to reply, the IO should consider whether the procedures relating to abandoned applications below should be followed or whether it is appropriate to issue a decision.

174. While complying with section 45, for natural justice reasons, the IO should consider seeking comments from the PA on any information received from the applicant in the course of the investigation, which appears to be material to the investigation and of which the PA is not aware.

175. Additionally, if as a result of research carried out by the IO, the IO comes to the view on a material matter which is not known by, or may not be known, by the PA, the research should be shared with the PA and the PA must be given an opportunity to comment on the results of

the research. In many cases, it will also be necessary to given the applicant the opportunity to comment.

Updates during the investigation

176. Throughout the investigation period, the IO should keep the applicant up to date about what is happening with the investigation. This will be at the discretion of the IO, but applicants should be advised when important steps are taken in the investigation or if there have been significant delays. In general, applicants should never go more than two months without contact from the IO.

Meetings with PAs

177. Where there is continued difficulty in obtaining clear submissions from the PA (which may be due to the complexity or volume of information or history of communications between the PA and the applicant), the IO should consider arranging a meeting directly with the PA, to view systems and to achieve clarity on the context of the request or to gain an understanding of how information is stored and managed by the PA (e.g. section 12/17 cases). The IO should consider using Skype or alternative means to hold this meeting.

Contact with a third party

178. On limited occasions it may be necessary to contact a third party e.g. to provide expert advice on a particular subject. An IO must obtain DHOE approval before contacting third parties for advice. The approval of the HOE must be sought where seeking advice would have cost implications.

179. In contacting third parties, IOs must be aware of section 45 of FOISA, which applies to the information withheld, the submissions made by the PA and, potentially, to information provided by the applicant.

180. Section 45 does not prohibit SIC passing information to her solicitors or other legal representatives in order to obtain legal advice or in connection with an ongoing case. Any such contact will be made by HOE.

Abandoned applications

181. Under section 49(2) of FOISA, SIC has one month, or such other period as he considers reasonable, from receipt of the application to decide whether the application has been withdrawn or abandoned. In practice, an application may be deemed to be abandoned at any time during the investigation if the applicant fails to reply to correspondence from SIC and there is no evidence that the applicant remains engaged with their application.

182. If an applicant fails to respond to a request for comments, etc. from SIC, this may indicate that they no longer wish to pursue their application for a decision from SIC. Where this appears to be the case, the IO should discuss the case with their DHOE. Where agreed, the IO should write to the applicant to ask them to reply within 10 working days, and to warn them that their application may be regarded as abandoned if they fail to do so. The IO should attempt to contact the applicant by telephone or email.

183. If no reply is received from the applicant, the IO should discuss the way forward with the DHOE. It may be possible to issue a decision without the comments from the applicant. However, if the DHOE agrees that the appropriate approach would be to treat the application as abandoned, the IO must issue the SL5 (recorded delivery), which advises the applicant that SIC has determined that no decision falls to be made as the application has been

abandoned, and gives reasons for this determination. This letter must be signed by DHOE/HOE/SIC. This letter should also been sent by email to the applicant wherever possible. The IO should also send the SL5b to the public authority (the IO can sign this letter).

Section 10: Assessing the submissions

184. Once submissions have been received from the PA, the IO must ensure that these are appropriately renamed and saved into the WP file. Submissions from the PA should be saved using the following naming convention (YYYY/MM/DD – SUBMISSIONS PA (1, 2, 3 etc., followed by a brief description of content, if required).

185. Any additional withheld information supplied at this stage must be separated from the PA's submissions, renamed (with 'WITHHELD INFORMATION" using upper case in the title) and saved independently in the WP file for ease of destruction at a later point.

186. The IO, as soon as possible after the receipt of submissions, must:

(i) check that the PA has addressed all of the questions raised in the SL8.

(ii) identify any new matters or exemptions/exceptions that were not raised in the PA's correspondence with the applicant.

(iii) identify areas where further evidence or information is required in order to answer the questions raised by the application.

(iv) check that they are relevant and specific to the information withheld in each case.

187. If any new matters or exemptions/exceptions are raised by the PA which are material to SIC's consideration of the application, the applicant must be informed and, where relevant, given an opportunity to comment .

188. Before beginning to investigate, the IO should be clear about which exemption/exceptions have been cited and be confident that all of the information withheld has 1) been supplied and 2) falls within the scope of the request.

189. The IO must consider whether or not the PA has provided enough information to show whether or not the tests relevant to each exemption/exception have been satisfied. IO can refer, among other things, to the following resources to help them reach a recommendation:

- SIC's briefings on any of the exemption/exception cited;
- Precedent from previous decisions;
- Legal Advice obtained by SIC (saved in VC by searching by document type: 'Legal Advice')
- Legal Information resources in SIC library and on LINETS (IOs without access to LINETS can ask colleagues with access to carry out research on their behalf)
- Research in media and other external resources, particularly on potential harm and the public interest.
- ICO decision and guidance; Information Tribunal and other court decisions.

190. IOs should carry out a proportionate level of research into the broader issues relating to the case, to understand the context in which it sits, and to allow informed critical assessment of the submissions provided by the PA.

191. Where a PA has cited multiple exemptions/exceptions in relation to the same information, it may not always be necessary to fully consider each exemption/exception in reaching a

decision. If it is clear that an absolute exemption should be upheld, there is normally no need to consider whether any other exemptions cited should be upheld. Similarly, there may be no need to consider all the exemptions/exceptions cited by the PA if it becomes clear that the information should be entirely withheld under a qualified exemption and that the public interest lies in maintaining the exemption.

Public interest

192. If relevant, the IO must consider whether the PA has provided enough information to consider both sides of the public interest test.

193. The IO must be satisfied that the PA has weighed the public interest in disclosure against the public authority in maintaining the exemption.

194. With specific reference to the EIRS, where the IO has accepted that more than one exception applies to environmental information, the PA must have been given an opportunity to provide arguments on the cumulative public interest test.

195. It may be necessary to establish SIC's view on the balance of the public interest. This should be highlighted when compiling the triage note for DHOE.

Where a PA changes its position during the investigation

196. If the PA simply applies additional exemptions/exceptions, the IO must inform the applicant and invite them to comment and continue the investigation and decision as normal. The PA must provide submissions on the new exemption.

197. If the PA discovers a significant amount of relevant information after claiming that it did not hold relevant information, then the IO should draft recommendations requiring the PA to substitute a different decision under section 21(4)(b) of FOISA or regulation 16(3) of the EIRs.

198. Where the basis on which the information was withheld has changed (e.g. excessive costs to not held, or vexatious to relying on exemptions) and further investigation is required by the IO to reach a decision, the IO should draft recommendations requiring a new review response in terms of section 21(4)(b) or regulation 16(3). However, there may be cases where the IO already has enough information in order to reach a recommendation on the PA's revised position, without requiring further investigation. In these cases, a decision notice considering the PA's position in full should be prepared.

199. If, at any point during the investigation, the IO becomes concerned that the PA is not being open and honest about the information it holds, or is being deliberately obstructive, the IO should immediately discuss with DHOE or HOE

200. If, during an investigation, the IO has reason to believe that a section 65/regulation 19 offence may have been committed, the procedures at appendix 6 must be followed.

Section 65 offences

Section 65 of FOISA states that it is an offence for records to be altered, defaced, blocked, erased, destroyed or concealed with the intention of preventing disclosure of information by the public authority. (There is a similar offence under regulation 19 of the EIRs.)

Section 11: Triage

201. Once sufficient submissions have been received from the PA and considered by the IO, the IO must prepare a short note for their DHOE (Triage). These should only be prepared when the IO is satisfied that there are no obvious gaps in the PA's submissions.

202. Triage should be submitted to DHOE within one week of receiving submissions. This period can be extended for complex case with the approval of DHOE. Where the SIC is the approver of a case, the DHOE must send the completed triage note to SIC (cc'ing the HOE), regardless of the weighting of the case. Where the triage note has been copied to SIC, or where SIC asks to seek the triage note, no further action should be taken on the case until SIC has commented on the note.

203. Triage is **mandatory** for all investigations not resolved prior to the receipt of submissions from the PA, although the level of detail required will be proportionate to the issues under investigation. IOs must use the Triage template within WP.

204. Triage is not designed to replace regular case updates which consider an IO's caseload as a whole.

205. IOs should follow the guidance below when drafting triage notes:

    (i) Only reproduce **full details** of request, initial response, request for review and review outcome, where it is necessary for the DHOE's understanding of the case. Nb: the investigation cannot consider matters which have not been subject to review and consequently the review and review outcome generally form the focus of the investigation.

    (ii) IOs should provide a **brief** background or context to the request, including keys dates (e.g. date of award of tender) website links and details of any overlapping/linked or similar cases.

    (iii) IOs must **summarise** or list the key points of the submissions by <u>both</u> parties. This will illustrate to the DHOE the IO's understanding of the case (wholesale reproduction of submissions should be avoided).

    (iv) Where reference is made to a specific document, please ensure either a copy or hyperlink is provided to the DHOE or that the document is easily identifiable from the WP file.

    (v) Summaries should highlight the key areas for consideration and indicate areas where there are potential gaps in the arguments supplied.

    (vi) Triage should be a maximum of 2/3 pages.

    (vii) IOs are expected, wherever possible, to provide their view on the proposed outcome and/or next steps.

    (viii) Each triage must highlight any possible scope for resolution.

    (ix) Advice sought from DHOEs should be clearly set out in numbered questions.

206. The purpose of triage to alert the DHOE/HOE to any significant issues with the case, to confirm that the investigation is heading in the right direction and to ensure that appropriate advice and guidance is provided sooner rather than later. Triage will also allow the DHOE to

identify applications which may require input from SIC at an earlier stage. As a result of the triage, the IO may be asked by the DHOE to arrange a meeting and prepare a briefing note for SIC.

207. DHOEs must be directed to the WP file and their advice will be added to the note.

208. DHOEs will provide their comments on the triage note within one week, unless the case is complicated, in which case the timeframe will be agreed between the DHOE and the IO.

209. Where, following triage, it is clear to the DHOE that the SIC would not uphold the application of a particular exemption/exception, IOs should (where considered appropriate) contact the PA to inform them of the likely outcome of the investigation (or part of investigation). This should be supplemented with examples of precedent and an explanation provided as to why this conclusion was reached. The investigation should continue, as required, but the PA should be provided with an early opportunity to withdraw their application/its/their reliance on exemptions/exceptions at this point.

210. Alternatively, where it is clear to the DHOE that the SIC would uphold the application of a particular exemption/exception, the IO should contact the applicant to advise them of the likely outcome of the investigation.

Content of case files

211. IOs must ensure that the case file in WP contains copies of all correspondence and notes of all phone calls or meetings relating to the case, and that the case file is always kept up-to-date. Emails should be added to the case file on the day on which the email is received/sent.

212. Progress with the investigation will also be recorded in the case file by copying in notes from case updates meetings with DHOE. Additionally, IOs may find it useful to amend the standard withheld information schedule to create a working document which records their thinking around key points of the investigation. This is particularly useful where reasoning is not clear from the decision notice (usually due to section 45 constraints).

Section 12: Decision notice

213. Where resolution has failed, or is not appropriate, the IO must draft a decision notice for SIC to consider. All decision notices are prepared in VC and the decision template file must be used.

214. Draft decision notices should be saved in the sub category “Investigation” in the “Enforcement” file and categorised as “Decision”. They should be named in the following manner “Draft Decision/Applicant and Public Authority/WP number” (e.g. Draft Decision John Smith and Dundee City Council 201400132).

215. When submitted for formal approval, the draft should be in a form which, if approved, could simply be signed and issued. IOs should not, unless directed to do so, submit drafts for approval that are incomplete. Guidance can be sought from DHOEs on sections of the drafts prior to formal submission.

216. Detailed guidance on drafting decision notices, can be found at Appendix 2: Key questions for public authorities.

217. At the point of submission, IOs should ensure that:

    (i) covering decision letters are prepared;

    (ii) the hard copy case file is prepared in line with our procedures;

    (iii) the withheld information under consideration is clearly labelled and that any information which is recommended for disclosure is easily identifiable.

218. IOs may find it useful to complete an approval checklist prior to submission.

219. The covering note from the IO submitting the draft decision notice for approval must highlight any areas which should be brought to the attention of the approvers. Given the restrictions of section 45 of FOISA, it is not always possible to explain in detail the reasons for certain recommendations; this is the type of information which must be contained in the covering note to approvers.

220. It is also good practice to annotate draft decision notices using the “insert comment” facility in Word to provide approvers with a quick and direct access to the submissions, information or evidence investigators are referring to or relying on when drafting decision notices. See guidance in box below:

Annotating draft decision notices

Adopting the following practice allows approvers to quickly access the relevant information in the red file.

1. Hard copy information in red file

Add tabs to all of the key documents you will be making reference to in the draft decision notice, particularly where it has been necessary to obtain additional submissions from either party.

For example:

- PA Subs1 19/08/16
- PA Subs2 03/09/16
- PA evidence of third party consultation

- APP subs 12/08/16
- PA Evidence of searches 19/08/16

2. Draft decision notices – references to information (submissions, information, supporting evidence, etc.)

When drafting a decision and referring to or relying on any information obtained during the investigation, use the “new comment” function in the “review” tab to pinpoint exactly where the information you are referring to is recorded.

The level of detail in the comments box will depend on the document you are referring to, e.g.:

- PA Subs 1, Q3
- PA SUBs 2, Page 1, Paras 3-4

Section 13: Approval

221. All decisions, with the exception of Failure to Responds (FTRs) and limited cases where SIC carries out first level approval, are required to go through a second level case approval.

222. The covering decision letters must be prepared prior to submission for approval.

First level approval

223. The draft decision notice is to be submitted to the relevant manager (identified at case allocation) using the Workpro approval system. The "summary" section must be cut and pasted from the draft decision. This must be updated at each stage of the approval process to ensure it accurately reflects the outcome of the investigation.

224. The covering notes from the IO must contain the next relevant KPI target date. (The KPIs here are the Enforcement Team KPIs, not the KPIs set for individual officers. In 2016/17, the Enforcement Team KPI target dates are 4, 6 and 12 months from the date of validation.) It must also include any issues to be brought to the attention of the approvers. Given the restrictions imposed by section 45 of FOISA, it is not always possible to explain in detail reasoning within the decision notice itself. This type of information should be included in the covering note.

225. The IO should also bring to the first level approver's attention any issues that might impact on when the decision notice is issued, with reference to relevant documents or other information (see paragraph 240. for more information).

226. The IO should hold onto the hard copy file until asked to provide it by either the HOE or DHOE. The file must be set out in such a way that it reflects the standard case file structure, it can easily understood and the information which has been withheld, submissions etc. can be easily located. No loose papers should be contained within the file. IF THE CASE FILE IS NOT PREPARED, IT WILL BE RETURNED TO THE IO.

227. Throughout the approval process, the location of the file must be updated in Workpro. This is done by updating the "case properties" section of the Workpro file. It is the responsibility of the person transferring the file to update the location in Workpro, unless the DHOE/HOE retrieves the file in the absence of the IO, in which case the DHOE/HOE must update the location.

228. HOE/DHOE will consider whether the draft decision is:

    (i) lawful,

    (ii) reflects an investigation carried out in accordance with these procedures and what has been agreed at triage/case management meetings,

    (iii) follows VI guidance in relation to spelling, grammar and equalities approach to writing and is

    (iv) generally at the standard required by SIC.

229. Further work may be required by the IO at this stage, before HOE/DHOE is satisfied that the draft decision is ready to be passed for second level approval.

230. Where significant alterations are made to the draft decision notice, the case should be returned to the IO prior to being submitted for second level approval to ensure that the case

file is appropriately prepared e.g. any information the draft orders disclosure of remains clearly identifiable.

231. Where the outcome of the decision has been altered, the case must be returned to the IO for review and to ensure that the covering decision letters still accurately reflect the outcome of the decision.

Second level approval

232. HOE/DHOE will consider whether the case is “red” or “white” before passing the draft decision on for second level approval. “Red” cases will be those where SIC/HOE requires to see the file, documentary evidence and other background information , usually because the case is sensitive, complex or raises new issues of interpretation.

233. All cases passed to SIC for second level approval are “red”, the hard copy case file should be prepared and checked before passing to SIC’s PA. The Workpro file should be updated to reflect the case file’s location.

234. On submission to SIC/HOE for second level, the DHOE/HOE must contain in the covering note:

    (i) Why resolution was not achieved or thought not appropriate.

