

SCOTTISH EXECUTIVE STATISTICIAN GROUP
STATISTICS NOTICE 04/4
Version 4 – 20th DECEMBER 2004

Freedom of Information and statistics

INTRODUCTION

Background

1. The Freedom of Information (Scotland) Act 2002 comes into force on 1st January 2005. It introduces new rights to access information held by Scottish Public Authorities and encourages the proactive dissemination of information through approved publication schemes. The Act will be promoted and enforced by the independent Scottish Information Commissioner.
2. This note provides information and advice on implementation of FoI requirements with regard to the release of statistics and sets out action required. It is not intended to be a comprehensive guide to the Act, and it should be seen as complementary to rather than a replacement of general guidance on FoI. I would recommend that you make use of the [Freedom of Information Unit](#) intranet site. All staff should ensure that they are familiar with the requirements of the Act and the associated SE FoI [Section 60 Code](#).
3. This guidance has been the subject of discussion with the Scottish Information Commissioner and he considers that the approach to implementation contained within it is consistent with the principles of the Act.
4. You should note that the Scottish Act differs in some important ways from the equivalent UK Act, so you should be cautious about following advice you may see from other parts of the Government Statistical Service.
5. You should also be aware that information requests concerning the environment¹ are governed by Environmental Information Regulations. Whilst the revised regulations will be aligned as closely as possible with the FoI regime, you need to be aware of differences.²

Overall impact

6. Much of what the Act contains puts into legislation the principles of openness and access to information that have been in place for the Government Statistical Service for

¹ 'Environmental information' covers a broad spectrum of issues - not only the obvious subjects such as pollution and conservation, but also the built environment such as developments, planning, and anything affecting health

² Main differences are - Requests need not be written; longer response time when cases are complex and voluminous; slightly different fees structure; and some differences in exemptions, in particular no absolute exemptions.

some time. We should therefore find that the practices we have built up in implementing the National Statistics Code of Practice will serve us in good stead.

7. The general increase in access to and publication of information amongst other public bodies should also re-inforce the implementation of the NS Code of Practice.
8. We have no idea how many requests are going to be generated but a huge proportion of our information is already available and most branches already deal with a significant volume of ad-hoc requests.
9. Statistics that have been published are not affected by FoI. Most of our statistics are already published and as such are outwith the legal framework provided by the Act, but only once they are published. The Executive's FoI publication scheme has already been produced. [Scottish Executive Publication Scheme](#). Essentially it means that those statistics releases that are noted on the Statistics website are regarded as published in terms of the Act. As noted in para 34, this provides an important incentive to publish more of your information. The exemption also includes statistics that have been published by others, even if they have to be paid for.
10. So the main FoI issues for statistics relate to currently unpublished statistics (including statistics outwith 12 weeks before publication and background data).

Action required

11. All branches will need to take action now to ensure that they are ready to implement the Act. For each set of statistics, the main responses to the Act are likely to be one or more of the following, and you will need to prepare for each of them.
 - (a) Changing what you publish.
 - (b) Dealing with requests.
 - (c) Changing what you collect.
 - (d) Changing processing arrangements.
12. Before considering these in more detail it is important to understand the types of statistics that are or may be exempt from the FoI requirements.

EXEMPTIONS

13. The Act includes a number of exemptions. The following section sets out how they apply to statistics, although it does not include all possible exemptions. Most exemptions are not absolute and can be outweighed by consideration of the public interest³ in disclosing the information. The exemptions for Environmental Information operate in slightly different ways – for example a public interest test is attached to all categories on all categories of environmental information.

A. Confidential data are mostly exempt [Sections 36 and 38]

14. At present we do not release personal information or disclosive information which otherwise contravenes the Data Protection Act, and FoI will not require us to. Similarly

³ . The Section 60 Code of Practice sets out factors to consider when assessing the public interest in release (paras 73-75).

where disclosure of information would constitute a breach of confidence actionable by that person or any other person, the information is exempt.

