Barrhead Housing Group

Freedom of Information

Procedures for dealing with information requests under the Freedom of Information (Scotland) Act 2002 and the Environmental Information Regulations (Scotland) 2004

CONTENTS

1 INTRODUCTION

1.1 Scope

These procedures have been developed to enable officers of Barrhead Housing Group ("the Group") to deal with requests for information under the Freedom of Information (Scotland) Act 2002 and the Environmental Information Regulations (Scotland) 2004.

It is intended that this document will ensure that the Group

- can efficiently deal with enquiries;
- will meet its statutory obligationst
- will properly apply exemptions
- use charges appropriately;
- can provide a consistent and quality service; and
- continues to develop an open and inclusive culture of information sharing.

The officer responsibility for maintaining this document is the Group's Corporate Services Manager, Iain MacLean. All enquiries and comments should be addressed to him at FOI@barrheadha.org or on 0141 880 3825

1.2 Requests for information

The main element of Freedom of Information is that it gives a statutory right of access to the information held by public authorities.

The definition of "information" is very broad as it covers all recorded information in any format in any media. This includes information in hard copy files and data from computer records, but also includes:

- e-mails;
- unstructured manual records (for example, hand-written notes of a meeting in a notebook);
- CCTV; and
- answering machines messages.

The Act is retrospective, so it covers information held of any age.

An applicant can request information in a number of ways see briefing.They can ask for a photocopy or print-out of the relevant documents or files, or they can request physical access to the records. They can also request a summary of the information. BHG should comply with such a request where it is "reasonably practicable" to do so (s11(1)).

Staff should not ask about the motive of the application, but we need to be satisfied as to the identity of the applicant so applications should be accompanied by a real name and correspondence / email address.

Although there are a number of exemptions to the requirement to provide information, most of them are not absolute. Often, they can only be applied after considering whether releasing information would cause *substantial prejudice* to the particular exemption, AND that it will be public interest to withhold the information. In considering the exemptions, the balance is in favour of release.

There are *separate* Environmental Information Regulations (EIR). There are different rules for accessing environmental information than those arising from FOI.

There are a number of differences between how the Group has to deal with requests for this type of information, but the Scottish Information Commissioner has stressed that FoI and the EIR are meant to be closely aligned.

For that reason, and to simplify how the Group deals with ***all*** requests, we have not established separate procedures for dealing with requests under the EIR. Instead, these follow the standard FoI request procedures, but with due regard for the separate provisions of those regulations where appropriate.

2 IDENTIFYING AN FoI REQUEST

Freedom of Information is meant to encourage a culture of openness and accountability in Scottish public authorities.

However, while all requests for information have to be considered with due regard to the provisions of FoI, simple and day to day enquiries which can be answered with a simple answer, and where this is acceptable to the applicant, should be dealt with in that manner.

In summary, not all information requests which the Group receives should be treated as Freedom of Information requests. Advice should be sought from the Corporate Services Manager if required, but in general:

A request should be considered as an FoI/EIR enquiry and therefore liable to the procedures detailed in this document if:

- the enquirer specifically mentions the FoI Act or the EIR; or
- it is an unusual enquiry which might not have been received or answered before FoI was established; or
- the enquiry is not straightforward, controversial or if there are likely to be reasons for withholding all or part of the response.

However, despite what has been written above staff need to be alert to all potential FOI requests, or any dissatisfaction on the part of the requester so that they can be notified of appropriate appeal rights if they are unhappy for any reason.

Our approach within BHG is that FOI should be seen as the norm rather than the exception, and staff should ask themselves initially whether any requests made should be dealt with using FOI processes, to avoid the risk of valid requests being missed or overlooked.

3 DEALING with an FoI REQUEST

3.1 Responsibility

As established in the Group's Freedom of Information Policy, the responsibility for dealing with a Freedom of Information enquiry lies with the Corporate Servicces Manager, who will liais with officers aros BHG as necessary in relation to enquiries which are received. Ths responsibility includes recording the request, identifying material, collating it, considering exemptions and calculating and charging fees.

Where the CSM requires input from another service, he / she will:

- Ask as soon as possible
- Give them a date by which they need a response, having regard to the timescales required under the legislation

3.2 Timescales see briefing

Section 10 of the Freedom of Information (Scotland) Act states that requests must be dealt with promptly, and "in any event not later than the twentieth working day afte receipt".