    (ii) Whether the decision is likely to attract media attention.

    (iii) Highlight the next KPI target date.

    (iv) Any issues that could have an impact on when the decision notice is issued and/or published (see paragraph 240. for more information).

235. In sensitive or high profile cases, the DHOE/HOE should set up a meeting with SIC and the P&I team in advance of the decision notice being issued to discuss a strategy for responding to requests from journalists.

236. When cases are passed to SIC for second level approval, ensure that the approval email is also sent to SIC’s PA and the P&I team.

Preparing Decision for issue

237. SIC/HOE and DHOEs must check the content of the covering letters prior to approval.

238. The second level approver must consider whether there are any reasons to delay or bring forward issuing or publishing a decision. The presumption is that decisions will be issued as soon as they are ready (or within a few days allowing for us to complete procedures) and any delay must be exceptional and properly noted in a file note. Decisions will usually be published on the SIC’s website one week after issuing.

239. The second level approver must take a case-by-case decision based on balancing the public interest, statutory requirements, the operational needs of the office and fairness.

240. Reasons to delay might include (this is not exhaustive):

    (i) the applicant has requested it, and we agree. For example, the applicant may tell us that they are going to be away and will be unable to receive the decision at the same time as the authority – this could affect their appeal rights.

(ii) there are legal or other restrictions in force. For example, in the run-up to the Scottish Independence Referendum, the Scottish Independence Referendum Act 2013 made it unlawful for SIC to publish information which dealt with any of the issues raised by the referendum question.

(iii) issuing immediately would create unreasonable operational challenges for us, due, for example, to the absence of key personnel.

241. The applicant and authority should be updated. The HOE will approve all communications in relation to delay or potential delay where the delay is as a result of legal or other restrictions in force.

242. The second level approver must also consider whether to publish the decision before the usual week. The most usual reason for this will be if the decision is about a high profile matter that is likely to get media attention, and it is in the public interest for the decision to be generally available immediately.

243. Once approved, the HOE/DHOE will enter the decision number to the Workpro case file. The IO should add this to the decision notice along with the date of issue.

244. The IO should check that all tracked changes/comments have been addressed and removed from the decision notice and that it remains coherent. Where the decision notice requires action to be taken by the public authority, it is the IOs responsibility to ensure that the appropriate compliance date is added to the “decision” box in the decision notice. This must be at least 45 calendar days after the date of the decision. Compliance dates should not fall at the weekend or at a public holiday.

245. The IO must also ensure that the covering decision letters still reflect the content of the decision notice- this MUST be done prior to alerting the ETSA that a decision will be issued.

Section 14: Issue of the decision notice

246. If approved prior to 2pm, the decision notice will normally be issued on the same date. If approved after 2pm, the decision notice will be issued the following day, subject to certain exceptional circumstances.

247. As soon as the IO has a decision number, they should alert the ETSA, to let them know when the decision is to be issued and ask them to prepare copies of the decision notice for signature. The IO must provide the ETSA with the following information;

    (i) when the decision is to be issued,

    (ii) who will be signing the decision,

    (iii) Workpro reference number (to obtain the covering letters),

    (iv) VC reference number for the decision.

248. The ETSA should be given as much notice as possible that a decision notice requires to be prepared. In some cases, particularly where there is a high volume of decisions being issued, the ETSA may ask that the issue of decision be delayed until the following day.

249. The ETSA will check the formatting of the decision notice and that there are no obvious errors/omissions in the covering letters.

250. ETSA will print off and bind two copies of the decision, and arrange for both to be signed alongside the covering letters by DHOE/HOE/SIC. Where the letter and/or decision refers to marked-up information (or other enclosures specific to the case), these must be give the second level approver at the same time as the letters and decisions for signing.

251. Once the decisions and letters have been signed, ETSA will then arrange for the decision notices to be sent recorded delivery and will complete the mail out book and the RD book. Where a marked-up version of the information is being sent to the public authority along with the decision (see paragraph 250.), ETSA, plus one other member of staff (preferably the IO), must check the envelope to ensure that the information is being sent to the public authority and not to the applicant. A note must be added to WorkPro to record that this has happened.

252. Once signed, the ETSA will LOCK the covering letters in the Workpro file, mark as sent and notify the IO that the decision has been signed.

253. Once notified that the decision has been signed the IO must:

    (i) Create a final version of the decision notice in VC (and an anonymised version if required) and record the final version VC number in Workpro. The IO should use the following procedure to create a new final version:

    (ii) Open in “Read Only” use “Save as” function to create a new document on desktop.

    (iii) Select the “Add-Ins” tab and use the “Send to VC” function.

    (iv) Use the “Index in VC” function and save the new document in the correct categorisation in VC, using the naming convention e.g. 2013 10 16 Decision 123/2013 Mr Smith and Scottish Ministers 201300161. Anonymised versions of decisions should use the following naming convention: 2013 10 16 Decision 123/2013 ANON Mr Smith and Scottish Ministers 201300161.

(v) Complete all the relevant fields in Workpro and move the file onto the "Decision Notice" workflow.

(vi) Prepare a PDF of the final version of the decision notice and send this by email to the officer within the public authority who has been the point of contact during the investigation and, where the IO has an email address from the applicant, to the applicant. This email should be sent on the day the decision is posted.

(vii) Create tasks in Workpro to:

(a) Check compliance with decision notice

(b) Close the case and arrange for the ETSA to destroy the documents 3 months from the date of issue (subject to Appeal)

254. If the applicant's name is to be withheld from the published version of the decision notice, the IO must make sure that two copies of the decision, one anonymised and one non-anonymised are saved in VC. The IO must be aware that the decision may contain potential identifiers within the substantive text of the decision notice and may not be restricted to names only.

255. The IO must send the website upload/compliance template email using Workpro. Within this email the IO must ensure that the ETSA is provided with the VC number for the anonymised version of the decision notice, where relevant.

256. ETSA will publish the decision on the website, not less than five working days following date of issue (unless a separate timescale has been agreed).

257. Once published on the website, the IO should transfer the hard copy case file to ETSA, unless compliance is required.

258. It is the IO's responsibility to ensure that any withheld information contained in the Workpro file is clearly marked as such – including withheld information contained with the body of submissions. This will allow the ETSA to clearly identify and destroy the withheld information at the appropriate time.

259. In some cases, the applicant or the public authority may seek further clarification of SIC's decision because they do not understand it or do not agree with it. The IO will seek to provide that clarification, but will not enter into detailed discussions with either the applicant or public authority. IOs should use the standard template letter in responding to post-decision queries.

260. SIC's complaints procedure, makes it clear that the Commissioner cannot accept complaints about the outcome of decisions.

Section 15: Checking compliance and closing the case

Compliance required

261. The IO will check compliance with the public authority and applicant at the appropriate time, unless confirmation has been received prior to this.

262. Evidence of compliance will have been stipulated in the decision letter; in most cases verification should be possible on the basis of a confirmation letter and document schedule sent to the applicant, combined with the applicant's confirmation that these have been received. There will be cases (partial disclosures) where the actual information disclosed to the applicant requires to be seen. Where the disclosed information has been posted on the authority's website, a link to the relevant pages should generally be sufficient.

263. If compliance is confirmed, the IO will issue compliance letters and record the date of compliance in the Workpro file. Assuming the appeal period has passed, the IO should close the Workpro file at this point.

264. If compliance is not confirmed and no appeal has been lodged, the IO must notify DHOE/HOE.

No compliance required

265. The IO should close the Workpro case file on the expiry of the appeal period. The IO should ensure at this point that the withheld information is CLEARLY highlighted within the Workpro file for ease of destruction by the ETSA. This also applies to cases closed during the course of the investigation.

266. If the information or documentary evidence is to be returned to the public authority/applicant this must be clearly marked on the front of the hard copy case file and a note in the Workpro file – please note that this includes any information received DURING THE COURSE OF THE INVESTIGATION.

No appeal

267. If no appeal is received within three months from decision issue date, the ETSA will destroy documentary evidence and the contents of the paper file, with the exception of:

    (i) any information either party has asked to be returned (which will include original documents)

    (ii) information provided on media including memory sticks, CDs and DVDs, which will be returned to the relevant party.

268. The ETSA will ensure the deletion of any documentary evidence/other information to be destroyed from the Workpro file. The ETSA will add a note to the Workpro file recording the destruction of the contents of the file/evidence.

Appeal received

269. If an appeal is received, the IO must notify DHOE/HOE and transfer the case in Workpro to the HOE immediately.

Remember that, if the application identifies a potential failure on the part of the public authority, the IO must complete the "Issues/Non-compliance" section using the drop down list to indicate the relevant compliance issue. Comments can be added if necessary.

If an IO is carrying out a level 1 intervention (in line with the Commissioner's Intervention Procedures), this should be recorded in the relevant fields in the right hand side of the "Issues/non-compliance" page in WorkPro.

Section 16: Appeal

270. This step is only relevant where the public authority or the applicant appeals against the decision of SIC on a point of law. It is possible, although unlikely, that both parties could appeal against the same decision.

271. HOE will notify SIC, the IO, both DHOEs and the P&I Team immediately where a case has been appealed. If the IO is notified by the public authority or the applicant that an appeal is likely, HOE must be notified and a note must be placed in WorkPro.

272. Where confirmation is received from a public authority or from an applicant that they have appealed or intend to appeal against a decision of SIC, HOE must be informed immediately. The case must then be transferred to HOE in WorkPro.

273. HOE will ask CST to add a note to the online version of the decision notice, advising that an appeal is pending. CST will also update the properties of the online decision, so that the case appears in the searchable list of appeals.

274. When an appeal is served on SIC, HOE will contact our external solicitors.

275. A meeting is likely to be necessary to determine whether the appeal should be defended. In most cases, this will involve counsel or a solicitor-advocate (to be instructed by the external solicitors, with the agreement of HOE and SIC). In advance of this meeting, a full copy of the case file must be provided to the solicitors – it is the responsibility of the IO to prepare this copy (or arrange for a copy to be made).

276. The IO is likely to be asked to accompany HOE and SIC to meetings with the external solicitors and to the hearing at the Court of Session and to provide other, general assistance with the case.

277. Once the outcome of the court case is known, HOE will note the outcome of the case on WorkPro. HOE will ask CST to update the note on the online version of the decision notice, where relevant, adding a link to the judgement.

Section 17: Enforcement of decision notice

278. If the public authority has not complied with the steps required in the decision notice, under section 53(1) the Commissioner has the right to refer the case to the Court of Session immediately. The following steps will normally be followed before a referral is made unless the public authority has advised us that it does not intend to comply with the decision notice or, if in the HOE's view, it is reasonable to refer the matter to the Court of Session more quickly.

279. The IO should prepare SL20. This reminds the public authority that they have a duty to comply with the decision of the SIC and that failure to do so is likely to lead to the matter being referred to the Court of Session. The letter must be sent to the Chief Executive, or equivalent. The public authority will be given five working days to comply with the decision. The letter will be signed by HOE.

280. If, after 10 working days, the authority has still not complied, the IO must alert HOE. Depending on the circumstances, HOE may ask the IO to prepare SL21 to the public authority, requiring them to comply with the decision notice within five working days. The letter must be sent to the Chief Executive or equivalent and be signed by the SIC.

281. HOE will discuss the matter with SIC and, where appropriate, instruct our solicitors to begin proceedings and to refer the matter to the Court of Session.

282. Where the public authority only partially complies with the decision notice, the steps set out above should be taken, unless the public authority has advised us that it does not intend to comply with the remainder of the decision notice. However, the IO should also contact the applicant to find out their views on the partial disclosure of information as this will be taken into account in deciding whether to refer the matter to the Court of Session.

283. Once the case is complete, any decision issued by the Court will be published on the SIC decisions database.

284. The above steps will not apply where the First Minister has issued a ministerial certificate. Where this applies, SIC and HOE must be advised immediately. HOE will advise SIC on whether the certificate is valid (i.e. whether it complies with section 52). The P&I team must also be advised immediately.

Section 18: Information notices

285. SIC can issue an information notice if he requires information from a Scottish public authority (section 50). The notice can seek both recorded and unrecorded information.

286. Use of an information notice is not confined to cases where an application has been made to SIC for a decision under section 47(1). SIC can also issue an information notice if he wishes to determine whether an authority has complied or is complying with FOISA or to determine whether the practice of an authority conforms to one of the codes of practice.

287. Slightly different procedures will apply depending on whether the information is sought as part of a section 47(1) application or is used as a standalone procedure to determine whether an authority is complying with FOISA or a code of practice. The content of the notice will also vary. E.g. where an information notice is issued in response to an application under section 47(1), it must state that an application has been received.

288. Information Notices must always be served on the Chief Executive (or equivalent) of the public authority. Where an information notice relates to an application for a decision, the IO should also send a copy to the public authority official dealing with the investigation.

Information required for investigation of an application

289. Where SIC has been asked for a decision under section 47(1), the VO/IO will almost always require information from the authority to assist with the investigation. Where the VO/IO has made more than one attempt to obtain the information from the authority, it is likely to be appropriate to initiate the information notice procedure. The VO/IO should discuss this with DHOE/HOE (who may, depending on the circumstances, discuss it with SIC before proceeding).

290. If the authority fails to respond within the set time limits without good reason, an information notice (SL27a if to be signed by HOE or DHOE and SL27b if to be signed by SIC) should then be issued. An IO may choose to deviate from this procedure in any given case, particularly where experience has shown that the public authority will not comply with requests for information until an information notice is served.

291. Whenever an information notice is issued, the IO must use the template in WorkPro to create SL27a/SL27b. Reports will be prepared on WorkPro to count the number of occasions on which an information notice is sent and this information is likely to be included in SIC's Annual Report to the Scottish Parliament. If the appropriate templates are not used, the information notice will not be counted. This means that IOs must create a new information notice from the template each time one is required, rather than adapting an existing document. As noted earlier in the procedures, where an information notice is prepared in WorkPro but is not subsequently issued, it is the responsibility of the IO to ensure that the record is deleted from WorkPro to ensure that the wrong number does not appear in the Annual Report.

292. Section 50(4) of FOISA suggests that it is only where an information notice is issued under section 50(1)(b) (for the purpose of checking compliance, etc.) that a public authority must be given a minimum of six weeks to respond to an information notice. However, this appears to be a drafting error in FOISA and information notices issued under section 50(1)(a) (i.e. in response to an application) should also allow a public authority a minimum of six weeks to respond to a notice. Where information notices are used, this must be made clear to the public authority. However, at the same time, the public authority should be requested to

respond within the six weeks if possible, in order to allow us to comply with the timescales expected by Parliament in section 49(3)(b).

293. An information notice can be cancelled at any time by sending SL25; see section 50(8) of FOISA . Where the authority complies with the information notice, it is not our normal practice to send formal notification that the notice has been cancelled, but SL25 can be sent if the public authority requests such confirmation.

294. Where the authority does not comply with the notice within the time specified, the IO should discuss this with HOE/DHOE and send a reminder; SL24.

295. Where the authority does not comply with the notice and SIC decides to take the matter to the Court of Session the enforcement procedure should be followed by HOE.

Information required for enforcement or ensuring compliance

296. The process will be slightly different where SIC is seeking information outwith an application for a decision. These steps are set out below.

297. Where SIC is considering issuing a practice recommendation or an enforcement notice, it may be necessary to obtain information from the authority. Where the IO is experiencing difficulty obtaining this information from the authority, the IO should consider initiating the information notice procedure.

298. Where an information notice is used to determine whether an authority is complying with FOISA or code of practice the notice must allow the authority a minimum of six weeks to respond. This may have a bearing on when a notice is used.

299. A notice issued to determine whether an authority is complying with FOISA/code of practice must state the following:

    (i) the purpose for which SIC regards the information as relevant

    (ii) SIC's reasons for regarding the information as relevant

    (iii) the time within which the information is to be provided

    (iv) the right of appeal conferred by section 56

Appendix 1: Validation Guidance

Purpose of Validation

300. The Commissioner must establish that an application is eligible to be investigated by her. An invalid application cannot be investigated by the Commissioner. If an application is wrongly validated, then any subsequent decision would be unenforceable. This guidance is designed to assist the VO in coming to a view as to whether the application is valid.

Validation of cases

301. The applicant must have gone through these two basic steps before they can make a valid application to the Commissioner:

Step 1: They must have made a valid information request to a Scottish public authority AND

Step 2: They must have asked that public authority to review its decision.