15. However this will not include data where we have simply given an agreement not to make information publicly available (e.g. as in the case of some schools data). We cannot give such undertakings in future, unless some other FoI exemption applies. You should bear in mind that where the source data is held by a public body they too could be the subject of a request for information that could not be refused under FoI.
16. Information provided in confidence by a UK Government Department is exempt.

B. Statistics that are due to be published within 12 weeks are exempt [Section 27(1)]

17. Information which is intended for future publication is exempt from FoI provisions if it is already being held with a view to publication within 12 weeks and it is reasonable (in terms of the public interest) that the information be withheld until the publication date.
18. I would anticipate that the National Statistics Code of Practice will help sustain an argument that it is reasonable to withhold information until publication date, but it may still be challenged on occasion. In addition you will need to have planned dates of publication well in advance, so that the 12 weeks can be measured.

C. Statistics that are part of a research programme may be exempt [Section 27(2)]

19. In respect of statistics being prepared earlier than 12 weeks before publication, it may be the case that they can be considered to be part of a research programme. "Research programme" is not defined in the Act and the Scottish Information Commissioner has indicated that he is likely to take a tough line on interpreting this provision.
20. Exemptions may include statistics that are still in the course of preparation, and where their release would prejudice the programme itself (e.g. by stopping off the flow of data). The fact that it would be misleading is not sufficient reason. These exemptions are subject to the statistics being planned for publication at some point and subject to the usual public interest test that applies to most exemptions.
21. This exemption is particularly difficult to interpret, and at least until advised otherwise it is important to only use this exemption in relation to statistics where it has been cleared with me or a senior statistician.

D. Other statistics in the course of preparation for publication, prior to the 12 week period are not exempt

22. If the above exemption does not apply, then all statistics in the course of preparation and prior to the 12 week period before publication (if they exist), will be subject to FoI requirements and must be made available on request even when they are incomplete and/or not of quality fit for publication. The response, which is covered later in this note, may depend on the following distinction, though there is a grey area in between:
 - (a) Statistics that are of usable quality, but are more meaningful if they are published as part of a larger range of statistics or covering a longer time period.
 - (b) Statistics which are incomplete – for example only covering a proportion of returns – or require further processing before they are meaningful.

E. Most statistics produced solely for management purposes will not be exempt except in very limited circumstances.

23. As so much of the Statistics Group activity is published, information produced only for internal purposes consists of only a very small set of statistics plus a fair amount of additional analysis. The former are mainly but not wholly in Health Department, and there may be an increase in other areas as statistical support for the Partnership Agreement builds up.
24. Statistics or additional analysis (including emerging findings) produced purely for internal management purposes may be exempt on the 'informing policy' rule [Section clause 29(1)], related to and prior to specific Ministerial decisions. Once a policy decision has been taken, any statistical information is not exempt.
25. In addition regard must be had to the public interest in the disclosure of factual information which is intended to be used, to provide an informed background to the taking of a decision. On that basis such exemptions are only likely to be possible in a limited number of cases.
26. Where management statistics (or analysis) are produced on a routine basis for general information they would not be exempt, unless their release would substantially prejudice the effective conduct of public affairs, and that seems unlikely to apply.

F. Background data must be made available

27. Background data are data that form the background to a statistical release (whether National Statistics or otherwise) but are not included in the release. We already make background data available in many forms to meet user needs and that should continue.
28. Under the National Statistics Code background data should be made available subject only to confidentiality, practicality and reliability. The first two constraints apply under FoI, though our interpretation of them may be subject to challenge in any instance. FoI appears to result in reliability no longer being tenable as a reason for withholding data.
29. With regard to background data, there is no requirement for us to aggregate non-disclosable individual records in a manner such that the results are unreliable, and we would clearly not wish to make it available pro-actively on such a basis. For example we should not aggregate data into areas that are too small for proper use. However where we hold background data in such aggregations (say as a by-product of processing or data checking), unreliability in itself will no longer be a sufficient reason to withhold data.
30. We should not make background data available in aggregations that would allow disclosure of personal data through differencing from published aggregations..
31. Such requests for new or additional analysis, do not come under the terms of the FoI Act. However in all of this you should bear in mind the FoI duty to provide advice and assistance. You should ensure that advice is provided on what levels of aggregation are available or could be provided.
32. Note that if you plan to publish background data after the main release, the 'intended for publication' exemption would apply for 12 weeks before the date of publication of the