This timescale is suspended by the issuing of a fees notice (see section 6 below), and only resumes with receipt of payment. Similarly, if the Group has to contact the applicant requiring, for example, more information to allow us to process the enquiry, the "clock stops" until we have the information needed to process their request or, if the clarification substantively amends the original request, restarts the clock at 20 working days.

If no clarification is received, the request should be held as "pending" for a period of three months, then marked as "void"

It should be stressed, however, that the 20 working days period is the statutory maximum. If it is possible to respond sooner, staff should do so.

"Working Days" are Mondays to Fridays, regardless of when any particular office might be open. The response must be made within 20 working days. The Commissioner has clarified the definition of "working days" as follows:

> *Section 73 of FOISA defines "working day" as any day other than a Saturday, a Sunday, Christmas Day or a day which, under the Banking and Financial Dealings Act 1971, is a bank holiday in Scotland.*

The statutory bank holidays for Scotland are set out in a table on the Scottish Government's website, which can be found at the link below:
http://www.scotland.gov.uk/Topics/People/bank-holidays

Staff who might be likely to receive email requests should make provision for their email to be forwarded to a colleague if they are out of the office for an extended period of time. "Out of office" should be used appropriately, to direct people to a colleague who can deal with an enquiry in their absence.

It is worth stressing that while the 20-day period is the statutory maximum, in each case every effort should be made to deal with the enquiry as quickly as possible: 20 days is not a target, but the statutory backstop by which enquiries MUST be responded to.

On receipt of any enquiry, an acknowledgement letter should be sent as soon as possible (see appendices), unless the response is being given immediately. This should thank the applicant for their enquiry, and inform them of the statutory timescale, and the possibility of exemptions and fees.

Enquiries treated as FOI should be recorded in the FOI register here

3.3 Guide to Information

A Guide to Inormation is a statutory obligation under Section 23 of the FoI(S)A. The Group's current Guide was approved by the Board on 26 September 2019 and was notified to the Scottish Information Commissioner on xxx. It is available on the intranet here and lists the classes of information which the Group can make available to anyone who might request them.

Information covered by the Guide is considered as "otherwise accessible" under the Act. This means that it is exempt the full access provisions detailed in Section 1 of the Act, and we are not obliged to follow the detailed and potentially onerous requirements specified therein.

3.4 Advice, assistance and clarification

Scottish Ministers have produced a Code of Practice (s60) which staff shoud have regard to. Under 15(2) of the FOI Act, an authority that complies with the s.60 Code will be complying with the duty to advise and assist,

Under Section 15 of the Freedom of Information (Scotland) Act the Group is under a specific duty to provide advice and assistance to applicants and potential applicants as far as it is reasonably able to do so see guidance .

In giving assistance, an applicant's reasons for requesting the information are not relevant. Applicants should not be given the impression that they are obliged to disclose the nature of their interest or that they will be treated differently if they do so. However, there may be occasions when we can more accurately answer an enquiry if the applicant is asked to be more specific.

Any request, except those relating to Environmental Information (see section 7 below), for information must be made in writing or in any other format capable of being used for subsequent reference see briefing. The Act specifies that a request must be in "permanent form", so this will include those:

- transmitted by fax;
- sent by e-mail;
- sent by e-form on the website;
- left on an answering machine;

- in theory, were an applicant send a tweet/video, that too would need to be considered as an enquiry under FoI.

Any request would need to meet the statutory FOI requirements i.e. include a real name, address for correspondence and describe the information required

Where a potential applicant is unable to frame his or her request in one of these forms for whatever reason, we should ensure that appropriate assistance is given to enable that person to make a request for information. While there is a general duty to provide advice and assistance to those making requests for information, particular consideration should be given to those with a disability or with communication difficulties.

The key issue is the need to respond flexibly to requests for information, and to provide the necessary level of advice and assistance to all applicants.

Where the applicant has provided insufficient information to enable the Group to identify and locate the information sought, or where the request is unclear, we should help the applicant to describe more clearly and particularly what information they require. It should be stressed, however, that the aim of providing assistance is to clarify the nature of the information being sought and not to determine the applicant's aims or motivation. Where more information is needed to clarify the request, it is important that the applicant is contacted as soon as possible. In such cases, the 20 day period will run (or re-start) from the date of receipt of clarification.

Other help and assistance which could be offered by front-line staff or by departmental practitioners might include:

- providing an outline of different kinds of information which might meet the terms of the request;
- providing access to further information to help the applicant to see the nature and extent of the information held by the authority;
- providing a general response to the request setting out options for further information which could be provided on request; or
- in instances where a request would be refused on cost grounds, giving an indication of what information could be provided within the cost ceiling.

