

# LEGAL UPDATE

Action Required: For your information

No. L03/04 Date: 26/11/04

## **FREEDOM OF INFORMATION ACT GENERAL RIGHT OF ACCESS - JANUARY 2005**

### 1. INTRODUCTION

The final phase of the Freedom of Information Act 2000 comes into force on 1 January 2005. It will give a general right of access to all types of recorded information held by public bodies such as local councils and parish meetings.

Individuals already have the right to access information about themselves which is held on computer and most paper files under the Data Protection Act 1998. This is known as the "subject access right".

As far as local councils and parish meetings are concerned, the Freedom of Information Act will extend this right to allow access to all the types of information held whether personal or non-personal. This may include information about third parties but account must, of course, be taken of the provisions of the Data Protection Act 1998 before releasing any such personal information.

### 2. GENERAL RIGHT OF ACCESS

2.1 The Act gives applicants two related rights:

- The right to be told whether the information exists; and
- The right to receive the information

2.2 The right to access information can be exercised by anyone - both individuals and legal persons (e.g a corporate body).

2.3 There is no requirement for the person making the request to be a local resident, a local elector or have any other connection with the local area or indeed the United Kingdom.

2.4 When making a request for information the applicant will not be required to mention the Freedom of Information Act. However, the request must be made in permanent form, for instance in writing or by e-mail and must include basic contact details so that a reply can be sent. A request made by telephone will not be sufficient. It must also include enough detail to enable a council or parish meeting to identify the information requested.

2.5 Information can take several forms. Not only letters, contractual documents etc. but also e-mails, file notes, micro fiche and micro film, CCTV and audio tapes.

2.6 The Act is fully retrospective. This means that all information held by a local council or parish meeting as at 1 January 2005 could be that subject of access requests from that date.

2.7 It will not be necessary to comply with 'vexatious' or 'repeated' requests where a response has recently been sent to an identical or substantially similar request from the same person. However, councils and parish meetings will be under a duty to provide advice and assistance to anyone making a request. This may "kick in" where a council or parish meeting itself does not hold the information but is aware who does. In such circumstances the applicant should be given details of the other body. An example of this could be where minutes have been passed to the County Archivist.

2.8 A charge may be made for dealing with requests. The precise details of the charging regime have yet to be finalised by Parliament. However, this is expected to be finalised and disseminated shortly and further advice will be issued as an appendix to this Update in due course.

### 3 RESPONDING TO REQUESTS

3.1 All information not covered by an exemption (see below) must ordinarily be released to the applicant within 20 working days of receipt of the request.

3.2 Where possible the information must also be provided to the applicant in the manner in which they have specified (for example, by providing a summary or a copy or, allowing inspection of a record) .

3.3 Where a request received is unclear or problematical it may be useful to establish direct contact with the applicant and find out what they really want.

3.4 If it is believed an exemption applies and it is necessary to consider the balance of the "public interest test" before deciding whether or not to release the information then a "reasonable time" is allowed in which to respond in full. However, the applicant must be informed that an exemption applies, within the original 20 day period, and an estimate must be given of the date by which a decision will be made.

3.5 If it is decided that an exemption applies and that the information is therefore withheld the applicant must be informed of the decision including the reason for refusal - within a reasonable time.

3.6 If an applicant wishes to inspect the information in person it is recognised that, where the clerk's private residence is also the council office, this gives rise to issues of both privacy and security. In the circumstances if a council or parish meeting makes alternative arrangements which are "reasonable" in nature to enable inspection then this should be sufficient to meet their obligations under the Act. The following types of arrangements would appear to satisfy the reasonableness criteria:

- Arrange by prior appointment for the applicant to attend at the clerks residence but also ensure someone else is in attendance 6.g the chairman;
- Hire a room as a "one off" arrangement in a village hall/ community centre and invite the applicant to attend by prior appointment;
- Invite the applicant to attend, say 30 minutes, before the commencement of one of the councils scheduled meetings and take the documents to that meeting.

#### 4 EXEMPTIONS

4.1 Whilst the Act creates a general right of access to information held by a local council or parish meeting it then sets out 23 exemptions where that right is either dissapplied or qualified. There are two general categories of exemptions known as 'Absolute Exemptions' and 'Qualified Exemptions' respectively. Many of the exemptions will only be relevant to central government.

4.2 Where information falls within the scope of an 'absolute exemption' there is no obligation to communicate it to an applicant. Absolute exemptions include the following types of information:

- Information reasonably accessible by other means (most commonly this is likely to be information published in accordance with a publication scheme);
- Information from, or relating to, certain security bodies;
- Information contained in court records;
- Personal information about the person making the request (the Data Protection Act applies to such requests and the applicant should be applying under that legislation);
- Information provided in confidence (this applies if releasing the information would amount to an actionable breach of confidence at the time the request is made);
- Prohibitions on disclosure (this applies if the disclosure is prohibited by legislation or if disclosure would be a contempt of court);

4.3 In the case of 'qualified exemptions' however, a local council or parish meeting will have to go on to consider whether it must override the exemption because it is in the public interest to release the information. The "public interest test" involves considering the circumstances of each particular case and the exemption that covers the information. The balance will lie in favour of disclosure in that information may only be withheld if the public interest in withholding it is greater than the public interest in releasing it. The following exemptions are examples of qualified exemptions:

. **Information intended for future publication** (applies where the council! parish meeting plans to publish the information in the future, and it is reasonable at the time the request was made not to disclose it until then);

. **Investigations and proceedings conducted by** public authorities (covers information relevant to criminal investigations and proceedings and information obtained from Confidential sources for criminal or civil proceedings);

- **Law enforcement** (e.g. information which will prejudice the prevention or detection of crime);
- **Health and safety** (applies to information which would, or would be likely to, endanger the physical, or mental health or safety of any individual);
- **Environmental information;**
- . Personal Information concerning a third party (broadly requests for personal information about someone else will be dealt with under the Act but the principles of the Data Protection Act 1998 will be used to determine whether it should be disclosed);
- **Legal professional privilege** (applies where a claim to legal professional privilege could be maintained in legal proceedings);
- **Commercial interests** (applies to trade secrets and to information, the disclosure of which would, or would be likely to prejudice the commercial interests of any person.
- **National security;**
- **Defence** (information likely to prejudice national defence or the armed forces);
- **International relations** (information likely to prejudice the UK's international relations or interests);
- **Relations within the UK** (information likely to prejudice relations between the UK administrations, the UK government, the National Assembly for Wales, the Scottish administration, and the executive committee of the Northern Ireland Assembly);

- **The economy** (information likely to prejudice the economic interests of the UK or part of the UK, or the financial interests of the government or any of the national administrations in the UK).

Further guidance on exemptions can be found on the Information Commissioners website [www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk)

## 5 THE PUBLIC INTEREST TEST

5.1 The public interest test will require local councils and parish meetings to make a judgement about the public interest. Where the balance between disclosure and withholding the information is seen as equal, the information must be released.

5.2 The Information Commissioner lists the following public interest factors that would encourage the disclosure of information:

- Furthering the understanding of and participation in the public debate of issues of the day;
- Promoting accountability and transparency by public authorities for decisions taken by them;
- Promoting accountability and transparency in the spending of public money;
- Allowing individuals to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions; and
- Bringing to light information affecting public safety.

## 6 REFUSING A REQUEST

6.1 A local council or parish meeting must either:

- Provide the information or;
- Notify an applicant that the request has been refused (ordinarily within 20 working days).

6.2 The existence of the exemptions could sometimes lead to a situation where part of a document is disclosed and the rest is withheld.

6.3 Where disclosure is refused it is necessary to specify the exemption relied on and also state why the exemption applies.

6.4 Where disclosure is refused based on vexatious or repeated requests the applicant must be informed of this and the reason why.

6.5 When notifying an applicant that their request has been refused a local council/ parish meeting should also inform them:

- Of the councils own complaints procedure (hence it is important such a procedure is adopted); and
- The right of appeal to the Information Commissioner

6.6 If a local council/ parish meeting no longer holds the information which is the subject of the request the applicant can be informed of that accordingly.

## 7 ROLE OF THE INFORMATION COMMISSIONER

7.1 The Information Commissioner is an independent public official reporting to Parliament and has a number of duties in relation to Freedom of Information. These include:

- The promotion of good practice;
- The promotion of compliance with the Act;
- The enforcement of the Act;
- The dissemination of information and advice about the Act

7.2 An applicant who has made a request for information may apply to the Information Commissioner for a decision as to whether their request has been dealt with correctly. In response, the Information Commissioner may serve a decision notice on a council or parish meeting as well as the applicant setting out any steps which are required in order to comply. The Commissioner will also have the power to serve information notices and enforcement notices on councils and parish meetings. In certain circumstances the Commissioner may issue a decision or enforcement notice requiring disclosure of information in the public interest which must be complied with subject to a right of appeal.

## 8. PREPARING FOR IMPLEMENTATION

8.1 Any council or parish meeting which has not carried out an audit of the information it holds should consider doing so as a matter of urgency. Unless it is known what information is held and where it can be found it will be very difficult to deal with requests in an effective manner.

8.2 It may be helpful to agree a procedure for dealing with all requests. I would have thought that most councils will be happy for their clerk to deal with all uncontroversial requests. Where it is believed an exemption applies then it may be necessary to refer the matter to full council! a committee for a formal decision to be taken. This is where point 3.4 above may well need to be borne in mind.

8.3 All staff who may receive correspondence from the general public outside organisations should be advised of the implications of Freedom of Information so that they can recognise when a request has been received and if necessary direct it to the appropriate person in the council e.g. the clerk. Clearly members will also need to be aware of the FOI Act.

8.4 A retention and disposal policy for all information should be given due consideration. Clearly some types of information can be disposed of fairly quickly whilst others e.g. insurance policies etc, have a much longer lifespan. Minutes are a prime example of where a retention and disposal policy may be useful. Many councils already send their minutes to the County Archivist for storage however if this were done say on a yearly cycle then this could potentially reduce the number of requests local councils/ parish meetings have to deal with. If such an approach is adopted when a request is received and the council/ parish meeting no longer holds the minutes in question the applicant can then be referred to the County Archivist in accordance with 2.6 above. All information not just minutes held by a council should preferably be reviewed on a yearly basis. I am in the process of revising Legal Topic Note Number 38 (Local Council Documents and Records) and will disseminate the final version as soon as possible.

This update is provided by Ian Mark, Senior Legal Executive