background data, not the date of the main publication. Outwith the 12 weeks they would be subject to sections C and D above.

G. Other statistics of insufficient quality are not necessarily exempt

33. Sometimes statistical collections, particularly first time round, do not yield statistics of usable quality. The same principles set out in sections C and D apply. There is no exemption on the basis of poor quality.

RESPONSES

CHANGING WHAT YOU PUBLISH

34. **The most likely response will be to publish more information (including publishing more often).** Making information available pro-actively is part of the general SE guidance on the Act, and will often provide benefits. It will frequently be preferable on the grounds of efficiency, equality of access and more orderly release. It is more likely that the release can be managed so as to prevent misuse. In general it will be easier for Ministers to defend their position in relation to information that the Executive has made available pro-actively compared with information that has had to be made available under FoI requirements.
35. The main additions to publications are likely to be management information, emerging findings and perhaps phasing of release in response to the 12 week rule. But you may also find that the response of other public bodies suggests a new national publication.
36. All branches should now review what they publish and bring forward proposals for new publications in the light of FoI. These plans should be cleared with Ministers as an addition to the planned publications schedule and the new reasons for publication set out. You will need to plan changes to what you publish well in advance and consider the 12 week rule when fixing release dates.
37. Where the new information is of National Statistics quality and it is possible to publish it under NS arrangements you should bring forward proposals to bring the statistics in to NS scope. Guidance on this is contained in office notice 04/5.
38. We will require to develop new forms of publication. The following categories of publication are proposed, and more detail will be contained in our Publication Strategy produced in connection with the National Statistics protocol.

Type of publication	Release arrangements
National Statistics – published subject to the full rigours of the National Statistics Code of Practice and Protocol on Release Practice	In place and require no amendment.
Non National Statistics releases – following the same basic principles but subject to less rigorous arrangements ⁴ . Most management information which we choose to make available pro-actively as a result of FoI would fall into this category.	Particularly with regard to management information or where there is a high risk of misuse or misinterpretation, additional arrangements may be necessary to brief Ministers and to produce additional information (including perhaps a Ministerial statement) to minimise the risk of misuse.
Background data released after a formal statistics release.	Revised arrangements already in place.
Experimental statistics – for testing or research purposes and to be used in specified ways.	Must be clearly marked ‘experimental’ and limits on use set out. Other arrangements apply as in protocol on data presentation and publication strategy.

DEALING WITH REQUESTS

39. The option of providing information only on request rather than publishing is likely to be preferred where there is a high risk of misuse, or where there is only likely to be a very limited number of specific ad-hoc demands under FoI.
40. You should familiarise yourself with section 8 of the Act (requesting information) and section 11 (means of providing information). However the general response should be open and helpful as indicated in the [Section 60 Code](#) (paras 17-22).
41. We already meet most information requests that we can, and the Act will not change most of that. FoI does not undermine our undertaking to provide the public with statistical information in the form they need it. It will mean some changes to handling arrangements

Principles

42. All requests for information are subject to FoI regardless of whether they mention it. For FoI to apply requests need to be in writing or another recorded form (such as e-mail). You should not use this as a means of refusing a request and you should ensure that the applicant is aware of this requirement. Requests for environmental information can be in any form.
43. You have a duty to assist and advise people looking for information but can turn down vexatious requests. Executive policy on charging is under consideration. Further

⁴ Minimum requirements are that there should be a plan for their release, that the release will be managed by a senior professional and subject to specific arrangements and that a record of such arrangements is available. Pre-announcement of a release date is likely to be involved.

information required to identify and locate the information can be sought from the applicant if required.