If, after all reasonable assistance has been given, the applicant still cannot describe the information requested in a way which enables us to deal with the request, then the Group is not expected to ask for further clarification. However, we must disclose any information relating to the application which has been found and is not subject to any exemption. In these circumstances, the Group should explain why it cannot take the request any further and provide details of our review procedure and the applicant's subsequent rights to appeal to the Scottish Information Commissioner for a decision.

3.5 Communication & style letters

In communicating with the applicant, it is normally appropriate to use the format that they have used themselves: that is if they have written to us we should respond by letter; if they have contacted us by email we would normally contact them by the same means. If the applicant has asked for a response in a particular format, of course, we would respect their wishes where it is practical to do so.

On any occasion where:

- a request is being refused, or
- if we are stating that information is not held, or
- if we are issuing a fees notice,

the template letters to these procedures should be used, although, if appropriate, the relevant text can be incorporated into a more wide-ranging response. There are a number of statutory obligations which will not be met by using alternative forms of wording. In particular, we MUST:

- tell an applicant of their right to review and appeal any time we withhold information, or charge a fee;
- properly explain why an exemption has been invoked, including detailing our consideration of the public interest test.

Standard letters will **not** cover each eventuality. Often, in a more complicated enquiry, part of the enquiry can be satisfied while part has to be refused. In these cases, the relevant section from the style letter can simply be inserted into the letter covering the released material.

In the "otherwise available" letter, this requires some explanation. The Act states that if an applicant makes a request for something which is otherwise available we would simply direct them there rather than deal with the request through Section 1 of the Act. The Commissioner's guidelines further states however that, as this is technically a refusal, we must issue a formal refusal notice and notify the applicant of their right to request a review, etc. This creates the anomalous situation in which we are both giving information (or at least saying where it can be accessed) and refusing the request. The wording and format given in the letter is recommended for use in such circumstances.

When responding to a more complicated enquiry, it is important to retain a division between the separate elements of the enquiry, and the response should deal with each in turn. In particular, if more than one exemption is being used for separate pieces of information, it must be made clear which exemption relates to which information.

In responding to an enquiry and including documents (either electronic or paper) it may be useful to prepare and provide a list of contents.

If any information has been redacted or withheld, a copy of the complete information should be retained. This provides a full audit trail, and will be required in the event of a follow-up request or a review or an appeal to the Commissioner.

3.6 Format of Information

As noted above, an applicant has the right to request information in a number of different ways: they can request:

- digital copies, either by email or by removable drive;
- photo-copies of relevant documents or files, or print-outs of computer records;
- actual physical access to view hard copy or electronic records; or
- a summary or précis of the information.

Clearly, there will be times when certain of these options could present real difficulties for staff. Giving access to a PC would need to have due regard for security, and would not be possible were access being given to a record or file that contained exempt information which could not be blocked from access.

Nonetheless, the Act states that public authorities are obliged to consider whatever wishes the applicant has as to the format of the delivery of information. There is an element of reasonableness here and the test in FOI law is "reasonable practability". If there are good reasons why the particular wishes regarding format cannot be satisfied, we should endeavour to agree a solution which both satisfies the applicant and on which we can reasonably deliver.

3.7 Monitoring of Requests

To ensure that requests are promptly and accurately dealt with, it is important to record all requests and responses. In addition, the Freedom of Information Act's Section 60 Code of Practice requires the Group to monitor how we are dealing with requests The Commissioner also requires authorities to submit statistics to him on a quarterly basis. This is informed by the information which the Section 60 Code of Practice states that authorities should be collecting.

The CSM (in who's absence the Director of Customer Services) has the responsibility to ensure that all requests which they receive are recorded promptly and accurately on the FOI enquiry register. A copy of all responses and the supporting documentation (including any redacted material) should be placed in the FOI folder company / director / freedom of Information and EIR / (year) against the application reference which will be in the format of year/number e.g 2019/001

3.8 Refusals

There are a number of reasons why an enquiry might be refused, either in part or in whole and the exemptions under FoI and EIR are detailed below.

Note that even where exemptions do apply to part of an enquiry, the Group should endeavour to give as full an answer as possible.

Any time that a request is refused, in full or in part, a refusal notice **must** be issued. A style letter for this purpose is available. It explains that the Group holds the information but that a particular exemption applies and why (unless if to do so would itself disclose exempt information). If the exemption includes a public interest test, the refusal notice must also consider this.