302. The application document itself must also meet the format requirements as set out in section 47 of FOISA.

Resolution and validation

303. The DHOE will have identified any cases suitable for attempted resolution prior to validation; these are likely to be applications where the applicant seeks what is clearly their own personal data e.g. medical records.

304. The VO should contact the applicant and explain why their application will be unsuccessful, with reference to section 38(1)(a) of FOISA and advising them to contact the UK Information Commissioner (the ICO) for more information on how to access their personal information.

305. Where resolution is not successful, the case should be assessed as to its validity in the normal way.

Excluded applications- Section 48 of FOISA

306. The Commissioner cannot consider an application concerning a request for information made to :

(i) the Commissioner;

(ii) a procurator fiscal;

(iii) the Lord Advocate, to the extent that the information requested is held by the Lord Advocate as head of systems of criminal prosecution and the investigation of deaths in Scotland.

307. Applications concerning the above are likely to be INVALID. If section 48 applies, SL02 should be sent to the applicant indicating that the Commissioner is unable to consider the application and explaining why and the case closed in WP.

308. Such cases should be identified by the DHOE during their preliminary assessment, indicating which subsection of section 48 applies to the application. Where there is insufficient information to determine whether section 48 applies, DHOE should allocate the application to an IO for further investigation.

309. With specific reference to sections 48(b) and (c) and in line with her Enforcement Policy (INV42694), the Commissioner may use her other enforcement powers to seek information from the authority to determine whether the exclusion in section 48 applies. Where there is evidence of an unacceptable level of failure to comply with timescales, the Commissioner may issue an enforcement notice under section 51 of FOISA.

Format of the application- section 47 of FOISA

310. The VO must consider whether the format of the application meets the requirements of section 47(2) of FOISA:

    (i) Has the application been made in a permanent form?

    (ii) Does the application state the name of the applicant and an address for correspondence? (The applicant's name must be stated independently of any email address)

    (iii) Does the application either directly or with reference to attached documents specify the request for information to which the requirement for review relates?

    (iv) Does the application (or attached documents) specify the reasons why the applicant sought a review?

    (v) Does the application provide the reasons why the applicant is dissatisfied with the outcome of the review?

311. If the application does not meet the requirements detailed above, the application is INVALID, the applicant informed using SLO2a and the case closed in WP. Where appropriate, the applicant should be provided with advice on how to make a valid application alongside a copy of our template application form.

312. It should not be necessary for the VO to obtain copies of the initial request/initial response/requirement for review/review outcome (the key application documents) prior to reaching the conclusion about the format of the application to the Commissioner.

313. However, even if the format of the application complies with section 47(2), this does not mean that we will automatically have the power to carry out an investigation. We will also need to check other matters, such as the validity of the information request, whether the "true applicant" has been named, etc.

The information request

314. For an information request to be valid, it must be in writing or in another form which is capable of being used for subsequent reference.

315. FOISA gives a right to recorded information. Therefore, a request for an unrecorded opinion or for advice is not a valid information request. An information request may take the form of a question, if it is conceivable that the authority might hold an answer to the question in a recorded form.

316. Questions of a more argumentative kind, or where the applicant appears to have prejudged certain matters, should be treated carefully: DHOEs should be consulted if there is any doubt.

The name of the applicant

317. The request must state the name of the applicant and an address for correspondence. Anonymous requests are invalid, as are requests made using a pseudonym. Where an information request is made by email, an email address can be treated as an address for correspondence.

318. If the VO suspects that a pseudonym has been used, the DHOE should be consulted.

319. The person making the application must also clearly set out their name in the email or letter, e.g. by "signing" the email/letter at the end or using an auto signature i.e. the name must be stated independently of the email address, within the body of the email itself. A name in the first email of a continuous chain may suffice, provided there is enough of a link between the subject matter of the initial email and that of the request.

320. The application must name the "true applicant". If, for example, a firm of solicitors makes an information request on behalf of a client, but does not name the client, the request will be invalid. In some cases, where a third party claims to be acting on behalf of an individual, it may be necessary to seek confirmation from the individual in question. This is unlikely to be necessary where a firm of solicitors is acting on behalf of an individual, but may be necessary in other cases. Advice should be sought from the HOE/DHOE.

Postal address

321. If an applicant fails to provide a postal address, this is not a reason to invalidate their application or to stop investigating their case. They should be asked to provide a postal address so that the decision notice can be legally "served" at the end of our investigation. However, if they refuse to do so, the decision notice will be emailed to them (but cannot be served).

The request for review

322. For a request for review to be valid, it must be in writing or in another form capable of being used for subsequent reference.

323. A request for review must state the name of the applicant and an address for correspondence. The person asking for the review must be the same person who made the initial request.

324. The request for review must:

(i) Specify the request for information to which the requirement for review relates (i.e. it must make reference to the initial request in some way AND

(ii) Specify why the requester is unhappy with the way in which the Scottish public authority dealt with the information requested – simply stating they are seeking a review is not sufficient, there must be some basis for the public authority to undertake a review set out.

Timescales

[The following sections regarding timescales should be taken into account by the VO when investigating Failure to Respond applications]

325. There are number of different timescales, all of which must be complied with before an application can be validated.

326. Reference to days in FOISA, means "working days". There is a definition of "working days" in section 73 of FOISA. This excludes weekends and statutory bank holidays.

327. Any reference to "months" means calendar months.

Responding to the initial request

328. A public authority has a maximum of 20 working days to reply to a request for information. This period can be extended in limited cases under the EIRs (see below).

329. There are two sets of circumstances where the 20 day period is effectively extended. These are:

    (i) Where the public authority reasonable requires further information in order to identify and locate the requested information. In these cases, the public authority is entitled to ask the applicant for clarification. If the public authority does this, the 20 working days clock does not start until the applicant provides the clarification.

    (ii) Where the public authority issues the applicant with a fees notice. Again, the 20 working days clock will stop when the fees notice is issued to the applicant. The clock will restart when the applicant pays the fee. So, if the public authority issues a fees notice on day 8 and the applicant pays the required fee two weeks later, the public authority will have a further 12 working days in which to deal with the request, starting from the day after payment is received.

330. The public authority has 20 working days to respond to an information request. The 20 working days starts on the first working day after the authority receives the request. The public authority has up to 20 working days to respond to the applicant. This means that a public authority can post a response out to an applicant on the 20th working day. Even if the applicant does not receive a response until a couple of days after that, the public authority will be considered to have responded in line with the timescales set down under FOISA.

Making a request for review: timescales

331. The basic rule is that an applicant has 40 working days after receiving a response from the public authority to ask the public authority to carry out a review. This is regardless of whether the public authority has responded with an initial response within the 20 working days or not.

332. In some cases, the public authority will not have responded to the information request at all. Where this happens, the applicant can ask for a review to be carried out up to 60 working days after making the initial request.

333. If the request for review is made outwith these timescales, under FOISA only the public authority can decide to ignore the fact that it has been made late and carry out the review. However, if the public authority does not wish to carry out the review late, the Commissioner cannot force the authority to carry out a review.

334. If the request concerns environmental information, the public authority does not have discretion to carry out a late request for review and consequently any subsequent application to the Commissioner is invalid.

Making an application to the Commissioner

335. Applicants have six months to make an application to the Commissioner after:

(i) They have received a notice advising them of the outcome of the review from the public authority; or

(ii) The 20 working days for the public authority to respond to the request for review have passed and the authority has not responded to the request for review.

336. The Commissioner can choose to accept a late application if he thinks it is appropriate to do so. The Commissioner may consider it appropriate to accept a late application in the following circumstances:

(i) the authority misled the applicant, or

(ii) the authority failed to advise the applicant of their right to refer the matter to the Commissioner, or

(iii) reasons why the applicant might be dissatisfied with the authority's response to the request for information have only just become apparent, or

(iv) where the public authority has previously promised to provide the applicant with information but fails to do so, and as a result the six month deadline has passed.

337. All such cases must be discussed with the DHOE and approval to accept a late application must be sought from HOE or SIC.

338. Where the application has been made after the six month time limit and SIC does not exercise her discretion to accept the application, the case is INVALID and must be closed in WP. The SL02c should be sent to the applicant.

Miscellaneous rules about timescales

339. FOISA sets out some presumptions about when requests, applications, etc. are deemed to have been received by a public authority, applicant or the Commissioner. These presumptions are known as "rebuttable presumptions" which means that they can be overturned if it can be shown that something else has happened.

340. The presumptions are set out in section 74 of FOISA.

341. If a request etc. is sent by email, it is presumed to have been received by the public authority on the day on which it was sent (regardless of the time at which it was sent). That means that the timescales for responding will start the day after it was sent. However, if there was a problem with the sender's network and the public authority did not receive the email until the following day – or did not receive the email at all – then the presumption can be set aside and a different timescale applied.

342. Similarly, a request, etc. which is posted is deemed not have received by the public authority until the third day after the day of positing. This is clearly designed to allow for second class post. However, if it is clear from the records of a public authority (e.g. a date stamp) that the authority received the letter the day after it was sent, the 20 days for responding will run from the actual day of receipt.

Valid grounds of application

343. The grounds of application set the scope of the subsequent investigation and consequently forms an important part of the validation process.

344. The VO should check that the request has remained consistent throughout the processing of the request, request for review and application. Any issues raised in the application which

were not raised by the applicant in their request for review (unless it relates to an issue raised in the review outcome) cannot be considered by the Commissioner. If the applicant has narrowed the scope of their request at review stage, we can only investigate the narrowed request.

345. The matters raised in the application, must be within the Commissioner's jurisdiction (Part 1 of FOISA). If the grounds of the application do not fall within the Commissioner's jurisdiction, the case will be INVALID. The applicant should be informed and advice provided on how to make a new application should they wish to do so.

346. If the application does not provide reasons for dissatisfaction (see format of application above), the application is INVALID and the applicant should be invited to make a new application setting out why they are dissatisfied with the authority's handling of their request.

347. The grounds of appeal are confirmed with the applicant by the IO, on allocation.

348. If the format of the application is valid, but the VO is unable to determine whether the application is otherwise valid, the VO should contact the applicant seeking further information. The applicant is provided with two weeks to respond, if the applicant fails to respond, the VO must consider whether the applicant has abandoned or withdrawn their application.

349. It will not always be necessary to obtain copies of all four key documents before validating an application – although, generally, we will usually need the see the authority's response to the request and request for review (if a response has been made). The test is whether we have enough information, on balance, to be satisfied that the application is valid. For example:

- if the applicant has not provided us with the initial request, but the response sets out the date of the request and the request in full, we do not need to obtain a copy of the request
- if the applicant has not provided us with a copy of the request for review, but we have a copy of the review outcome, which sets out the reasons for dissatisfaction, etc., then we do not need to obtain a copy of the request for review

350. If the applicant does not have copies of the key documents, and we have concluded that we need to see some/all of them, they should be asked to contact the public authority direct to ask for copies of the documents and, thereafter, supply the documents to the VO.

It is not always necessary to obtain all key documents before an application can be validated

Validation and the EIRs

351. Where an application involves a verbal request for environmental information, the applicant will not be able to provide a copy of their request, unless it has been recorded in some way. The terms of the request may have been recorded in the correspondence between the applicant and the public authority, but if it is unclear what the request was for, or when it was made, the VO should contact the public authority for assistance. The public authority may have retained notes about when/how the request was received.

352. Any information received from the public authority should be confirmed with the applicant. In all cases, the VO (in consultation with DHOE/HOE, where necessary) will need to be satisfied that a valid request was received and be clear on the terms of the request.

Appendix 2: Key questions for public authorities

1. These key questions have been drawn up for IOs to consider when asking a public authority for submissions on particular exemptions or provisions in FOISA or the EIRs. They will therefore mostly be used at the time when composing the SL8, although they will also be useful when assessing whether the submissions from the public authority addresses key issues adequately.

2. Clearly, the questions do not contain an exhaustive list of questions and not all of the questions will be appropriate in every case, particularly where, e.g., the notice issued by the public authority at review stage is detailed and addresses all of the questions which we would be likely to put to the authority. However, the questions surrounding the exemptions have, in particular, been prepared with the aim of ensuring that IOs receive submissions on all of the necessary tests for each exemption. The questions are currently all aimed at FOISA exemptions. Care should therefore be taken when dealing with exceptions under the EIRs to ensure that the correct questions and tests are applied as it will not usually be possible simply to copy the questions for the FOISA exemptions. Key questions for the EIRs will be added during 2014/15.

   Please number questions in SL8s.

3. Remember that SIC's briefings on the exemptions also contain a lot of guidance on the types of information IOs need to be thinking about when asking questions about particular exemptions.

Part 1 Provisions

Excessive cost of compliance (section 12)

Remember that it might be necessary to ask questions to ensure that the request has been interpreted appropriately and to ensure that we understand how the information is held by the public authority.

4. Provide detailed calculations estimating the projected cost of responding to the request. In these calculations, include a breakdown of the cost of staff time, the type of work that would require to be undertaken (e.g. the number of files or documents considered relevant; the amount of staff hours) to satisfy the request and the number of hours that compliance with the request is likely to take.

5. In this calculation of costs, identify the role of the member of staff who would be tasked with this duty and what their grade and hourly rate is. Also provide an explanation as to why this particular grade of staff is required to carry out the tasks in question.

6. Advise of any other costs which are incorporated in the £15 an hour rate that the authority is quoting?

7. You have intimated that it would take x minutes per record to provide an answer to [applicant]'s request. How was this cost calculated? Could you provide us with a small worked example to support your calculation?

8. Section 15 of FOISA requires a public authority to provide reasonable advice and assistance to someone making an information request. The public authority should consider how best to provide the information requested in the most cost-effective way.

Describe any steps taken by public authority to try to help the applicant reduce the costs involved in providing the information that they have asked for.

9. Has the public authority provided a detailed breakdown associated with this request to the applicant? If so, please supply a copy.

10. (Where it suspected that the authority has aggregated the costs) At present there is no provision under FOISA for public authorities to aggregate the costs in responding to two or more requests from an applicant. The applicant could have sent separate letters or emails, or even separate letters in the same envelope. The fact that more than one request is contained in the same letter or email should not affect how an authority deals with them. Likewise, where an authority receives a request (or a number of requests) for information that specifies different time periods, each question relating to each time period should be considered as a separate request. In light of the above, provide a cost breakdown which deals with each of the applicant's requests separately [provide details of how the request should be broken down and tackled by the authority].

Remember, however, that some requests might be so interconnected that they should be treated as one request.

11. (Where it is suspected that the charge imposed is for establishing whether the information is held, rather than locating and retrieving it) The Fees Regulations allow a public authority to charge for direct and/or indirect costs incurred in locating and retrieving the information requested, but not for any costs incurred in determining whether an authority actually holds the information or for any costs incurred in deliberating whether or not to provide the information (see Annex 3 of the Section 60 Code of Practice for further guidance on the Fees Regulations). In light of the above, confirm that the charges applied to the request relate to the costs of locating and retrieving the information, and provide a breakdown showing how the costs were calculated.

Vexatious or repeated requests (section 14)

Section 14(1)

12. With reference to the Commissioner's briefing on section 14(1) of FOISA (copy enclosed), please explain, in detail, why [public authority] is relying on section 14(1) of FOISA in responding to this request. Please provide any documentary evidence which would support [public authority]'s position.

Section 14(2)

13. Your authority argues that this request is identical/substantially similar with an earlier request from [applicant]. Please provide a copy of his earlier request and evidence of your authority's compliance.

14. [IF RELEVANT] An authority is not obliged to comply with a subsequent request from the requester if identical or substantially similar UNLESS there has been a reasonable period of time between the requests. In this instance, please explain why your authority does not consider there to have been a reasonable time period between these requests. In doing so, please provide context to the nature of the information captured by this request. Please state whether there have been any additions/amendments or changes to the information captured by this request, in this time frame.

Information not held (section 17)

15. What steps did the public authority take to establish that the information is not held? Provide as much detail as possible. If the public authority has provided its staff with any guidance on collating responses to information requests, a copy should be provided.

16. What searches were carried out for information relating to the request? To support the contention that the information is not held, explain the extent of any search carried out, and why this would have been likely to retrieve any information covered by the request. Provide screen shots of the searches which have been carried out, making it clear what the search parameters were and what the timeframe for the search, etc., was.

17. If other members of staff were consulted, please list them and (if not obvious) explain why they would be likely to know whether relevant information was held.

18. If a search was not thought to be necessary, please explain why.

19. If searches were carried out, please make it clear which sets of records or data resources were included. Were relevant diaries and notebooks included?