44. You should continue to follow best practice in terms of ensuring that the information request is clear and that the information requested will meet the applicant's needs.
45. You can of course discuss requests with the applicant and advise them whether or not the requested data is fit for purpose and whether any alternatives exist. But you must recognise that they have the right of access to the information requested unless it is exempt.
46. You should not apply exemptions where you would not normally have refused the request under the National Statistics Code of Practice. Principally this means that you should not refuse requests for published information simply because it is not covered by FoI requirements. Nor should you refuse requests simply because they are not in the form required for the Act to apply.
47. In some cases you may decide that, as a result of a request for information, it is worth publishing the information as well as responding to the request. Where there is a risk of misuse, you may decide to publish some alternative information and/or some guidance on the use of the data that has been released.

Handling arrangements

48. You should note that there is a 20 day limit for responding and familiarise yourself with other requirements in the Act. A 40 day response time can apply to complex and voluminous Environmental Information Requests.
49. Within the Executive there it has been agreed that there will be monitoring of certain types of request: (i.e. requests which we refuse in whole or part (and why); requests for which we charge; requests of a complex or sensitive nature; requests which lead to reviews; and requests which lead to appeals to the Scottish Information Commissioner.) A "smart" template will be provided to facilitate this, and to notify the FoI Unit, who will provide regular (weekly) reports to Ministers.
50. It has been agreed that routine monitoring of timescales should not take place, but that audits, spot checks, limited monitoring in particular areas, etc will be appropriate. Once ERDM is fully in force the capacity for centralised monitoring will be enhanced. Departments should generally avoid putting in place more localised systems unless there is a clear and demonstrable need for them.
51. You should also ensure that appropriate statements are prepared where there is a significant risk of politically-sensitive use or general misuse of statistics made available in this way.

CHANGING WHAT YOU COLLECT

52. FoI should not lead to a reduction in the information collected. It does not change whether information is needed or not, although realistically it may sharpen focus on this question.

53. However, it is possible in extreme cases that the release of information collected, say for internal management purposes, would be so misleading or damaging to the interests of data providers that the data collection should cease. An example might be where it is appropriate for Ministers to be aware of monthly performance of some part of the public sector, but where public scrutiny on such a regular basis would be detrimental to the service, though if it could be considered to substantially prejudice the effective conduct of public affairs it would be exempt, subject to consideration of any overriding public interest.
54. The point about confidentiality in para. 15 may also affect what we are able to collect.

CHANGING PROCESSING ARRANGEMENTS

55. Where processing takes more than 12 weeks and hence presents the difficulties noted in section D above, it may be appropriate to change processing arrangements (e.g. collect less often, process less often, process faster). This may be seen as a perverse reaction to the Act and should only be used where the statistics would actually be misleading. Such decisions can only be made in advance of FoI requests being made.

SUMMARY OF EARLY ACTION

56. Statistics branches should take steps to ensure that all their staff understand the Act, general SE guidance and the contents of this note.
57. They must also be aware of any Departmental arrangements for handling requests.
58. You must consider all currently unpublished statistics and decide on which of the responses set out above they will adopt with regard to each set of statistics. A summary of exemptions and responses to non exempt information is given in the Annex.
59. In doing so for each set of statistics you should:
 - (a) Clarify whether an exemption is possible and appropriate.
 - (b) Otherwise decide which of the possible responses in para. 11 is suitable.
 - (c) Consult users and providers on changes to the content of publications or any new publication plans.
 - (d) Submit proposals to Ministers.
 - (e) Where additional statistics are to be published or released in response to FoI requests, ensure that the appropriate guidance on their proper use is available.
60. It would be helpful if you would copy me into material produced as a result of these considerations. I will update this guidance as necessary and ensure that best practice is shared across the Group. As noted in para. 21 I would like any intention to use the research programme exemption to be cleared first.
61. It is also vital that I am notified immediately of any cases where there appears to be a conflict between the Act and the National Statistics Code of Practice. You should do this through your senior statistician where that is possible.