The notice should also inform the applicant of his or her right to apply for a review of the decision and appeal to the Commissioner.

The Scottish Information Commissioner has prepared a wide range of helpful briefing documents which staff should have regard to when dealing with requests under FOI and when considering exemptions/ refusals. The link to all the guidance is here

4 EXEMPTIONS: GENERAL

4.1 Introduction

This section considers the applicability of the exemptions to the right of access under the Freedom of Information (Scotland) Act 2002. The individual exemptions are considered in detail at section 5 below.

Note that, as detailed in section 3.9 on "refusals":

- even if an exemption applies to part of the information requested, the Group is still obliged to comply with the remainder of the request; and
- refusal notices (the wording for which is given in the letter(s) must be used to inform the applicant when the release of information is being refused.

4.2 Absolute/non-absolute

Most of the exemptions to the right of access under the Freedom of Information Act are **not** absolute - even if an exemption applies to information, the information may have to be disclosed anyway (see "public interest test" below).

4.3 Substantial Prejudice

Many of the exemptions only apply if the disclosure of the information would "prejudice substantially" some particular interest. The term is not defined in the Act but it is clear that there must be some real possibility of serious harm arising to the interest to be protected before the test of substantial prejudice is met. The Group should consider disclosing the information unless the prejudice caused would be "real, actual and of significant substance".

In short, we cannot claim that an exemption applies if it only vaguely relates to the matter in hand: it must be a real and substantive issue.

4.4 Public Interest Test: Link to Guidance

The Act does not define "the public interest" but it has been described as "something which is of serious concern and benefit to the public". It has also been held that public interest does not mean what is of interest to the public but what is in the interest of the public. What constitutes the public interest may change over time and according to the circumstances of each case. When applying an exemption, public authorities must consider whether, in all the circumstances of the case, the public interest in withholding the information is outweighed by the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure. In balancing the public interest, the Scottish Information Commissioner has suggested that we should consider:

- the general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation;
- whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment;
- whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
- whether disclosure would contribute to the administration of justice and enforcement of the law including the prevention or detection of crime or the apprehension or prosecution of offenders;
- whether disclosure would contribute to the effective oversight of expenditure of public funds and that the public obtain value for money;
- whether disclosure would ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims;
- whether disclosure would contribute to a debate on a matter of public interest;
- whether disclosure would prejudice the protection of an individual's right to privacy.

Whereas we should **not** take into account:

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

4.5 Exemptions over time:

Many exemptions are related to the age or currency of the information, and this should be borne in mind particularly when considering the applicability of non-absolute exemptions. Some exemptions fall away when the material has become an "historical record" (taken to be over 15 years old); others, in particular that relating to personal data, have an applicability of up to 100 years.

Bear in mind, though, that the period when the exemption applies can be much shorter.

For example, a request for the details of tenders relating to an as yet un-awarded contract would likely be exempt from disclosure under sections 33 and 36 (commercial interests and confidentiality).

These exemptions might not apply so readily were the same request to be made a few months later, however, when it would be far more difficult to demonstrate how substantial prejudice to either the commercial interests of the tendering firms or to our duty of confidentiality might result from disclosure. After a longer period of time (dependant on the circumstances of the case) the exemptions would fall away entirely and could no longer be applied.

5 INDIVIDUAL EXEMPTIONS:

Under **Section 14,** requests can be refused if they are "vexatious Link to Guidance". The Scottish Information Commissioner requires public authorities to be able to make a strong case for refusing requests on these grounds. It should be noted that vexatious assessment relates to the request and not the individual.

The application of another part of Section 14 of the Act - "repeated" requests – states that if an authority deals with an enquiry it is not then obliged to answer "a subsequent request from that person which is identical or substantially similar" unless a substantial period of time has elapsed between the two requests. How long "substantial" might be is unclear, but we would have to have regard not only to the period of time but to how much the information requested has changed in the interim.

Under **Section 17,** Information not held briefing the request can be refused if the information requested is not held. Matters to take into account before deciding whether the information is held, how to check for information held etc can be found in the briefing

Section 25 – Information otherwise available Link to Guidance

This is an absolute exemption. It relates to information which an applicant can reasonably obtain elsewhere: if a person already has a mechanism for gaining information - even if it is not necessarily in the format that they would like it, and even if they have to pay a fee - it is exempt from the provisions of FoI.