20. If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

21. If searches included electronic data, which search terms were used. Would the public authority be expected to hold this information? Does it have a legal duty to hold it? Does internal or external guidance create an expectation that the public authority will hold the information?

22. Has the public authority ever held this information? If so:

    (i) Has the information been mislaid?

    (ii) Is it known whether the information has been destroyed or deleted, and if so, is there any audit trail? For instance, was the information destroyed in line with an established records retention schedule?

23. If the information is electronic data which has been deleted, is retrieval possible from (for instance) back-up server tapes? Might copies have been made and held in other locations?

24. If the public authority has access to the information but believes it does not "hold" it, in terms of section 3(2) of FOISA, is there evidence available to show that it was provided in confidence by a Minister of the Crown of by a department of the Government of the United Kingdom? Or is held on behalf of another person (if so, which other person)?

25. Can the information be obtained or collated from other related pieces of information? Although public authorities are not required to create new information in order to respond to requests, the Commissioner has previously commented that he does not consider the extraction of information from existing data to involve the authority in the creation of new information (Decision 066/2005).

26. (*Where the request is for numbers and the public authority takes the view that it does not hold the information*) Although public authorities are not required to create new information in order to respond to requests, the Commissioner takes the view that if a public authority has the building blocks to generate the information and no complex judgement is required

to produce it, the authority does hold the information (Decision 210/2013). How easy would it be for the public authority to count the numbers? What skill is needed to determine whether a particular case falls within the scope of the request?

27. The IO may want to carry out their own search (web-based usually) for this information and share any positive results with the public authority.

    N.b. – in some cases, it may be necessary for the IO to visit the public authority to see their records management system in practice and to oversee the searches being carried out for the information. This may be an appropriate way forward where the public authority has a history of non-cooperation with SIC investigations.

Section 18 (Neither confirm or deny)

28. Your authority is seeking to rely on section 18 of FOISA. As you are aware, section 18 of FOISA gives public authorities the right to refuse to reveal whether information exists or is held by them in certain limited circumstances. If the information were held it must be the case that the information could be withheld under any of the exemptions contained in sections 28 to 35, 38, 39(1) or 41 of FOISA.

29. Please confirm which exemption, read in conjunction with section 18, the public authority considers would be applicable in this case. Please also provide succinct reasoning as to why the exemption would apply. Where the exemption is subject to the public interest test in section 2(1)(b) of FOISA, this will include an explanation of why the public interest in withholding the information outweighs that in disclosing the information.

30. Please detail why your authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.

31. Please confirm whether the information exists. If it does, please provide me with a copy of the information.

Part 2: The Exemptions

Information otherwise accessible (section 25)

32. In relation to the section 25(1) exemption, provide an overview of how the requested information would be accessed by the applicant and why the information is considered to be reasonably accessible to him/her. If the information is available via a public scheme, please provide a link to the publication scheme and highlight the relevant part of the scheme?

33. Detail the charges (if any) applied by the authority to the applicant to access this information.

34. If the information in question is available online, please provide the relevant URLs. Confirm when this information was uploaded onto [public authority]'s website.

35. For information considered exempt under section 25 of FOISA, detail any assistance given to the applicant in accessing this information.

36. A detailed description of all work undertaken by the authority to ensure that it holds no additional information falling within the scope of the request, which is not accessible in the means described.

37. Has the public authority taken the particular circumstances of [the applicant] into account when deciding whether access to the information is reasonable?

38. Where the public authority has applied section 25(2)(b)(i) of FOISA, please provide details of the enactment which the public authority is relying upon.

39. Where section 25(2)(b)(ii) applies, provide evidence that the information is held by the Keeper of the Records of Scotland and that he makes it available for inspection and (in so far as practicable) copying

40. Where the information is not held by the public authority but the public authority considers that it is reasonably accessible elsewhere, what steps have the public authority taken to confirm that this is the case? Where can the information be accessed (please provide as detailed a response as possible).

Prohibitions on disclosure (section 26)

Section 26(a)

41. Specify the enactment and the provision(s) of that enactment containing the prohibition in question. Explain in detail why the provision(s) in question would prohibit disclosure

Section 26(b)

42. Specify the Community obligation which would prohibit disclosure or with which disclosure would otherwise be incompatible. Explain in detail why this would be the case

Section 26(c)

43. Describe in detail why disclosure would constitute or be punishable as a contempt of court. Provide evidence of this.

Information intended for future publication (section 27)

Section 27(1) – future publication

44. What was the publication date (if the publication date is very close to the date of the initial request then it may be likely that the exemption is upheld)?

45. Can the authority provide proof that the information actually has been published? (Consider whether publication on the internet enough, especially if the applicant has no computer access, and whether the information is published solely on an internal website – see Decision 030/2008 Mark Nixon and Glasgow City Council.)

46. Settled intention to publish – does the authority have any documented proof that the information was going to be published at the time of the initial request? (Future publication cannot be used as a delaying tactic. See Decision 098/2006 Mr Jim Mather MSP and the Scottish Executive, the Commissioner considered that the decision to publish was taken after the request was received.)

47. Is the published information exactly what the applicant had asked for? (See decision 051/2005 Mr B and the Scottish Prison Complaints Commission)

48. If the information has not been published, then the authority should provide a detailed explanation as to why it has not been published. Has the applicant been informed of this delay when it was realised that a delay was likely to occur and been given a revised date of publication?

49. Can the authority provide justification that the delay in publication is reasonable in all circumstances? (Is the delay in publication so time-sensitive that to disclose the information prior to publication date would result in a critical event?)

50. Remember to ask questions about the public interest test – see below.

Section 27(2) – programme of research

51. Can the authority provide proof that the information is part of a programme of research?

52. Is there an intention to publish the results of this research at a future date? If so, can any date be given? Is there any proof of this intention to publish?

53. Ask the authority to submit arguments to prove that the programme of research or the interests of the participants of the authority holding the information would, or would be likely to be, prejudiced substantially if the information were to be disclosed early.

    Remember to ask questions about the public interest test – see below.

Relations within the United Kingdom (section 28)

54. Was the information supplied by a department of the UK Government or by a Minister of the Crown, and was it supplied to the authority in confidence? Provide evidence to support that. Include details of any information that supports your view that the information was supplied in confidence (see also questions for section 36 for assistance).

55. Provide details of the administrations whose relations would, or would be likely to, be substantially prejudiced by disclosure, and outline the type of harm that would occur by disclosure of the information.

56. If the information is subject to the Memorandum of Understanding, please provide details of the restrictions (if any) that were placed upon the information by the administration who supplied it to you.

    Remember to ask questions about the public interest test – see below.

Formulation of Scottish Administration policy etc. (section 29)

<u>Section 29(1)(a)</u>

57. Describe in detail the policy formulation or development exercise to which the information relates; in particular, explain why the matter(s) under consideration should be considered policy, why what is being done should be considered the formulation or (as the case may be) development of that policy, and how the information relates to that process.

58. Is the process still ongoing and, if not, when was it completed?

59. Does a change of administration have any effect to the arguments?

60. Has statistical information been used to provide an informed background to the taking of the decision?

    Remember to ask questions about the public interest test – see below.

<u>Section 29(1)(b)</u>

61. Identify which Ministers the communications involve, or which Cabinet/committee discussions the information relates to; describe (in adequate detail) how the information relates to the communications in question.

62. Has statistical information been used to provide an informed background to the taking of the decision?

63. Taking section 29(3) into account, what regard has been given 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 taking of the decision.

Remember to ask questions about the public interest test – see below.

Section 29(1)(c)

64. Identify the Law Officers asked to provide the advice and what advice was being sought.

65. Clarify that the advice was provided in their role as Law Officer.

66. Remember to ask questions about the public interest test – see below.

Section 29(1)(d)

67. Which private office(s) does the information relate to? How does it relate to its/their operation?

Remember to ask questions about the public interest test – see below.

68. Prejudice to effective conduct of public affairs (section 30)

Section 30

Section 30(a) - the maintenance of the convention of collective responsibility

Note: The main point of investigation is likely to be whether disclosure of Minister's personal views would, or would be likely to, "substantially" prejudice the maintenance of the convention of collective responsibility. Points to consider will be whether the Ministerial views expressed are significant, and whether the Minister already has made their views publicly known (e.g. media interviews). This will require a judgement call based on understanding of the circumstances surrounding the case.

69. Please explain why disclosure of the views expressed by the Minister(s) in the information withheld would, or would be likely to prejudice substantially the maintenance of the convention of collective responsibility.

70. Please make it clear why the views expressed are significant, in the context of the convention of collective responsibility.

71. The Ministerial views contained in the information withheld seem similar to those expressed in [details of article etc.] Please explain why disclosure of the information in question would now be likely to pose a significant threat to the maintenance of the convention of collective responsibility.

Remember to ask questions about the public interest test – see below.

Section 30(b) – inhibition of advice/exchange of views

72. Why would disclosure of the advice/views in the information withheld cause or be likely to cause substantial inhibition. Outline the situations in which such inhibition would be likely to occur. If there are particular factors to take into account, you should make sure the Commissioner is aware of them. These might include factors affecting the sensitivity of the information, such as the timing of the request; the parties involved in the exchange; or the manner in which the advice or opinion is expressed.

73. Explain who is likely to be substantially inhibited from providing advice or views if the information requested were to be disclosed, and explain why this would happen.

74. Describe the relationship between the person(s) providing the advice/views in the information withheld, and those who would be likely to find themselves inhibited substantially by its disclosure. For example, would similar advice or views be communicated and received as part of the individuals' expected day-to-day professional duties?

75. (If the public authority appears to have treated section 30(b) as a class exemption) In her decisions on section 30(b)(i) and (ii), the Commissioner has made it clear that these exemptions do not apply automatically to all advice or views, and that public authorities should assess the effects of disclosing the contents of documents before applying either of the exemptions in section 30(b). At present I have not seen evidence that the public authority considered the effects of disclosing each piece of information before withholding the information under section 30(b). Please make clear the relationship between the contents of the information withheld, and the inhibition that would be likely to result from disclosure.

Remember to ask questions about the public interest test – see below.

<u>Section 30(c) – otherwise cause substantial inhibition</u>

76. How and why disclosure of the information requested would limit [name of public authority]'s ability to conduct its business effectively. Please provide as much detail as possible: for example, explain what activities would be affected, and in what way, and show why this outcome would result from disclosure of the information.

Nb use of word "otherwise" here – if it appears that the public authority has conflated section 30(c) with 30(a) or (b) ask for information as to why disclosure would otherwise cause substantial prejudice.

Remember to ask questions about the public interest test – see below.

National security and defence (section 31)

77. In relation to section 31(1), provide me with full details of the public authority's consideration as to why exemption from section 1(1) is required for the purpose of safeguarding national security.

78. If a Ministerial Certificate has been issued under section 31(2), provide a copy and confirm that the certificate is still extant. Provide evidence that the information in question is covered by the certificate.

79. In relation to section 34(4), provide full details as to why disclosure of the information would, or would be likely to, prejudice substantially the defence of the British Islands or any colony; or the capability, effectiveness or security of any relevant forces.

Remember to ask questions about the public interest test – see below – this includes situations where a certificate has been issued under section 31(2).

80. In this type of case, it is likely that special arrangements will need to be put in place for viewing the information or for holding onto the information and/or submissions.

International relations (section 32)

81. Provide details as to why the disclosure would, or would be likely to, prejudice substantially: the relations between the UK and any other State (s32(1)(a)(i), between the UK and any international organisation or international court (s32(1)(a)(ii)); the interests of the UK abroad (s32(1)(a)(iii) or the promotion or protection by the UK of its interests abroad (s32(1)(a)(iv).

82. Confirm that the disclosure would prejudice relations or the interests of the UK as a whole.

83. Confirm that the "international court", "international organisation" or "State" falls within the definitions given in s32(3).

84. If relying on s32(1)(b), provide evidence as to the fact that the terms on which the information was obtained require it to be held in confidence or that the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be held in confidence. For example, is there a formal agreement between parties or a statement by the information supplier that indicates that confidentiality is required.

    Remember to ask questions about the public interest test – see below.

Commercial interests and the economy (section 33)

Section 33(1)(a) – trade secrets

85. Provide evidence that the information is a trade secret. Is it the case that the information is generally used in trade or business but is not generally known in that trade or business? Does the information have economic value from not being generally known and are steps taken to keep the information secret? Is the information only known to a limited number of individuals? What evidence is there to show that this is the case?

    Remember to ask questions about the public interest test – see below.

Section 33(1)(b) – commercial interests

86. Clearly identify the party or parties whose interests are of concern to your authority, whether it is the authority itself or a third party.

87. In what respect are these commercial interests? Where it is your own authority's commercial interests that are of concern, please provide a detailed explanation of those interests and how they relate to the information withheld.

88. Describe the substantial prejudice that would or would be likely to follow disclosure of the information requested, and when and how this would be likely to happen.

89. (Where the information concerns a tendering process) Provide a copy of the Invitation to Tender (ITT) (where appropriate), details of when the tendering process was complete or details of what stage the tendering process had reached when the request for information was made. Please also provide details of when the tendering process is likely to be complete.

90. In the information withheld, please identify the material that your authority considers particularly sensitive.

91. Please provide copies of correspondence your authority has had with the third parties in relation to this request, having particular regard to the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf).

    Remember to ask questions about the public interest test – see below.

Section 33(2) – financial or economic interests of the UK

92. Confirm whether it is the financial or economic interests of the whole of part of the UK which would or would be likely to be prejudiced substantially by the disclosure of this information.

93. If it is a part of the UK, confirm which part you consider will be prejudiced. Provide evidence as to why this prejudice will occur, or is likely to occur.

94. Explain why you consider the interests in question to be economic (s33(2)(a)) or financial (s33(2)(b)). When considering s33(2)(b), check that the administration in question falls within the definition provided by section 28(2).

Remember to ask questions about the public interest test – see below.

Investigations by Scottish public authorities etc. (section 34)

Section 34(1)(a) – criminal investigations

95. Confirm that the investigation was one which the public authority had a duty to conduct and, where applicable, under which legislation the duty is conferred (please quote the relevant sections of the legislation).

96. Confirm that this relates to a duty to ascertain:

- whether a person should be prosecuted for an offence (section 34(1)(a)(i));
- whether someone prosecuted for an offence is guilty of it (section 34(1)(a)(ii)).

97. Confirm that the information was held specifically as a result of an investigation into whether a person should be prosecuted for an offence or whether someone prosecuted for an offence is guilty of it.

98. Confirm that the information was gathered to ascertain whether a person should be prosecuted for an offence.

99. Remember to ask questions about the public interest test – see below.

Section 34(1)(b) – report to PF

100. Confirm that the information is held as a result of an investigation carried out, or in the process of being carried out, by your public authority, which may lead to a decision by the authority to make a report to the PF to enable it to be determined whether criminal proceedings should be instituted (i.e. was such a decision an option).

Remember to ask questions about the public interest test – see below.

Section 34(1)(c) – criminal proceedings following report to PF

101. Confirm that the information was or is held for the purpose of criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.

Remember to ask questions about the public interest test – see below.

Section 34(2) – fatal accident inquiries and cause of death

102. Provide confirmation and proof that the information was held for the purposes of an inquiry under the Fatal Accidents and Sudden Death Inquiry (Scotland) Act 1976 (i.e. a fatal accident inquiry), which has not yet concluded. Once a FAI has been concluded, the information does not fall under the exemption (section 34(2)(a)).

103. Provide confirmation and evidence that the information is held as the result of an investigation into the cause of death of an individual and that the investigation is not connected to a fatal accident inquiry.

104. Confirm that the public authority had a duty to ascertain the cause of death of a person and if applicable under which legislation such a duty is conferred (s34(2)(b)(i)) or that the information is held for the purpose of making a report to the procurator fiscal as respects the cause of death of a person (s34(2)(b)(ii)).

Remember to ask questions about the public interest test – see below.

Section 34(3) – confidential sources

105. Provide confirmation and proof that the information was obtained or recorded by the authority for the purposes of an investigation, other than the type of investigations mentioned in section 34(1), but which is by virtue either of (1) Her Majesty's prerogative conducted for any purpose specified in section 35(2) or (2) by or under any enactment for any purpose specified in section 35(2).

106. In the case of either (1) or (2), confirm which purpose listed in section 35(2) of FOISA the investigation was carried out in relation to.

If (2), confirm which statutory powers the investigation was carried out under.

Confirm that the information relates to the obtaining of information from confidential sources – please note that the exemption in section 34(3)(b) is not a stand-alone exemption.