Rob Wishart
Chief Statistician
20 December 2004

Annex A

IMPLICATIONS FOR CODE OF PRACTICE AND PUBLISHING ARRANGEMENTS

Certain National Statistics principles are likely to be more widely adopted

1. In practice FoI is likely to lead many other parts of the office to adopt some of the National Statistics principles, in particular pre-announcing publication dates, publication as early as possible and release of background information.

Poor quality will no longer be a justification for not releasing information

2. FoI potentially undermines a key principle of the Code of Practice – that statistics will be fit for purpose and of high quality, since it may require release of
 - incomplete figures, if they are available earlier than 12 weeks before publication and are not part of a research programme
 - partial background data if available
 - other substandard statistics
3. Additional action will be necessary to discourage misuse of such information.

Orderly release could become more difficult

4. Again for statistics being processed outwith the 12 weeks before publication, orderly release could be seriously undermined. There is also a general risk that statistics will be sought and used selectively. Effective publication plans are the prime solution to this and the principles of the Code should at least help sustain the argument that is reasonable to withhold the information until its publication.

Emerging findings are more likely to be published

5. The Code makes provision for selective release of emerging findings in certain circumstances, although if there are significant policy implications the presumption is that they would be published. We have made little use of the emerging findings concept in Scotland. Under FoI emerging findings are unlikely to be exempt.

It is possible that the principle of Ministerial pre-release access could be challenged as a result of FoI.

6. The exemption for information intended for future publication is subject to a test of reasonableness. The provision of the statistics to Ministers before publication may be used as an argument that once it has gone to Ministers it is not reasonable to withhold information. However the NS Code is clear that provision to Ministers is to respond completely at the time of publication.

Certain elements of the Code will require amendment

7. A review of the Code of Practice is scheduled to begin in spring 2005. The implications of FoI for the Code and for specific Protocols will presumably be built in at that stage. At present the implications are thought to include the following.

- (a) The current coverage of background data in the Release Practices protocol is very sketchy and needs to be firmed up. Unreliability can no longer be a sole reason for withholding background data.
- (b) It may be appropriate to recognise various new forms of publication.
- (c) Release of emerging findings may need some adjustment
- (d) There is an even greater need for the Code and Release Practices protocol to properly set out arrangements for handling management information.
- (e) Management of quality and orderly release need to be reviewed in the light of FoI. In particular how best to manage the release of poor quality data under FoI needs to be enhanced.

TABLE 1 – EXEMPTIONS AND RESPONSES

Type of statistics	Exemptions	Possible responses for non exempt information			
		Publish	Make available only on request	Stop collecting	Change processing arrangements
Published statistics	Exempt				
Statistics due to be published within twelve weeks	Exempt (if reasonable)				
Confidential data	Mostly exempt				
Statistics produced solely for management purposes (including emerging findings)	Only exempt if related to a specific policy decision and having regard for public interest, until that decision is made.	Possible/ preferred in many cases	Possible	If extremely misleading or damaging to data providers	If misleading or damaging to data providers
Statistics in course of preparation for publication, prior to the 12 week period		Possible	Possible	N/A	If misleading or damaging to data providers
(a) intermediate results of usable quality					
(b) incomplete/ not of usable quality	May be exempt if part of a programme of research	No	Not if exempt. Otherwise possible	N/A	Possible
Background data	No	Preferred	If unreliable or low demand or if a lot of extra effort is required.	N/A	If misleading or damaging to data providers
Other statistics of insufficient quality	No	Possible -if use can be controlled	Preferred	No	N/A