Section 26 – Prohibitions on disclosure Link to Guidance

This is absolute exemption. It applies where disclosure of information is prohibited by other legislation, it would involve a contempt of court or it would be incompatible with a European Community obligation. Freedom of Information does not supersede previous legislation which specifically prohibits disclosure.

It is important to note that where this exemption is used as justification for withholding information the refusal notice should state what enactment or statutory instrument applies and which specific provision prevents disclosure.

Section 27 – Intention to Publish Link to Guidance

This exemption, which is non-absolute, relates to information the authority already intends to publish when the request for information is received.

It applies to information intended for publication within 12 where it is "reasonable in all the circumstances" to withhold the information until the date when the information is due to be published. It makes no difference whether the information is to be published by the Group or by any other person.

When weighing up whether it is reasonable to withhold information until its planned publication date, issues to consider will include:

- the length of time before the publication date: generally the closer the date the more reasonable it would normally be to withhold information until that time.
- whether the information is still being compiled and would present a misleading picture if provided, for example, where responses to a consultation or survey are collected over a period of weeks.
- whether the information relates to new services not yet in operation or to other situations for which administrative support is not yet in place.
- whether releasing information early will disadvantage other interested parties; for instance, details of an invitation to tender for work.

Section 30 - Prejudice to effective conduct of public affairs Link to Guidance

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

FoI is not intended to take away the ability of public authorities to "think in private", and if release of information would undermine the Group's ability to function properly, this exemption could be considered.

Section 33 – Commercial interests and the economy Link to Guidance

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

- Information which constitutes a trade secret (a trade secret is a business-related fact that the court will protect as being essential to an enterprise);
- Information, the disclosure of which would, or would likely to, prejudice substantially the commercial interests of any person including those of the Group;

In considering the applicability of this exemption, it can be good practice to consult any third party whose interests might be threatened. Whatever their opinion, though, it is up to the Group to decide on disclosure.

Section 34 – Investigations by Scottish public authorities and proceedings arising out of such investigations Link to Guidance

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

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

Section 35 – Law enforcement Link to Guidance

This is a qualified exemption and so the public interest test must be applied. This covers information which would, or would be likely to, prejudice substantially a number of law enforcement matters, such as:

- the prevention or detection of crime,
- the apprehension or prosecution of offenders
- the operation of immigration controls.

"prevention and detection of crime" is wide ranging, encompassing any action taken to anticipate and prevent crime, or to establish the identity and secure prosecution of the persons suspected of being responsible for crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and detection.

The exemption also covers information which would, or would be likely to, prejudice substantially any civil proceedings brought and arising out of an investigation conducted for a number of regulatory purposes. These include the following purposes:

- To ascertain whether a person has failed to comply with the law;
- To ascertain whether a person is responsible for conduct which is improper;
- To ascertain whether circumstances which would justify regulatory action exist;
- To ascertain a person's fitness or competence in relation to management or professional activity;
- To ascertain the cause of an accident

Section 36 – Confidentiality Link to Guidance

The first part of the exemption, Section 36(1), applies to any information about which a claim to confidentiality of communications could be maintained in legal proceedings, for example communications with solicitors. This part of the exemption is subject to the public interest test.

The second part of the exemption, Section 36(2), applies to information which was obtained by a Scottish public authority from another person which, if disclosed would constitute an actionable breach of confidence. This part of the exemption is absolute, although it is worth noting that the test of whether a breach of confidence will be actionable has a public interest element embedded within in – there's more info on this in the Commissioner's section 36 briefing.

Section 37 – Court records Link to Guidance

This exemption creates an absolute exemption from release and applies to information that is held by a public authority solely because it is contained in a document that appears in a "court record".

Courts, their staff and judges are not public authorities for the purposes of the Act and so they are not required to make information available under its terms. The effect of section 37 is to ensure that existing procedures governing access to information generated by or used in court (and other legal dispute resolution) proceedings are not

overridden by the provisions of the Act. The exemption ensures that where authorities that are bound by the Act hold information solely because of their involvement in court proceedings, an inquiry or arbitration, they are not required to release it outwith these proceedings.

While the potential scope of the term "court record" is wide ranging, information is exempt under section 37 only where a public authority holds it **solely** because it is contained in such a record.

Section 38 – Personal information Link to Guidance

S38(1) a provides an absolute exemption for personal data requested where the applicant is the data subject. Any such application should be dealt with under the subject access provisions of the GDPR/DPA.