Remember to ask questions about the public interest test – see below.

Section 34(4) – civil proceedings

107. Confirm that the information is obtained or recorded by a Scottish public authority for the purpose of civil proceedings

108. Confirm that civil proceedings were brought by or on behalf of the authority

109. In order for section 34(4) to apply, the civil proceedings must have arisen out of an investigation mentioned in either section 34(1) or section 34(3). Provide details of the type of investigation carried out and why it relates to either a section 34(1) or 34(3) investigation.

Remember to ask questions about the public interest test – see below.

Law enforcement (section 35)

110. Confirm which of the subsections in section 35(1) has been applied (if not already clear).

111. Why would disclosure of the information prejudice substantially, or be likely to prejudice substantially, that action? (Where the disclosure would prejudice the actions of another person or body, confirm who or which body would be prejudiced.)

112. Where the authority has relied on the exemption in section 35(1)(g), confirm which public authority's (either under FOISA or under the Freedom of Information Act 2000) exercise of a function in relation to one of the purposes in section 35(2) would, or would be likely to be, prejudiced substantially by disclosure of the requested information. Provide evidence that the authority has this function (citing statute wherever possible) and how this function would, or would be likely to be, prejudiced substantially.

Remember to ask questions about the public interest test – see below.

Confidentiality (section 36)

Section 36(1)

113. If the public authority is not claiming that the information is subject to legal professional privilege, confirm which type of information it is and ask them to evidence why it is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.

114. If the public authority is claiming that the information is subject to legal professional privilege, confirm whether it is legal advice privilege or litigation privilege.

115. Where the information is subject to legal advice privilege, check that the communications in question relate to legal advice being sought or given and that the advice came from a solicitor (or other legal representative, such as an advocate) acting in his/her professional capacity.

116. Where the information is subject to litigation privilege (communications post litem motam), provide evidence that the documents in question were prepared in contemplation of litigation.

117. In either case, check that legal professional privilege has not been waived (an Internet search may show e.g. that the information is in the public domain).

    Remember to ask questions about the public interest test – see below.

Section 36(2)

118. Clarify how the documents/information came to be in the possession of the public authority, and identify the originating author(s) of the documents in question and the context in which it was/they were created.

119. Is the public authority relying on an explicit or implied obligation of confidentiality? Provide evidence as to the obligation of confidentiality.

120. Explain how the disclosure of the information would lead to an actionable breach of confidence. Confirm whether: the information has the necessary quality of confidence (i.e. it is not generally accessible to the public already); the information was communicated in circumstances importing an obligation of confidence; unauthorised disclosure would cause detriment (to be specified) to the party which provided it.

121. Is there a public interest defence which would permit disclosure of the information? (It may be appropriate to refer public authorities to SIC's guidance on section 36(2) in posing these questions.)

Court records (section 37)

122. Confirm which of the five exemptions set out in section 37(1) are being applied and, in the case of each, that the information in question is contained within a document as defined in the particular exemption(s). Provide evidence that this is the case.

123. In addition, confirm that the public authority holds the information solely because it is contained in such a document and, where possible, provide evidence that this is the case.

124. Check that "court" or "inquiry" in question falls within the definitions given in section 37(2).

125. Check that the information in question is not held by the authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976

Remember to ask questions about the public interest test – see below.

Personal information (section 38)

Section 38(1)(a)

126. Explain why the information in question is personal data as defined by section 1(1) of the Data Protection Act 1998 (if unclear, refer to guidance by the Information Commissioner on determining_what_is_personal_data.

127. Confirm that the applicant is the data subject (or that the applicant is acting on behalf of the applicant - in which case, ask for evidence of this).

Section 38(1)(b)

128. Explain why the information in question is personal data as defined by section 1(1) of the Data Protection Act 1998 (if unclear, refer to guidance by the Information Commissioner on determining what is personal data – see link above).

129. Is any of the data sensitive personal data for the purposes of the DPA? If so, please confirm which information comprises sensitive personal data and why.

130. (If the request is for numbers, statistics, etc.) Explain how disclosure of the numbers/statistics in response to the request would lead to individuals being identified by members of the public. Would it be possible to disclose the information in a way which would not lead to individuals being identified?

Section 38(1)(b) and 38(2))(a)(i) or (b): breach of data protection principles

131. Which of the data protection principles would be contravened by disclosure of the personal data and why?

132. If the public authority is relying on the first data protection principle, why does it consider that disclosure of the information would be unfair and/or unlawful?

133. Has the public authority considered whether any of the conditions in schedule 2 (and, in the case of sensitive personal data, schedule 3) would allow the information to be disclosed?

- Has/have the data subject(s) been asked whether he/she/they would be willing to consent to the disclosure of their personal data?
- Has the public authority asked the applicant why they consider that they have a legitimate interest to the information? Does the public authority otherwise consider that the applicant has a legitimate interest to the information? Why does the authority consider that disclosure of the information would be unwarranted by reason of prejudice to the rights and freedoms of the subjects of the information?

Section 38(1)(b) and 38(2)(a)(ii): breach of section 10 notice

134. Provide a copy of the notice submitted by the data subject, confirm which steps were taken in response to this notice and supply documentary evidence of these steps.

Remember to ask questions about the public interest test – see below.

Section 38(1)(b) and 38(3): non-disclosable under subject access request

135. Explain why the information is exempt from section 7(1)(c) of the Data Protection Act 1998, with specific reference to the provisions of the DPA.

Remember to ask questions about the public interest test – see below.

Section 38(1)(c): census information

136. Provide evidence that the information is personal census information as defined by section 8(7) of the Census Act 1920 or acquired or derived by virtue of section 1 to 9 of the Census (Great Britain) Act 1910 which relates to an identifiable person or household.

Section 38(1)(d): deceased person's health record

137. Provide evidence that the information constitutes a deceased person's health record as defined in section 1(1) of the Access to Health Records Act 1990

Health, safety and the environment (section 39)

Section 39(1): health and safety

138. Specify the individual(s) whose physical or mental health or safety would, or would be likely to, be endangered by the disclosure of the information.

139. For this exemption to apply there should be evidence of a risk to the health or the safety of an individual, rather than a hypothetical risk. In light of this, please provide details and evidence of why you consider the risk cited is real and not merely hypothetical. Can the public authority substantiate this claim?

140. Explain how the endangerment to the physical or mental health or the safety of an individual would manifest itself.

141. Clarify the nature of the endangerment to physical or mental health or safety which would result from disclosure of the information.

Remember to ask questions about the public interest test – see below.

Section 39(2): environmental information

142. Some of the withheld information appears to comprise environmental information (as defined in regulation 2(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs)). Such information should properly be dealt with under the EIRs. Do you agree that the request (insofar as it relates to environmental information) should be more appropriately dealt with under the EIRs as opposed to FOISA?

143. If you consider that the information is not environmental as defined in regulation 2(1) of the EIRs, please explain why. You might find it useful to consider guidance the Commissioner has issued on the definition of environmental information: http://www.itspublicknowledge.info/Law/EIRs/WhatIsEnvironmentalInformation.aspx .

144. Do you now wish to rely upon the exemption contained in section 39(2) of FOISA with respect to all of the requested information that comprises environmental information?

145. If you consider the information to be excepted from disclosure under any of the exceptions in regulation 10(4) and 10(5) of the EIRs, please clarify which exception(s) you consider to be applicable.

Remember to ask questions about the public interest test – see below.

Audit functions (section 40)

146. Which authority's functions are, or are likely to be, prejudiced substantially by the disclosure of the information?

147. Provide evidence that the public authority has a function either in relation to the audit of accounts of other Scottish public authorities or in relation to the examination of the economy, efficiency and effectiveness with which such authorities use their resources in discharging their functions.

148. Demonstrate that such substantial prejudice would, or would be likely to, occur.

Remember to ask questions about the public interest test – see below.

Communications with Her Majesty etc. and honours (section 41)

Section 41(1): communications

149. Demonstrate that the information relates to communications with the Queen, with other members of the Royal Family or the Royal Household (SIC's briefing on this exemption contains definitions of these terms although it will probably be necessary to check that the list of members of the Royal Family or the Royal Household has not changed over time)

Remember to ask questions about the public interest test – see below.

Section 41(2): honours

150. Demonstrate that the information relates to the award of honours by the Queen

Remember to ask questions about the public interest test – see below.

Public interest test

When dealing with cases which involve more than one exemption which is subject to the public interest test, public authorities are expected to make separate arguments in relation to each exemption. However, it is suggested that, when seeking submissions on the public interest test, the following questions should only be set out in full once in the letter.

151. With regards to the public interest test required by section 2(1)(b) of FOISA, state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

152. Specify the issues taken into account which are in favour of disclosing the information.

153. Specify the issues taken into account which are in favour of maintaining the exemption

154. Specify why you consider, on balance, that the public interest in maintaining the exemption outweighs that in disclosure of the information.

Scottish Ministers' Code of Practice on records management by Scottish public authorities under FOISA ("the Section 61 Code")

155. It may be appropriate to check a public authority has complied with the Section 60 code where:

- the authority doesn't hold information which we might expect it to, i.e. relating to its functions and decisions
- the authority has found it difficult to establish whether it holds information
- the authority cannot say whether/how/when information was destroyed
- there are general concerns about the records management arrangements the public authority has in place

- the authority cannot produce information held on its behalf, for example by a contractor.

The authority doesn't hold information we would expect it to

156. The Section 61 Code says:

- authorities should ensure they keep the records they will need for business, regulatory, legal and accountability purposes (Part 1, pages 13 and 14)
- authorities must have in place a records management plan (RMP), and keep it under review (required by the Public Records (Scotland) Act 2011 and referred to on page 7 of the Code)

157. Possible questions:

- has the authority identified what decisions or actions should be recorded, how these records should be stored, and how long they should be kept?
- does the authority control amendments or access to the records, which would demonstrate that the records can be relied upon?
- does the RMP show whether the authority keeps certain type of records and how long the records are kept, and are disposals recorded?

The authority finds it difficult to be sure whether it holds information

158. The Section 61 Code says:

- authorities should know what records they hold and where they are, and should ensure that they remain usable for as long as they are required (Part 1, pages 17 and 18)
- authorities should keep their records in systems that enable records to be stored and retrieved as necessary (Part 1, pages 15 and 16)

159. Possible question:

- does the system for holding records meet the following criteria?
    - it is easy to use and to understand
    - it allows information to be retrieved quickly and easily (including searches carried out under FOI)
    - it creates an audit trail showing when records were viewed, used, amended and deleted.

The authority can't say how/when/whether records were destroyed

160. The Section 61 Code says:

- authorities should define how long they need to keep particular records, should dispose of them when they are no longer needed and should be able to explain why records are no longer held (Part 1, pages 20 – 22)
- disposal should be in accordance with clearly established policies which reflect the authority's continuing need to access the information, or the potential value of the records for historical or other research. This should be in the form of an overall policy, stating the types of records likely to be selected for permanent preservation, and

disposal schedules which identify records which can be destroyed or transferred to archives after a set period.

161. Possible questions:

- does the disposal schedule contain sufficient detail to identify the records and the period for which they will be retained?
- has the disposal schedule been kept up to date?
- for records which are not covered by the disposal schedule, does the authority record disposal decisions and keep evidence of records identified for destruction (if not apparent from its overall policy)?
- can the authority evidence that, as part of routine records management processes, destruction of a specified type of record or a specified age took place in accordance with the disposal schedule?

There are general concerns about the records management arrangements

162. The Section 61 Code says:

- authorities *should have in place organisational arrangements that support records management (Part 1, pages 10 and 11)*
- authorities *should have in place a records management policy, either as a separate policy or as part of a wider information or knowledge management policy (Part 1, page 12)*
- *authorities must have in place a Records Management Plan, and keep it under review (required by the Public Records (Scotland) Act 2011 and referred to on page 7 of the Code)*

163. Possible questions:

- is there evidence that records management is a core corporate function (i.e. is there evidence that records are managed at all stages from planning and creation to disposal?
- is responsibility for records management identified?
- do staff have clearly defined instructions on creating, keeping and managing records?
- are staff trained in records management policies and procedures?

The authority can't produce information held on its behalf, e.g. by a contractor

164. The Section 61 Code says:

- authorities should ensure that records shared with other bodies or held on their behalf by other bodies are managed in accordance with the Code (Part 1, page 23)

165. Possible questions:

- has the authority ensured that all parties agree on what information should be kept, and by whom, for how long, and what the disposal arrangements are?
- which body holds the information for the purposes of FOI?

- is the contractor responsible for ensuring records are covered by its records management plan and properly managed?
- are details of records management responsibilities and processes recorded in the contract?

Appendix 3: Construction of the decision notice

Part 1: General

Introduction

1. An investigation should be pursued in such a fashion that not only can the Commissioner come to a decision but in reaching that decision it is clear that SIC has taken into account all relevant information, including the following:

2. The documents or information in dispute

   (i) The relevant views and material provided by the public authority

   (ii) The relevant views and material provided by the applicant

   (iii) The relevant views and material provided by third parties, where appropriate

3. Not all of this information will be found in the decision itself, but the SIC's reasoning in coming to a particular decision must be clear from the decision, so that any competent person with no prior knowledge of the parties involved, the information in dispute or FOISA/the EIRs, is able to understand it. All material on which that reasoning is based must be retained in the relevant case file for as long as it is required in accordance with the Investigations Procedures, in the form of documentary evidence, correspondence, or notes recording meetings, discussions, actions, research or analysis.

4. The decision should also indicate any references which SIC has called upon in coming to that decision and in interpreting FOISA/EIRs. These will include sources as diverse as:

   - Legal precedent
   - Comparable decisions of the SIC and cases in other jurisdictions
   - Dictionary definitions
   - Relevant information in the public domain
   - Legal advice
   - Technical advice

5. It goes without saying that all of this has to be done without revealing the detail of the information in dispute. Such disclosure may be an offence under both section 45 of FOISA and, in relation to personal data, section 55 of the Data Protection Act 1998. It should be borne in mind that personal data such as the names of individuals may identifiable from contextual information and particular care should be taken in this connection.

Guidance on naming public authorities in decisions

6. As a general rule (i.e. unless otherwise agreed with HOE/DHOE), the relevant authority for the purposes of the decision will be that appearing in the relevant WorkPro case record. Subject to any modifications detailed below, the name of the relevant authority for decisions and the decisions database should be as it appears in WorkPro.

7. With the exception of conjunctions and prepositions, each word in the name should start with a capital letter.

8. “The” should be omitted from the beginning of the name.

9. “and” should be used rather than “&”.

10. “Scottish Ministers” should be used in respect of all central departments of the Scottish Government, including Ministerial offices.

11. Executive agencies, i.e.

    (i) Accountant in Bankruptcy

    (ii) Disclosure Scotland

    (iii) Historic Scotland

    (iv) Education Scotland

    (v) Scottish Prison Service

    (vi) Scottish Public Pensions Agency

    (vii) Social Work Inspection Agency

    (viii) Student Awards Agency for Scotland and

    (ix) Transport Scotland

    should be given the name of the agency (as in WorkPro). The Rent Registration Service should be treated in the same way.

12. As a general rule (there may be exceptions – to be discussed with HOE/DHOE), decisions in respect of the Scottish Parliament should be in the name of “Scottish Parliamentary Corporate Body”.

13. As a general rule, the non-Ministerial office holders listed in Part 2 of Schedule 1 (type [ ]/002 in WorkPro) should be used only where the request has been addressed to the individual office holder in question. Applications relating to departments or agencies associated with these office holders should generally be dealt with as such.

14. The General Register Office for Scotland, however, as a non-Ministerial department of the Scottish Government, should be dealt with as the Registrar General of Births, Deaths and Marriages for Scotland (i.e. under Part 2).

15. A decision in respect of an individual inspector of schools should be in the name of “[name], HM Inspector of Schools”.

16. A decision in respect of an individual rent officer should be in the name of “[name], Rent Officer”.

17. A decision in respect of an individual social work inspector should be in the name of “[name], Social Work Inspector”.

18. A decision in respect of a regional health board should be in the name of “[region, as in WorkPro] Health Board” (abbreviated after the initial reference to “NHS [region]”.

19. A decision in respect of a fire and rescue service should be in the name of the relevant joint board (or, in the case of either Dumfries and Galloway or Fife, the relevant council)

20. A decision in respect of a college of further education (type 047/005 in WorkPro) should be in the name of “Board of Management of [name of college, as in WorkPro]”.

21. A decision in respect of the Police should be in the name of “Chief Constable of the Police Service of Scotland’ [as in WorkPro]”.