The exemption also covers third party personal data: that is where a request is made for access to information containing someone else's personal data. Basically, the Group can not release personal information to a third party if to do so would breach the GDPR provisions / Data Protection Act.

Section 39 – Health, safety and the environment Link to Guidance

This is a qualified exemption and so the public interest test must be applied. It relates to information whose disclosure would, or would be likely to, endanger the physical or mental health or the safety of an individual. It is worth noting that s.39 also contains an EIR exemption, which allows information requests for envornmental information under FOI to be refused, to enable them to be responded to under the EIRs (i.e. avoiding the need for a dual response).

Section 40 – Audit functions Link to Guidance

This is a qualified exemption and so the public interest test must be applied. This covers information the disclosure of which would, or would be likely to, prejudice substantially the exercise of the Group's functions into the audit of other public authorities or an examination of our own efficiency. Note that this exemption relates only to the function of external audit and not to that of our internal audit.

6 FEES Link to Guidance

6.1 Introduction

This section details the fees to be charged when dealing with an FoI enquiry under Section 1 of the Act.

The Freedom of Information (Scotland) Act 2002 provides for a scheme of charges. This was agreed by the Scottish Executive in 2004, and states that:

- the first £100 of work on an enquiry is to be provided free;
- a marginal charge of 10% (after the first £100) can be made on requests costing between £100 and £600;
- requests which will cost the authority over £600 to process can be refused.

For example:

- a request which costs the Group £80 to process would be free to the applicant;
- a request which costs the Group £300 to process could carry a charge of £20;
- a request which would cost the Group £800 to process could be refused.

6.2 Fees Process

Most requests the Group deals with cost less than £100 to process, so charging will not be relevant. Where the volume of work or material means that the work is likely to exceed this level, however, we have the discretion to estimate how much this is likely to be and to send a "fees notice" to the applicant.

The fees notice should be issued as soon as possible, and in any case within the normal twenty working day deadline for responding to an enquiry. The issuing of a fees notice temporarily "stops the clock" until the fee is paid.

Thereafter, if the fee is not paid within 3 months, the enquiry is deemed to have lapsed.

As well as copies of print-outs and photocopies, the fee should include a charge for officer time spent researching and collating information.

The charge for staff time should be calculated on: hourly rate + 25%, to include on-costs such as superannuation, NI, etc. - although note that the fees regulations cap the amount that the Group can charge for staff time at £15 per hour.

Note that we **cannot** charge for time spent in meetings discussing, for example, how to process the enquiry or in considering what exemptions might apply or why, and we also have to discount time spent calculating the fee.

Calculating fees will often not be straightforward, and that that without actually doing the work it is impossible to say how long it might take. None the less, the Scottish Information Commissioner has been receptive to accepting reasonable estimates: authorities are not being asked to PROVE that their fees notices are accurate, simply that they have been reasonably arrived at.

A link to the fees and charging guidance is contained here

A further difficulty is determining the line between "collating" information - for which we can make a charge, and "retrieving" it - for which we can not.

We can also include a charge for photocopying or printing of information. Under our publication scheme this charge was standardised at 10p per A4 sheet, and this amount should be used in calculating fees here. Other media, for example A3, plan copies, video tapes or electronic media, should be recharged on an at-cost basis.

Postage and packing should also be included in the fees calculation if that is the method of delivery of the information requested.

For example:

An enquiry is received which we estimate will take 21 hours of an officer's time to research and collate; a total of 4 officer hours in meetings to discuss; and which will comprise some 250 sheets of A4 paper and one A0 plan. Note that the figures given are only included for example.

The charge to be made is therefore:

21 hours of officer's time at £15 per hour = £315
4 officer/hours in meetings = no charge to applicant
250 A4 copies at 10p each = £25
A0 plan copy = £6
p& p = £4

A total of £350. The first £100 is free to the applicant, and we charge 10% of the amount over that figure, £250.

The fee to be charged, therefore, is £25.

It is likely in some instances that the total cost will be in the range £101 to £200. This would result in a charge to the applicant of between 10p and £10. While we are within our rights to issue a fees notice for such an amount, it is unlikely that we will do so as the cost of processing / recovery would be greater than the income received.

Once the costs have been calculated and the fee decided, we must issue the applicant with a fee notice. The wording for the fee notice is given in the letter template. The notice should include details of how the fee was arrived at, and should also include details of the applicant's right of appeal. As with other notices, the wording from this style letter can be incorporated into more general correspondence as noted under the section on "refusals" above.

Where the request will cost more than £600 to process, it can be refused outright. The refusal notice for this purpose is given in the template letter. However, under our duty to offer assistance, wherever practicable we should offer alternatives: perhaps suggesting a more specific line of enquiry, or - where the bulk of the charging arises from the generation of a large bulk of hard copy data -offering the data in an alternative format.

The fee regime for charges dealt with under the EIR(S) is quite different. Here, the full cost can be recharged to the applicant. See Section 7 below for further details.

7 ENVIRONMENTAL INFORMATION REGULATIONS

7.1 Introduction

Although in the past rarely exercised, the public have in fact had the right to access environmental information since 1992. These provisions were further developed by the Environmental Information (Scotland) Regulations 2004.

The reason for separate regulations here is that they come from a European Directive on environmental matters, whereas Freedom of Information is a responsibility of individual national governments.

7.2 What is covered?

The Access to Environmental Information Regulations define "environmental information" as:

- the state of elements of the environment
- factors affecting the state of the environment
- measures and activities affecting or protecting the environment
- reports on the implementation of environmental legislation
- economic analysis used in environmental decision making
- the human condition as affected by the state of the environment

The Scottish Information Commissioner has suggested some specific examples of information requests which should be dealt with through these regulations:

- levels of chlorine in swimming pools
- water-quality and air-quality test reports
- genetically modified crops
- air-conditioning systems in public buildings

In practice, the two regimes - FoI and EIR - have been designed to be as similar as possible, so for most requests there will be little difference between whether it is dealt with as a request under Freedom of Information or under the Environmental Information Regulations. If information is simply being disclosed, it does not matter whether that is done through FoI or EIR, although you should acknowledfge this in any response

7.3 Differences between EIR and FoI

The main differences between the Environmental Information Regulations and the Freedom of Information provisions are:

- Generally, the timescale for response is the same. In the case of more complicated EIR requests which are complex **and** voluminous, however, the Group can claim an additional 20 working days to complete the work.
- The definition of "holding" of information is broader under EIR. For example, were the Group simply storing records for another public authority this would **not** count as "held" under FoI, and any applicant requesting the information contained therein would simply be directed to that other authority. This would **not** apply under EIR, and all information in our physical possession is covered.

- Requests under the EIR need **not** be in "permanent form". Under FoI, an enquiry has to be in writing or by email (see Section 2 above); under the environmental regulations even an oral enquiry should be dealt with as a formal request.
- As discussed at Sections 4 and 5 above, under FoI there are a number of exemptions. Similar provisions are laid out under the EIR, although they are referred to as "Exceptions". The Environmental Information Regulations contains NO absolute exemptions: therefore, the Group will still have to demonstrate how it is the public interest for information to be withheld. The Exceptions under EIR are detailed at section 7.4 below.
- The (discretionary) fee structure is significantly different for EIR:
    - "A reasonable amount" can be charged for providing environmental information. This must not exceed the actual cost of providing the information, but this means that the full **cost** of dealing with the request can be recharged.
    - As with requests dealt with under FoI, a charging notice should be issued to the applicant detailing how the costs have been arrived at.
    - There is no lower threshold below which information has to be given for free; and no upper limit threshold above which an enquiry can be refused.
    - It is not permitted to charge for allowing access to registers of environmental information, or for allowing an applicant to examine information at Group offices.

Despite the difference in charging regimes, the Association will align its FOI and EIR charging arrangements up to £600 for ease of processing, with full cost recovery above £600.

7.4 EIR Exceptions

As with FoI, information does not have to be provided in response to a request under the EIR if the information is not held or is otherwise accessible

The exceptions which might apply are:

- **The Request is "manifestly unreasonable".** Link to Guidance
- The Regulations provide that a request which provides a manifestly unreasonable request on a public authority can be refused.
- **Request too general Guidance** If an applicant fails to give us the details we need to identify the information he seeks, it can be refused. However, under our duty of assistance, this should only be done after explaining this to the applicant and giving them the opportunity to clarify or refine their search.
- **Incomplete data Guidance** There is an exception for "work in progress", although this must not be considered too widely and would need to be justified on a case by case basis.
- **Internal Communications Guidance** of a confidential nature. Authorities have to be able to "think in private", although, again, this exception cannot be too broadly interpreted and in each case a strong claim for confidentiality must be established.
- **Justice Guidance**There is an exception covering cases where release of information could prejudice the enforcement or administration of the law.
- **Intellectual Property Rights Guidance** covering copyright material or trade secrets.