22. The name of a publicly-owned company should be as it appears in the Companies Register (see “WebCHeck” on Companies House website - http://wck2.companieshouse.gov.uk/f9321df7afefeff54137f0ed899188ee/wcframe?name=accessCompanyInfo).

23. For the decisions database, it may be useful to add keywords to help users find authorities which are more commonly known by names other than their official ones.

General presentation

24. The relevant VC template **must** be used and the style and layout must follow the formatting instructions in the template.

25. Within this overall framework, clear, concise and logical presentation of facts and arguments is of particular importance, as is consistent use of language and tense. Particular care is required when “cutting and pasting” text from elsewhere, to ensure that the inserted text is accurate and makes sense in the context of the decision being drafted.

26. The decision will be written in the third person, referring to “the Commissioner”, “the Commissioner’s Office” and “the investigating officer”, as appropriate.

Front page

27. Title: Decision Number (e.g. “056/2006”) + (names of) Applicant (title + first name + surname + MP/MSP where appropriate) and Public Authority (in accordance with the section below, “Naming Public Authorities in Decisions”)

28. Brief (one-line) summary of subject matter of application (italics) (this should focus on the subject matter and should not usually begin with, e.g., the words ‘request for’)

29. Reference No: (WorkPro file number)

30. Decision Date: (date of signature by SIC/HOE/DHOE)

31. Note: unless there are circumstances justifying anonymity (see Appendix 3 of the Investigations Procedures), the applicant will be named in the decision.

Title

32. As on front page, at head of each subsequent page of text.

Summary

33. Brief, user-friendly, summary of the decision. The aim here is to give a summary of the main points of the decision, rather than simply noting that a request, followed by a request for review etc. was made. Abbreviation of names of parties, statutes, etc. should start here.

34. This should be brief (should not normally exceed 200 words) and should:

    (i) be in layman’s language, avoiding jargon

    (ii) not name the requester (e.g. “Police Scotland were asked for …”)

    (iii) say what happened and what the outcome was

(iv) not refer to the fact that a request/review was made (unless this is relevant to the finding, e.g. "The Council did not respond to the request for review.") or to the fact that we carried out an investigation

(v) not refer in detail to relevant sections of FOISA, etc. (e.g. "The Council argued that disclosure would harm the effective conduct of public affairs" and not "The Council argued that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs in terms of section 30(c) of FOISA").

Relevant statutory provisions

35. Accurate list of the provisions of FOISA/the EIRs/other relevant primary and secondary legislation (including EU directives, where relevant) considered in the decision (including headings), with reference to the Appendix (where the relevant provisions will be set out in full).

36. (The Commissioner's decisions should be cited in italics, where discussed in the text of the decision, using the title of the relevant decision as it appears on the front page. Court decisions should also be cited in italics where discussed, using the full citation from the official record. However, these do not have to be listed in the "relevant statutory provisions" section, but simply referred to in the text of the decision, using footnotes where necessary.)

Background

37. Concise details of what the application to the Commissioner is about, from the applicant's initial request to the authority for information to validation of the application and allocation to an investigating officer. This will not usually be an exhaustive narrative of everything that has happened along the way, but should include brief details of the following:

(i) The applicant's request for information (sufficient to identify the information requested, the authority and when the request was made). It is clearly a good idea to stick as closely as possible to the actual wording of the request, but there may be circumstances where this is not appropriate, e.g. if the information request contains bad grammar or bad language, unless this is relevant to the case at hand. In cases where the information request is very long, it may be necessary to add an appendix to the decision, setting out the terms of the information request in full.

(ii) The authority's response to the request (i.e. if, how and when it responded, including any exemptions (section and heading) cited)

(iii) The applicant's request for review (sufficient to identify the basis of the request and when it was made)

(iv) The authority's response to the request for review (i.e. if, how and when it responded, including any changes made to its original decision on review)

(v) The application to the Commissioner (in particular, when it was made) and its validation (standard paragraph)

Investigation

38. This section should confirm that

(i) comments on the application were invited from the authority as required by section 49(3)(a) of FOISA (and, as appropriate, from the applicant and any relevant third parties) and

(ii) the information in dispute has been obtained from the authority and inspected (or, as appropriate, the steps taken by the authority to confirm that it is not held)

39. It should bring out the key points made in the submissions received, without setting those submissions out in detail. It should also identify any relevant developments prior to the decision being reached (e.g. partial disclosure of information/partial settlement). If not readily apparent from the "Background" section, the scope of the investigation should also be made clear (and, where appropriate, explained) here.

Commissioner's analysis and findings

40. This is the core of the decision. It is broken down into consideration of the key questions which the Commissioner requires to address in coming to a conclusion, and should confirm that all relevant issues have been given due consideration by the Commissioner in reaching her decision. The starting point in identifying the relevant issues should be the respects in which the applicant is dissatisfied with the authority's handling of the case. In complex cases this may be done for several issues or exemptions and there may be a finding for each one. Where a number of different issues are to be considered, a paragraph early on in the section should confirm that matters that will be addressed and the order in which they will be considered in the following text.

41. The analysis will consider the matters in dispute, expand upon the key submissions made by the public authority and the applicant (and any relevant third parties) and then comment upon the merits of them. In doing so at this point, the Commissioner may employ the references which have informed her decision (see "Introduction" and "Relevant statutory provisions and other sources" above – accurate citation of these references is important). All of this should be done as succinctly as is possible without losing meaning: unless issues new to the Commissioner are under consideration, reference to earlier relevant decisions is likely to be more appropriate than repeating analysis carried out already.

42. The purpose of this section is to set out clearly (but not at unnecessary length) how the Commissioner has arrived at a determination and her reasons for doing so. This is important if the applicant and the public authority are to understand and accept the decision. Similarly, it will be important for wider consideration in media reporting and (where necessary) in establishing precedent. Finally, should the case be judicially challenged it will help demonstrate whether the Commissioner's determination and the factors informing it have been reasonable.

43. While it is important that this section sets out the Commissioner's position clearly, it is equally important that it does so in a detached and impartial (and generally reasonable) manner and does not "preach" or take either party to task unnecessarily. While there will from time to time be a need to highlight wider points of principle clearly, any more pointed comment on individual practice issues that may be required in the circumstances of a particular case should go in the letter to the relevant party and not in a public decision notice.

44. Where it is not considered necessary for any reason to consider certain of the exemptions cited by the authority, this should be stated clearly following the conclusions on those exemptions which have been considered.

45. Findings on individual documents should be presented in a way which is appropriate and proportionate to the information under consideration and the outcome(s) in respect of those documents. Detailed schedules of documents may be helpful in certain cases but should not be used indiscriminately.

Decision

46. This should name the parties in full and should set out:

    (i) whether or not the authority has been found to have complied with Part 1 of FOISA/ the EIRs in dealing with the applicant's request for information

    (ii) any provisions of FOISA or the EIRs (cited accurately) with which the authority has not so complied

    (iii) the steps (if any) which the authority is required to take to comply. (Where SIC has found there to be a technical breach of FOISA or the EIRs but is not requiring the public authority to take any action in response to that breach, the decision should contain the following wording: "Given that [reasons why no action required], the Commissioner does not require [public authority] to take any action in response to this particular application in relation to this failure/these failures." This ensures that we will be able to take enforcement action in the future against the authority if such technical breaches reoccur in the future.)

    (iv) the period within which the authority is required to take those steps (generally 45 calendar days from intimation of the decision, unless there are particular reasons for allowing longer), with the date by which those steps are to be taken.

Appeal

47. Standard paragraph setting out the parties' rights of appeal to the Court of Session.

Enforcement

48. A standard paragraph to be used where compliance is required.

Appendix

49. Full and accurate text of any statutory provisions considered in the decision. Ensure that this is wholly consistent with the provisions listed in the "Relevant Statutory Provisions" section at the start of the decision.

50. When setting out a section or regulation in part only, use the format in the template, e.g.:

    30 Prejudice to effective conduct of public affairs

    … Information is exempt information if its disclosure under this Act –

    …

    (b) would, or would be likely to, inhibit substantially –

    …

    (ii) the free and frank exchange of views for the purposes of deliberation;

    …

51. If it is necessary to append a schedule of documents to the decision notice, this should follow the Appendix.

Appendix 4: Anonymity

Decision notices

1. When a case is validated and SL7/SL7a issued, the applicant is asked to let us know if they want their name to be withheld from the version of the decision notice to appear on the website, or if there are valid reasons for withholding their name in response to a request under FOISA or the EIRs. The applicant is asked to let SIC know within 3 weeks if this is the case – however, the applicant can elect to do this at any point during the course of the investigation. (This is made clear in the Applicants' Guide which is sent out at the beginning of the investigation.)

2. There may be times when the applicant's name should be withheld from the published version of the decision notice without the applicant having requested this. In some cases the information in the decision notice reveals sensitive personal data such as criminal convictions or health conditions, either about the applicant or about a third party.

3. Naming an applicant in a decision may also identify other individuals – e.g. where the application relates to a neighbourhood dispute or the applicant wants access to files relating to a relative. In these cases, the decision notice should be anonymised even if the applicant has not asked to be anonymised. If you are uncertain whether a decision should be anonymised, speak to your DHOE.

4. Where the applicant's name is to be withheld from the published version of the decision notice, the IO must create an anonymised version once the decision has been approved. This should be stored in VC along with the final, unamended version (see Section 5 for more guidance on this).

5. IOs should ensure that the applicant cannot be identified inadvertently by the anonymised name. Names such as Mr X or Ms Y are usually appropriate.

Disclosing the names of applicants

6. As a Scottish public authority, the Commissioner has a duty to respond to information requests made under FOISA or the EIRs. This means it is possible that he will receive a request asking him to disclose the applicant's name. If this happens, the Commissioner will usually be required to disclose this information unless there are good reasons, in terms of the FOISA exemptions or EIRs exceptions, for withholding it.

7. As noted above, the applicant is given the opportunity to provide the Commissioner with details of any valid reasons why their name should not be disclosed in response to a request under FOISA or the EIRs. Although the applicant is asked to provide their reasons for wishing to remain anonymous within 3 weeks, they should be advised if we receive a request for their identity. If the applicant then puts forward reasons why their name should not be disclosed, these must be taken into account (in relation to the data protection principles) before deciding whether the information should be disclosed.

Appendix 5: The INSPIRE (Scotland) Regulations

Background

1. The Inspire (Scotland) Regulations 2009 (INSPIRE) came into force on 31 December 2009. They are based on an EU Directive – the INSPIRE Directive 2007/2/EC – which aims to make available consistent spatial data sets about the environment and create services for accessing these databases so that they can be more easily shared or combined to benefit the development and monitoring of environmental policy and practice in all Member States across the European Community.

2. INSPIRE applies to all Scottish public authorities – the definition of "Scottish public authority" in INSPIRE is based on the definition contained in the EIRs. INSPIRE also applied to "third parties", usually a body which holds spatial data sets or operates a spatial data service on behalf of a Scottish public authority.

The role of the Commissioner

3. The role of the Commissioner in relation to INSPIRE is important, although relatively limited. Anyone can make an application to the Commissioner for a decision whether, in any respect specified in the application, a Scottish public authority or third party has acted or is acting in a way which is not compatible with regulation 8(4)(c) or with regulation 10 of INSPIRE.

4. Any applications received under INSPIRE will be investigated (and any decisions enforced) in line with Part 4 of FOISA. However, when dealing with these types of application, Part 4 is modified - a copy of Part 4, as modified, is set out in Appendix 14 to these procedures.

The basis of the application

5. As mentioned above, an application can be made to the Commissioner in relation to the following a failure by a public authority or third party to comply with regulations 8(4)(c) and 10.

6. Under regulation 8, a Scottish public authority or third party must establish and operate the following services in relation to any spatial data set or spatial data service for which it is responsible:

   (i) discovery services, enabling users to search and display the contents of metadata for spatial data sets and services by means of keywords, classification, quality and validity, geographical location, access or use conditions and identification of who is responsible for creating, managing, maintaining and distributing them;

   (ii) view services, enabling users to display, navigate, zoom in and out, pan or overlay viewable spatial data sets and to display legend information and any relevant content of metadata;

   (iii) download services, enabling users to download copies of whole datasets or parts of datasets and, where practicable, accessed directly;

   (iv) transform services, enabling users to transform INSPIRE compliant spatial datasets to achieve interoperability and

   (v) invoke services enabling spatial datasets to be invoked.

7. In terms of regulation 8(4)(c), these services must be available to the public and accessible via the internet or any other appropriate means of telecommunication.

8. However, this right of access is subject to the "limitations" specified in regulation 10(2), (3) and (4). These are very similar to the exceptions set out in the EIRs.

9. There are some important differences between INSPIRE and FOISA which it is important to be aware of. For example:

   (i) INSPIRE does not specify timescales for responding to a request for access.

   (ii) As with FOISA and the EIRs, an applicant must go through the Scottish public authority's or third party's internal complaints procedures before making an application to the Commissioner. There are no timescales which regulate how quickly a public authority or third party should carry out a review or for making an application to the Commissioner. (SIC is currently working with the Government to ensure that the guidance to be published on INSPIRE takes account of such matters.)

   (iii) A Scottish public authority or third party may make a charge for a view service where that charge secures the maintenance of spatial data sets and spatial data services, especially in cases involving very large volumes of frequently updated data. Such a charge must be reasonable. The Commissioner may be asked to consider whether a charge has been applied appropriately.

   (iv) The limitations are not subject to the "prejudice substantially" test as are the exemptions and exceptions in FOISA and the EIRs – they are instead subject to the lower test of "adversely affect". While this means that we are more likely to find that limitations apply, the limitations are all (except for the limitation involving the disclosure of personal data which would breach one or more data protection principles) subject to the public interest test, so the outcome may well be the same.

10. The Scottish Government's current version of the guidance on INSPIRE can be downloaded from here: http://www.scotland.gov.uk/Topics/Government/PublicServiceReform/efficientgovernment/OneScotland/Guidance

11. We are likely to receive only a small number of applications under INSPIRE, but we must be able to recognise them when they come in, and be aware that it may not automatically be clear that the request is in fact being made under INSPIRE. In many cases, even if an applicant makes a request under INSPIRE, it may be that they will be more successful by making an application under the EIRs – where this is the case, advice on this point should be given to the applicant.

Appendix 6: Criminal offences under FOISA and the EIRs

Introduction

1. Under section 65 of FOISA, it is a criminal offence for a Scottish public authority (or for any person employed by, who is an officer of, or is subject to the direction of, the authority) to alter, deface, block, erase, destroy or conceal a record held by the authority if a request has been made for information contained in the record and the applicant is entitled to be given the information.

2. There is a similar offence under regulation 19 of the EIRs.

3. The maximum penalty for committing these offences is £5,000. (The offence is not subject to a custodial sentence.)

4. There is a time limit for a procurator fiscal to raise criminal proceedings: they must be commenced within six months from the date of sufficient evidence to justify proceedings coming to the knowledge of the fiscal. No proceedings can be commenced more than three years after the commission of the offence (or, in the case of a continuous contravention, three years after the last date on which the offence was committed).

5. When we receive an allegation that a criminal offence has been committed under section 65 or regulation 19, or we uncover evidence which leads us to suspect that such an offence may have been committed, steps must be taken quickly to determine whether the matter should be subject to a formal criminal investigation. The timely and effective investigation of these offences is vital to maintain public confidence in the general right of access to information afforded under FOISA and the EIRs.

6. The Commissioner has entered into a Memorandum of Understanding (MoU) with the Police Service of Scotland and the Crown Office. This sets out the framework for the investigation and reporting of offences, and aims to ensure that there is a clear understanding of the various roles and responsibilities each organisation (including the Commissioner's office) has in the investigation and reporting of offences. The current MoU, agreed in 2014, is in VC56842. It is important that any officer involved in investigating an allegation or suspicion that an offence has been committed is fully aware of the contents of the MoU.

7. Under the MoU, the police will refer all allegations to us, whether they consider that there is evidence to suggest that an offence has been committed or not. This will allow the Commissioner to determine whether, even if there is no evidence to suggest that an offence has been committed, the case raises other practice issues for the Enforcement Team.

8. However, as noted below, where the allegation has been made direct to the Commissioner, the allegations will not automatically be referred to the police. The Commissioner will only refer the matter to the police where he reasonably believes that there is evidence to suggest that an offence may have taken place. This will also be the case where, as a result of an investigation, assessment, etc., an officer uncovers evidence which leads him or her to suspect that a criminal offence may have been committed.

9. Similarly, where, during an investigation or assessment (or otherwise), an officer suspects that an offence may have been committed, the suspicion should be referred immediately to the HOE for further action, without the suspicion being raised with the public authority.

Allegations made to SIC

10. The HOE (or, in her absence, one of the DHOEs) must be advised immediately when an allegation is received that an offence under section 65 or regulation 19 has been committed. The HOE will then determine whether to deal with the case herself or whether to delegate the matter to a DHOE or FOIO. (For the remainder of this section, the officer with responsibility for dealing with the case is referred to as the "SIC investigating officer.")

11. The Commissioner will determine whether an allegation should be referred to the police. It is therefore important that the Commissioner is advised of the allegation and of the background to the allegation at the earliest opportunity.

12. However, the matter is not to be referred to the Commissioner if the offence which is alleged to have been committed took place more than three years prior to the allegation coming to our attention. Instead, the SIC investigating officer should write to the person who made the allegation, explaining that no investigation will be carried out because it is too late to do so (with reference to section 65A of FOISA or regulation 19A of the EIRs). In those circumstances, the SIC investigating officer should also consider whether there are any practice issues which it is worth referring to Policy and Information and whether there is any advice which can be given to the person who made the allegation regarding the use of his/her information rights.

13. Except where the paragraph above applies, the SIC investigating officer must prepare a report for the Commissioner (to be copied to the HOE), setting out the basis of the allegation and the initial view of the officer as to whether there are any grounds for believing that an offence may have taken place. Officers may find it useful to prepare a "timeline" setting out the events which are alleged to have happened. No contact should be made with the public authority in question at this stage, as this could have the effect of prejudicing any future criminal investigation, without the approval of the SIC/HOE. (It is recommended that contact should only be made with the public authority in relation to the allegation once the matter has been referred to the police and the police have confirmed that they are happy for such contact to be made – see below.)

14. A discussion should then take place with the SIC to determine whether to refer the matter to the police. As noted above, an allegation will only be referred to the police where the Commissioner reasonably believes that there is evidence to suggest that an offence may have been committed. It should be noted that, although the burden of proof is high for criminal offences ("beyond all reasonable doubt"), at this stage the Commissioner is considering only whether there is reasonable evidence to suggest that an offence may have been committed. This is a lower test.

15. Occasionally, an applicant will allege that an offence has been committed where he/she is dissatisfied with the initial response provided by a public authority to an information request (e.g. to say that it does not hold the information requested). Generally, where this happens, and the applicant has not sought a review or made an application to the Commissioner, the applicant will be advised to seek a review and/or make an application to the Commissioner, unless the applicant can provide some evidence to substantiate the allegation (and the Commissioner reasonably believes that there is evidence to suggest that an offence may have taken place).

16. Where the Commissioner decides not to refer the matter to the police, the SIC investigating officer should write to the person who made the allegation, explaining the basis for not taking the matter further. Advice should, wherever possible, be given to the person who made the allegation to assist them with their information request.

Referring the case to the police

17. Where the Commissioner decides that the case should be referred to the police, the HOE will refer the matter by email to Police Scotland's Information Manager (Disclosure). The SIC investigating officer will provide the HOE with a report for Police Scotland, which contains as much information as possible about the background to the case. This will include the report prepared for SIC, a summary of the discussions with SIC which led to the referral being made and the name and direct contact details of the SIC investigating officer.

18. The report will also deal with any technical issues relating to FOISA/the EIRs raised by the case.

19. On receipt of the referral, Police Scotland will alert their FOI Central Processing Department who, in turn, will notify the Information Manager (Disclosure) of the full circumstances of the case. The person appointed to investigate the allegation should contact the SIC investigating officer within five working days. If, 10 working days after the referral, no police investigating officer has been appointed, the HOE will contact Police Scotland's Information Manager for an update on the situation.

20. The police investigating officer and the SIC investigating officer will initially consider whether the allegations made will be the subject of a joint investigation (under the MoU, all criminal investigations to be carried out will be carried out on a joint basis). At this stage, much will depend on the recommendations and advice from the police as to the likelihood of there being sufficient evidence to refer the matter to the procurator fiscal, but the SIC investigating officer will be able to give advice on FOISA and EIRs-related matters, which may well be new to the police investigating officer.

21. Any actions identified will therefore be progressed jointly, where this can be done without compromising the investigation. In many cases, it is likely that individual steps will be taken, but with the agreement of the other side. For example, the police investigating officer may decide to interview witnesses on his/her own, but the SIC investigating officer will be able to give advice on some of the issues to be discussed during the interview. It may be agreed that the SIC investigating officer will write to the public authority to seek further background to the incident, but the police investigating officer will approve the correspondence before it is sent to avoid prejudicing the criminal investigation.

22. It is possible that, as part of the investigation, it is decided that the Commissioner should seek a warrant to enter premises, etc. in terms of schedule 3 of FOISA. Where such a step is being considered, the HOE must be advised as soon as possible, as she will be responsible for taking steps to seek the warrant.

23. At the end of the joint investigation, a decision will either be made either to refer the matter to the procurator fiscal or not to refer the matter on the basis that prima facie evidence does not exist to substantiate the allegation that an offence has been committed.

24. Where a decision is made to refer the matter to the procurator fiscal, the police investigating officer will draft the report, but can expect full support from the SIC investigating officer in preparing and checking the report, and particularly the aspects of the report which deal with technical issues relating to FOISA and/or the EIRs.

25. Where a decision is made not to refer the matter to the procurator fiscal (or the matter is referred to the fiscal, but the fiscal decides not to take any action), the SIC investigating officer will be responsible for advising the person who made the allegation of the outcome of the investigation. Again, advice should be given to the person who made the allegation, where possible, on how best to use their information rights. Advice should be sought on the contents of the correspondence with the person who made the allegation from the police and/or procurator fiscal, as appropriate.

26. The Commissioner and HOE should be kept updated at all times with the progress of the investigation. Similarly, the person who made the allegation should also be kept up to date with any progress in the investigation, although the SIC investigating officer should ensure that the police investigating officer is content with the level of detail provided to the person who made the allegation, again to ensure that the investigation is not prejudiced in any way.

Allegations made direct to police

27. An allegation that a criminal offence has been committed under section 65 of FOISA or regulation 19 of the EIRs may also be made direct to the police.

28. In line with the MoU, the police will refer all allegations to the FOI Co-ordinator within three working days of receipt of the allegation, who will then refer the matter within a further three working days to the HOE.

29. The HOE may decide to deal with the allegation herself or arrange for another officer (again, this may be a DHOE or FOIO) to deal with the allegation. As with 14.13, the SIC investigating officer must prepare a report for the SIC on the background to the case. Where allegations have been direct to the police, however, there is no need to consider whether to refer the matter to the police; what is required is to determine, in the light of the advice from the police, whether a joint criminal investigation should be carried out.

30. Where the decision is not to carry out such an investigation, the SIC investigating officer will determine whether the case nonetheless raises other practice issues which should be investigated.

Records management

31. As with other casework, all records involving allegations must be saved in WorkPro. There is a separate workflow in WorkPro for such cases under “Enforcement.”

Appendix 7 Correspondence with prisoners

1. Correspondence between SIC and prisoners is treated as “privileged”. This means that correspondence from SIC will not be opened by the Scottish Prison Service (SPS), but instead will be opened by the prisoner him or herself.

2. When sending a letter or notice to a prisoner, the following procedure must be followed:

   (i) All letters must be “double enveloped”

   (ii) The inner envelope must bear the Commissioner’s logo and address and have the following information recorded on it, where known:

      (a) Full name of prisoner, date of birth and hall location;

      (b) Name, address and telephone number of sender;

      (c) The case reference number;

      (d) The envelope must be marked with the word “**Privileged**”.

   (iii) The outer envelope should contain a covering letter addressed to the Governor, asking that the mail be passed to the prisoner unopened. The letters to the Governors will be prepared by ETSA or CST.

   (iv) All prisoner letters going out on a particular day must be in the outgoing mail tray by 3pm, to allow ETSA/CST to prepare the covering letter to the Governor.

   (v) Where possible, prisoner numbers should be quoted in all correspondence.

Appendix 8: List of standard letters

The standard letters which have been prepared in line with these procedures are contained in WorkPro. However, for ease of reference, here is a list of the letters which have been prepared, together with the purpose of the letter etc.

Title	Purpose	Process
SL01 Acknowledgement to Applicant	Acknowledge receipt of application plus EMF	Validation
SL01a Request for comments from PA – s8	Seeking comments from public authority where the authority have argued that the information request is invalid	Validation
SL02 Not valid (S48)	Advise applicant can't accept application because it involves a request to SIC, Procurator Fiscal, or Lord Advocate (s.48) plus EMF	Validation
SL02a Not valid (incomplete)	Advise applicant further information required to validate application – info to be provided within 2 weeks plus EMF	Validation
SL02b – Not valid (timescales/other issues)	Advise applicant not valid - failure to complete required steps or meet timescales plus EMF	Validation
SL02c – Out of time	Application made later than 6 months plus EMF	Validation
SL02d – Personal data	Application relates to request for applicant's personal data – explains unlikely to be provided under FOISA	Validation
SL03 – Request for info (App)	Asks applicant to provide copies of missing correspondence	Validation
SL04 – Final reminder (Applicant)	Recorded delivery letter giving applicant a final 10 days in which to provide missing info for validation	Validation
SL05 - Abandoned	Recorded delivery letter advising that case has been closed, because no response to request for further information.	Validation / Investigation
SL05a - Withdrawn	Recorded delivery letter confirming case closed after applicant withdraws	Validation / Investigation
SL05b - Withdrawn/Abandoned Public Authority	Advising PA that case closed	Validation / Investigation
SL06 – Documents Request – Public Authority	Asking PA to supply copies of all information withheld (sent by VO)	Validation / Investigation
SL06a – Valid application PA	Notifying PA of valid application	Validation / Investigation
SL06a – Valid application	Notifying PA of valid application	Validation /

Title	Purpose	Process
PA (SG)		Investigation
SL07 – Valid application	Advising applicant that application accepted and enclosing guidance	Validation
SL07a– Valid application (FTR)	Advising applicant that application accepted and explaining investigation/decision will focus on FTR aspects only.	Validation
SL08 – Seeking PA Submissions	Advising PA that investigation will be carried out and asking for detailed submissions	Investigation
SL08a – Seeking PA Submissions FTR	Advising PA that investigation will be carried out and asking for submissions on FTR case	Investigation
SL08b – Technical Investigation – Seeking Submissions	Information Notice sent instead of SL8 in technical cases. Signed by HOE/DHOE.	Investigation
SL09 – Confirm IO	Introducing IO to applicant	Investigation
SL10a – No decision – Applicant	Recorded delivery, advising applicant no decision will be made, as application is frivolous/vexatious or withdrawn/abandoned.	Investigation
SL10b – No decision – Public Authority	Advising PA case closed as no decision falls to be made	Investigation
SL12 – Info disclosed during investigation	Encouraging applicant to withdraw following disclosure of information during investigation	Investigation
SL13a – Decision Partial Breach to Applicant - Commissioner	Decision letter for applicant where PA has partially complied (for decisions signed by SIC)	Decision
SL13b – Decision Partial Breach to Applicant – HOE/DHOE	Decision letter for applicant where PA has partially complied (for decisions signed by HOE/DHOE)	Decision
SL13c - Decision Partial Breach to PA - Commissioner	Decision letter for PA, where PA has partially complied (decision signed by SIC)	Decision
SL13d Decision Partial Breach to PA – HOE/DHOE	Decision letter for PA, where PA has partially complied (decision signed by HOE/DHOE)	Decision
SL14a – Decision Complete Breach to Applicant – Commissioner	Decision letter for applicant where PA has failed to comply (for decisions signed by SIC)	Decision
SL14b – Decision Complete Breach to Applicant – HOE/DHOE	Decision letter for applicant where PA has failed to comply (for decisions signed by HOE/DHOE)	Decision
SL14c - Decision Complete Breach to PA - Commissioner	Decision letter for PA, where PA has failed to comply (decision signed by SIC)	Decision

Title	Purpose	Process
SL14d - Decision Complete Breach to PA – HOE/DHOE	Decision letter for PA, where PA has failed to comply (decision signed by HOE/DHOE)	Decision
SL15a - Decision No Breach to Applicant – Commissioner	Decision letter for applicant where PA has complied in full (for decisions signed by SIC)	Decision
SL15b - Decision No Breach to Applicant – HOE/DHOE	Decision letter for applicant where PA has complied in full (for decisions signed by HOE/DHOE)	Decision
SL15c - Decision No Breach to PA - Commissioner	Decision letter for PA, where PA has completely complied (decision signed by SIC)	Decision
SL15d - Decision No Breach to PA – HOE/DHOE	Decision letter for PA, where PA has completely complied (decision signed by HOE/DHOE)	Decision
SL16 – No change to decision - Applicant	Advising applicant no review of SIC decision is possible/warranted	Decision
SL17a - Confirm Compliance to Applicant	Asking applicant if PA has complied with decision	Compliance
SL17b - Confirm Compliance to PA	Asking PA to confirm compliance within 5 days	Compliance
SL18a - Complied - Inform Applicant	Advising applicant that PA has complied with decision	Compliance
SL18b - Complied - Inform PA	This letter to be addressed to the Chief Executive (copy sent to the person who dealt with the investigation within the public authority) – confirming compliance	Compliance
SL19 – Document Return to PA	Returning documents to PA / confirming documents destroyed	Compliance
SL20 – Non-compliance (10 days' notice)	Giving PA 5 days to show it has complied with decision	Compliance
SL21 – Non-compliance (5 days' notice)	Giving PA a final 5 days to show it has complied with decision	Compliance
SL24 – No response to information notice	Gives PA 5 days to respond before Court proceedings initiated	Investigation
SL25 – Cancel Information Notice	Used where PA requires formal notification that information notice has been cancelled	Investigation
SL26a - Decision FTR to PA – DHOE	FTR decision letter to PA	Investigation
SL26b - Decision FTR to Applicant – DHOE	FTR decision letter to applicant	Investigation

Title	Purpose	Process
SL26c - Decision FTR to PA (Ministers) – DHOE	FTR decision letter to Ministers	Investigation
SL26d - Decision FTR to Applicant (Ministers) – DHOE	FTR decision letter to applicant (where PA is Ministers)	Investigation
SL27a – Information Notice – HOE/DHOE	Recorded delivery. Formal notice requiring information from PA under s50(1)(a), signed HOE/DHOE	Investigation
SL27b – Information Notice – Commissioner	Recorded delivery. Formal notice requiring information from PA under s50(1)(a), signed SIC.	Investigation
SL28a - Information Notice - S50(1)(b)(i) FOISA EIRs (D)HOE	Information notice: failure to comply with FOISA or EIRs: HOE/DHOE	Enforcement
SL28b - Information Notice - S50(1)(b)(i) FOISA EIRs SIC	Information notice: failure to comply with FOISA or EIRs: SIC	Enforcement
SL29a - Information Notice - S50(1)(b)(ii) FOISA EIRs (D)HOE	Information notice: failure to comply with codes of practice: HOE/DHOE	Enforcement
SL29b - Information Notice - S50(1)(b)(ii) FOISA EIRs SIC	Information notice: failure to comply with codes of practice: SIC	Enforcement

Appendix 9: Records management

General

1. Staff must comply with the Commissioner's Information and Records Management Handbook (VC85931). The following points give some additional information specific to investigations.

2. Information relating to an investigation must be kept safely and securely. Remember that it is a criminal offence to disclose information obtained in relation to an investigation without lawful authority.

3. All correspondence received (or prepared) in connection with an investigation must be saved in the relevant WorkPro file as soon as possible. Accurate records of all telephone conversations and notes from meetings (bearing in mind our duties under data protection legislation) must also be added to the WorkPro file at the earliest opportunity, so that an accurate, up-to-date record of the case is maintained.

4. All drafts of letters or emails which are not used should be deleted as soon as possible.

5. Unless the case involves national security or is deemed exceptionally sensitive by HOE (when separate arrangements will be made), the paper files and document boxes will be kept in a locked cupboard in the IO's room. The cupboards must be kept locked at all times, except when in use.

6. Files and document boxes must never be left unattended and must be locked away when not in use.

Removing case files from the building

7. Ideally, case files should not be taken out of the office, but if there is a genuine need to do this, it must be cleared with HOE, DHOE, or HOCS first.