- **Personal Data Guidance** This exception parallels the S38 exception under FoI.
- **Defence, National Security and International Relations**
- **Environmental Harm Guidance** covering situations in which release of information could lead to harm of the environment

There are some differences, in particular the existence of "exceptions" rather than "exemptions", the different fees structure, and the fact that requests can be in any format.

However, the similarities between the two regimes mean that it would be counter-productive to have a separate layer of bureaucracy to deal with requests under EIR: officers should use the same procedures for an information request whether it is for environmental information or not, simply bearing in mind the differences between the two. The general advice given in this document; the mechanisms and responsibility for processing requests detailed here; the style letters given in the appendices; the general obligation to provide help and assistance and to proactively make information available apply equally to *both* the Environmental Information Regulations and the broader Freedom of Information regime.

8 REVIEWS AND APPEALS

Under Sections 20 and 21 of the Freedom of Information (Scotland) Act, and under Section 16 of the EIR (Scotland) public authorities are required to establish a procedure for reviewing any decision made by them in connection with an information request.

There is also a subsequent right of appeal to the Scottish Information Commissioner.

Appeal procedure and responsible officer for determining reviews.

An applicant must be made fully aware of their right to ask for a review of a decision regarding their enquiry under FoI in every case where we have refused to disclose information, or have issued a fees notice, or if we are stating that the information is not held. The Group can be asked to review any aspect of how an enquiry was dealt with. This might include, for example:

- how we interpreted the scope of the request;
- the time taken to deal with the request;
- the application of exemptions;
- whether the request was dealt with under FoI or EIR.

The procedure for internal review is as follows:

- Wherever received in the Group, any request for a review should be immediately passed to the Corporate Services Manager.
- The Corporate Services Manager will make up a "review file", containing the original information request, the Group's response, the request for a review, a summary of the matter under consideration, and copies of other correspondence or material relevant to the review.
- The review will normally be carried out by the Chief Executive, but;
- The Chief Exevutive may delegate the responsibility for carrying out the review to a Director as appropriate.
- The officer carrying out the review will consider fully all aspects of the request, including, where appropriate, a report from the officer / service which dealt with it.
- The reviewing officer will make his/her decision within 20 working days of receipt of the appeal.
- If the reviewing officer determines, in whole or in part, that the information requested should be provided, s/he will notify the appellant of his decision, and will either issue the information or the matter will be referred back to the relevant officer for action.
- If the reviewing officer determines that the information should not be provided, she will so notify the appellant and the relevant officer(s).
- The reviewing officer's decision will be binding on the Group.
- If there are learning outcomes from the review, the reviewing officer will report this to the relevant officer(s) for any learning or necessary changes to procedues.
- Once the internal review process has been exhausted the applicant may then further appeal to the Scottish Information Commissioner if still dissatisfied.

A note of an applicant's right to a review is given in the appropriate style letters.

Copies of previous decisions issued by the Scottish Information Commissioner can be found here

APPENDIX: Sources of Further Information

The best source for further information is the website of the Scottish Information Commissioner:
http://www.itspublicknowledge.info/

The Scottish Government also has a useful online resource on FoI:
http://www.scotland.gov.uk/Topics/Government/FOI

The FoI Act itself can be found at:
http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/acts2002/20020013.htm

The EIR can be seen at:
http://www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm

For information on Data Protection matters see:
http://www.informationcommissioner.gov.uk/

Style letters & pro formas:

(1) Information Request Form
(2) FoI acknowledgement letter
(3) Standard receipt wording
(4) S25 (otherwise available) letter
(5) S17 (information not held) notice
(6) Refusal Notice
(7) Fees Notice
(8) Refusal Notice: excessive cost of compliance
(9) Information Notice about Reviews under Freedom of Information
(10) S38(1)a (data protection, applicant is data subject) letter
(11) Environmental Information Fees Notice

There is further information on the use of these appendices at Section 3.5 above.

Note that there are blocks of text in square brackets in several of the letters. This denotes an instruction or clarification, or where further specific details should be inserted. It should not, of course, be included in the documentation given out.

Note that the style letters will **not** cover each eventuality. For example in some requests, part of the enquiry can be satisfied while part has to be refused. In these cases, the relevant section from the Refusal Notice can simply be inserted into the letter covering the released material.