8. A record of this permission, stating the period that the file has been allowed out for, must be logged in the outgoing file register, held by HOE in Inglis, at the point of removal. The return of the file must also be recorded in the register.

File security when outside the building

9. In the rare event of files being taken out of the building, it is the officer's responsibility to ensure that the files are not put at risk. The following guidance should be followed by staff:

    - Files must be returned to the office as soon as possible. Files should be taken straight home, or straight to the meeting with the public authority involved. If this is not possible, they must be locked out of sight in the boot of the car only until such time they can be returned to the office or, failing which, kept temporarily in the officer's home.

    - When carrying files in public, officers must ensure that they are concealed and well protected from the elements. Never leave files unattended in public.

    - Officers must not work with files on public transport or in public areas, e.g. cafés. They may contain exempt information and so should not be put at risk of being accessed by the general public. This is applies especially to original evidence files being taken to a meeting with a public authority.

Procedure for lost or stolen files

10. The Commissioner's Information and Records Management Handbook sets out the procedures for data security breaches. Staff must familiarise themselves with the Handbook. The main thing to remember is that in the event of a security breach (or a near-miss), it must be reported immediately to the FAM (in whose absence, the HOCS, whom failing another member of the SMT).

11. HOE should also be notified immediately.

12. In the event of a file going missing while it is out of the building:

    - If it is lost, the responsible officer must check all places where it might have been left/stored.

    - If it cannot be found after extensive searching, the officer must inform FAM and HOE immediately, who will then assess whether the file is at risk of unauthorised access, what information has been lost and what information is recoverable from scanned versions.

    - If the file has been stolen, FAM and HOE must be informed immediately and will inform the local police in the area where it was stolen, if they have not been informed already. Again, FAM and HOE should also determine with the member of staff what information has been lost and what is recoverable from scanned documents.

    - If an original evidence file has been lost in transit every effort must be made to locate it. If this fails, the responsible Officer must then inform FAM and HOE, who will determine if the police should be informed.

    - If an original file has been stolen in transit, HOE, DHOE or HOCS should be informed and will contact the police in the area where it was stolen, if they have not already been informed.

    - It is the responsibility of the HOE to inform the public authority, as soon as possible, that the information has been lost or stolen.

Document Control Sheet

Document Information	
Full name of current version: Class, Title, Version No and Status. *E.g. C5 Key Documents Handbook v01 CURRENT ISSUE*	C2 Investigations Handbook v01 CURRENT ISSUE
VC File Id	VC44845
Type	Procedure
Approver	SMT
Responsible Manager	HOE
Date of next planned review	January 2018
Approval & Publication	
Approval Date (major version)	07/14
For publication *(Y/N)*	Y
Date published	16/10/17
Name of document in website file library	Investigations_Handbook
Corrections / Unplanned or Ad hoc reviews (see Summary of changes below for details)	
Date of last update	16 October 2017

Summary of changes to document

Date	Action by *(initials)*	Version updated *(e.g. 01.25-36)*	New version number *(e.g. 01.27, or 02.03)*	Brief description (*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*)
23/10/14	MK	01.08	01.09	Para.167: text added requiring two people to confirm information being sent to correct recipient
23/10/14	CMS	01.09	01.10	Draft sections 2/3/4 and 5 integrated
26/11/14	CMS	01.10	01.11	Insertion of appendix 6 -Correspondence with prisoners
11/12/14	CMS	01.11	01.12	Sections 1 and 2 and appendix 1 added
17/12/14	CMS	01.12	01.13	Amendment to figure 1
19/12/14	MK	01.19	01.20	Changes to Section 1 made to reflect fact that hard copy files to be opened for all new applications; text reworked and moved Para 101: highlights need to give SIC opportunity to comment on proposed resolution of weighted 3 cases Para 111: additional guidance on SL9s added Para 126: additional guidance on timing of SL8 added Para 175: notes that triage for cases weighted 3 to be copied to SIC Para 196: explanatory note on KPIs added Para 198: explanatory note on updating WP re location of file added Para 218: guidance added on naming conventions in VC Section 15: heading (typo corrected)
19/12/14	MK	01.20	01.21	Section 3: all references to cases “weighted 4” (not implemented) replaced with “weighted 3” Para 212: text added to reflect possible publication restrictions during purdah
09/01/15	MK	01.20	01.21	Page ii: Cross referenced VC box added Para 19: text moved to paragraph 33. No longer responsibility of ETSA to identify possible s65cases. Para 28: Original para.28 deleted as no longer required; para 27 split into two to retain paragraph numbering.

Summary of changes to document				
				Para 36: text added to reflect fact that DHOE may ask IO to review validity of application Para 44: text now notes that, if no issues arise, that is all the DHOE is required to note; two additional matters added for DHOE to consider in preliminary observations Paras 53 and 128: text added to reflect need to include application with the standard letter Paras 66 and 67: references to weighting corrected Para 118: requirement to seek advice from DHOE where public authority hasn't applied absolute exemption Para 182: incorrect references to applicant taken out
09/01/15	CMS	01.21	01.22	Figure 2: amendment made
09/01/15	EM	01.22	01.23	Paras 83 and 156: amended to provide for DHOE approval before pursuing potential abandonment.
15/01/15	MK	01.24	01.25	Coloured text (used to highlight recent changes) changes to black. Paras 83 and 156: tracked changes by EM (see above) accepted Para 35: text added to make it clear that VO must add a note to the file when case considered to be incapable of investigation Para 49: text added to make it clear that when case being validated by an IO, DHOE review must still take place
15/01/15	MK	01.25	01.26	Para 45: words "will complete" taken out before "synopsis" Para 55: reference to s25 added to cases where withheld information not required
20/01/15	MK	01.26	01.27	DCS prepared for adding to Key Documents Register
26/01/15	RA	01.27	01.29	VI updated and numbering fixed
28/01/15	KB	01.29	01.30	Publication details updated
28/01/15	KB	01.30	01.31	Add website file library name to DCS
02/03/15	MK	01.31	01.32	Para 29: Text added to reflect need for VO to complete synopsis and categorisation fields in WP. Para 53: VC reference to schedule of documents added. Section 2 amended to reflect the fact that VO will hold onto the file until the withheld information has been received before passing to ETSA. Appendix 4: new paragraph added re anonymisation of decisions where third party could be identified DCS updated.
04/03/15	LB	01.32	01.35	DCS updated and document published
04/03/15	MK	01.35	01.36	Section 17 (Enforcement of decision notice) updated to reflect current approach Reference to SL22 redacted from list of standard letters
04/03/15	LB	01.36	01.37	DCS updated and document published
10/03/15	PK	01.37	01.38	Newly revised template letters - changes to names and numbering: SLO8 – changed to 'Seeking PA Submissions' SLO8a – changed to 'Seeking PA Submissions FTR' SL08b – deleted SL23a – now SL27a SL23b – now SL27b SL48a – now SL28a SL48b – now SL28b SL49a – now SL29a SL49b – now SL29b Para 90 and 91: Name of letter changed to SL08a Para 255 and 256: Name of letter changed from SL23 to SL27 SL06 – Opening sentence changed to notify PA of new

Summary of changes to document				
				application and last paragraph removed about sending PA a copy of "A Guide for Scottish Public Authorities".
06/05/15	EM	01.38	01.39	Change to procedures/template letters for notifying PA of valid application – paras 46(ii), 55, 127 and Appendix 8 all amended, to provide for new SL06a and b
12/05/15	MK	01.40	01.41	Changes made on 06/05/15 by EM accepted. DCS updated.
13/05/15	LB	01.41	01.42	Document published
14/05/15	RA	01.42	01.43	Changes to Section 6, Resolution, to provide greater clarity and capture current practice.
14/05/15	MK	01.43	01.44	Changes by RA accepted.
15/05/15	KB	01.44	01.45	DCS updated and document published
27/05/15	PK	01.45	01.46	P.9 – seeking withheld info. Amended old VC reference INV49702 to VC45917.
27/05/15	KB	01.46	01.48	Updated reference to INVU throughout document. DCS updated and document published
27/05/15	KB	01.48	01.49	Published date amended on DCS
16/06/15	RA	01.49	01.50	Corrected typo in paragraph 107 (not republished at this point)
27/07/15	MK	01.50	01.51	Appendix 6 updated to include reference to updated MOU; para 184 corrected to link to correct appendix
28/07/15	LB	01.51	01.52	DCS updated and document published
25/08/15	MK	01.52	01.53	Changes made regarding new options for weighting of cases to sections 3, 6 and 11.
25/08/15	MK	01.53	01.54	No amendments, version discarded
31/08/15	KB	01.54	01.55	DCS updated with publish details. Published on website.
20/10/15	MK	01.55	01.56	Changes tracked in line with recent suggestions: • Para 21: ETSA to acknowledge receipt of correspondence relating to the application at initial stage • Paras 57-62: changes to clarify role of VO/ETSA • Pages 7, 14, 15 and 38: guidance added (box) regarding completion of issues log at closure of case • Para 186: no action to be taken on a case until SIC has commented on triage • Para 296: reference to seeking confirmation that third party acting on behalf of individual added
21/10/15	MK	01.56	01.57	After consultation, changes (to v01.55) accepted.
21/10/15	LB	01.57	01.59	'This document' removed from cross reference table, DCS updated and document published
19/01/16	AD	01.59	01.60	Changes tracked to take account of change to validation procedure: • Para 29: new paragraph added • Para 30: amended to take account of para 29 • Paras 57 to 59: change VO to ETSA
05/02/16	MK	01.60	01.61	Tracked changes (v01.60) accepted Para.187 updated to make it clear that triage note to be sent to SIC (and cc'd to HOE) once completed by DHOE. Appendix 7 – para 2(iii) – "inner envelope" replaced with "outer envelope"
23/02/16	LB	01.61	01.62	DCS updated and document published
01/03/16	AD	01.62	01.65	Changes tracked re. amended validation procedure / ETSA and VO responsibilities: • Paragraph 29: heading added, paragraph amended • Paragraph 30 added • Paragraph 31 amended • Paragraph 62 amended
15/03/16	MK	01.65	01.66	Changes tracked by AD (above) reviewed and accepted.
17/03/16	KB	01.66	01.67	DCS updated and document published
11/04/16	MK	01.67	01.68	Paragraph 87 updated to reflect change in practice: ETSA now responsible for destruction of cases closed during investigation

Summary of changes to document				
				Changes tracked (paragraph 231 and Section 13) for review by SMT.
12/04/16	MK	01.68	01.69	Tracked changes (see v01.68) temporarily removed to allow changes to para.87 to be published in advance of SMT approval for other changes.
12/04/16	MK	01.69	01.70	Tracked changes (see v01.68) re-added.
20/04/16	MK/KB	01.70	01.71	Changes to Section 13 accepted. Text deleted from paragraph 231 DCS updated, published on website
04/05/16	MK	01.71	01.72	Paragraph 117 amended – reasons to be given to PA where application withdrawn
04/05/16	LB	01.72	01.73	DCS updated and document re-published
10/05/16	MK	01.73	01.74	Paragraphs 236 and 237 amended: where information is being sent with a decision, the information must be given to the second level approver when the decisions and covering letters are being signed.
11/05/16	LB	01.74	01.75	DCS updated and document re-published
15/06/16	MK	01.75	01.76	Paragraph 86 deleted and paragraphs 119 and 243 (now 118 and 242) amended to reflect the fact that feedback forms are no longer being issued.
15/06/16	KB	01.76	01.77	DCS updated and document re-published
07/07/16	MK	01.77	01.78	Sections 1 and 2 updated to reflect that views re. validation to be given by HOE/DHOE. Para 240 amended to reflect the fact that feedback forms are no longer being issued.
08/07/16	KB	01.78	01.79	Flowchart Page 9 updated to reflect changes re validation to be given to HOE/DHOE. DCS updated and document re-published
04/08/16	MK	01.79	01.80	Section 1 (Receipt and Validation) updated to take account of forthcoming introduction of Appeals Portal
04/08/16	KB	01.80	01.81	DCS updated and document re-published
08/08/16	MK	01.81	01.82	Appendix 6 (Criminal offences) updated to reflect new contact at Police Scotland
11/08/16	MK	01.83	01.84	Paragraph 126 updated in line with s49(2)
12/08/16	KB	01.84	01.85	DCS updated and document re-published
15/08/16	KB	01.85	01.86	Document opened in error, version discarded
15/08/16	KB	01.86	01.87	DCS updated and document re-published
17/08/16	PK	01.87	01.88	Looking for guidance - opened HB in edit mode in error.
17/08/16	MK	01.88	01.89	DCS updated
22/08/16	KB	01.89	01.90	DCS updated and document re-published
26/08/16	MK	01.90	01.91	Checked out in error – no changes made.
04/10/16	MK	01.91	01.92	Para 223 – text re compliance with VI guidance added.
06/10/16	LB	01.92	01.94	DCS updated and document published
04/11/16	MK	01.94	01.95	Appendix 3 (Construction of decision notice): paras. 33/34 updated to take account of new rules re summaries of decision notices
07/11/16	KB	01.95	01.96	DCS updated, document published
05/12/16	MK	01.96	01.97	Introduction – typo corrected in reference to date of INSPIRE Regulations
05/12/16	KB	01.97	01.98	DCS updated, document published
06/12/16	AD	01.98	01.99	Appendix 1 paragraph 315 added for MK approval
06/12/16	MK	01.99	01.100	New paragraph 315 (postal addresses) approved
06/12/16	LB	01.100	01.102	DCS updated, document published
09/12/16	LB	01.102	01.103	Additional step to appeal portal procedures on page 4
09/12/16	MK	01.103	01.104	Change (see v103) accepted Text added re. annotating draft decision in Section 12
09/12/16	LB	01.104	01.105	DCS updated, document published
22/12/16	PK	01.105	01.106	Amend paras 36-38
22/12/16	PK	01.106	01.107	Update 01.106 to DCS

Summary of changes to document				
22/12/16	MK	01.107	01.108	Changes to paras. 36-38 accepted
13/01/17	LB	01.108	01.111	DCS updated and document republished
07/02/17	MK	01.111	01.112	Opened for editing in error
09/02/17	EM	01.112	01.113	Draft amendments to sections 2 and 8 for section 18 cases – for review.
13/02/17	MK	01.113	01.114	• Changes to sections 2 and 8 (see v01.113) accepted. • Cross-reference table (following list of abbreviations) deleted • Section 61 Code- reference added to para. 151 and list of possible questions added to Appendix 2
13/02/2017	MK	01.114	01.115	Highlighting in para 146 taken out.
14/02/2017	KB	01.115	01.116	DCS updated, published on website
02/03/2017	MK	01.116	01.117	Document opened in edit mode in error
06/03/2017	EMO	01.117	01.118	Document opened in edit mode in error
1/03/2017	AD	01.118	01.119	Suggested change to para.37
13/03/2017	EMO	01.119	01.120	DCS updated
29/03/2017	DL	01.120	01.121	• Added para 75 – dealing with Top Secret information • Paras 96,107,266 – revised instructions – media (memory sticks/CDs etc.) to be returned to sender
19/05/2017	MK	01.121	01.122	• DCS updated • Changes suggested to Parts 1, 16 and 17 and Appendix 8 • References to OMT updated to CST (and added to table of abbreviations)
8/6/17	AD	01.122	01.125	After discussion with ETSO, VOs and DHOEs, changes tracked to a number of paragraphs: 16, 27-29, 31-37, 49, 72 to reflect practice in acknowledging and opening new cases.
13/6/17	AD	01.125	01.126	Paragraph 31 amended to match current Workpro naming convention
21/06/17	MK	01.126	01.127	Tracked changes accepted.
22/06/17	KB	01.127	01.128	DCS updated, published on website
11/07/17	MK	01.128	01.129	• References to “HOOM” changed to “HOCS” • Para 69 updated re naming of withheld information, schedule, etc. in WorkPro • Appendix 9 added: Records Management • Information on OGL added to backing
12/07/17	KB	01.129	01.130	DCS updated, published on website
27/07/17	AD	01.130	01.131	Tracked suggested changes to Part 1 after discussion with Admin and ETSA.
03/08/17	MK	01.130	01.131	Tracked changes accepted.
03/08/17	MK	01.131	01.132	Checked out in error, no changes made
07/08/17	KB	01.132	01.133	DCS updated, published on website
16/10/17	MK	01.133	01.134	• Minor change to para 203 to clarify triage not required if case resolved prior to receipt of submissions. • References to “SIC” changed from she to he, etc.
16/10/17	LB	01.134	01.135	DCS updated, published on website
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