

Response to the Scottish Executive consultation on the draft code of practice under section 60 of the Freedom of Information (Scotland) Act 2002

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About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

- carrying out research into consumer issues and concerns;
- informing key policy and decision-makers about consumer concerns and issues;
- influencing key policy and decision-making processes;
- informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC's Chairman and Council members are appointed by the Secretary of State for Trade and Industry in consultation with the Secretary of State for Scotland. Future appointments will be in consultation with the First Minister. Martyn Evans, the SCC's Director, leads the staff team.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS

Can consumers actually get the goods or services they need or want?

CHOICE

Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION

Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS

If something goes wrong, can it be put right?

SAFETY

Are standards as high as they can reasonably be?

FAIRNESS

Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION

If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

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Introduction

The purpose of the Scottish Consumer Council is to make all consumers in Scotland matter. We do this by putting forward the consumer interest, particularly that of disadvantaged groups in society, and by working with those people who can make a difference to achieve beneficial change.

We have a particular interest in the implications of the draft code of practice for consumers who might wish to exercise their right of access to information under the Freedom of Information (Scotland) Act 2002. We have previously responded to past Scottish Executive consultations on freedom of information, and also submitted comments on an early draft of the code of practice.¹

The success of the freedom of information regime will depend to a considerable extent on whether Scottish public authorities embrace the spirit of the Act and follow the codes of practice. We welcome the draft code, which will encourage good practice among authorities. Observance of this code will be central to the effectiveness of the Act in practice. It is therefore important to ensure that the code is as clear and comprehensive as possible.

We very much welcome the fact that the Executive is conducting a public consultation on the draft code, in addition to consulting the Scottish Information Commissioner as required under the Act. We hope that the Commissioner will have an opportunity to see and comment on the points raised in response to this consultation, before the final code is approved.

We generally welcome the draft code of practice, which improves considerably on the original draft code which was placed before the Justice 1 committee of the Scottish parliament to support stage 2 scrutiny of the Freedom of Information (Scotland) Bill.²

We particularly welcome the fact that the draft code provides in a number of instances that public authorities should be prepared to justify to the Commissioner why they have not followed specific provisions of the code. These provisions should help to ensure that public authorities take the code seriously.

¹ *Response to an Open Scotland: Freedom of Information*, March 2000; *Response to the Scottish Executive Freedom of Information Consultation on Draft Legislation*, September 2001; *Comments on the working draft code of practice on the discharge of the functions of public authorities issued by the Scottish Executive to Justice 1 committee to support stage 2 scrutiny of the Freedom of Information (Scotland) Bill*, November 2002

² *See Comments on the working draft code of practice on the discharge of the functions of public authorities issued by the Scottish Executive to Justice 1 committee to support stage 2 scrutiny of the Freedom of Information (Scotland) Bill*; Scottish Consumer Council, November 2002

We have previously expressed concern that a non-mandatory code may not be sufficient.³ The code will simply provide guidance on the practice which is, in the opinion of Ministers, desirable for authorities to follow. We are concerned that some authorities may simply choose not to follow the code, which would lead to a lack of uniformity among authorities. This would be against the interests of applicants, who should be able to expect procedures to be uniformly accessible and user-friendly, whichever public authority holds the information they seek.

We recognise that Section 15(2) of the Act provides that an authority which conforms with the section 60 code of practice is deemed to comply with its duty to provide advice and assistance to applicants. However, this does not absolutely oblige public authorities to follow the good practice laid down in the code.

It is important that compliance with the codes by public authorities is monitored, to ensure that authorities are complying with them. The codes should be subject to review on a regular basis, and if there is evidence of consistent failure to comply, consideration should be given to whether they require to be given statutory force.

The Scottish Consumer Council was represented on the sub-group of the Freedom of Information Implementation Group which was tasked with producing the current draft code. We are very pleased that so many of our comments and suggestions have been taken on board. Given our close involvement in the production of the draft code, we do not intend to comment on its provisions in detail. However, we would like to make some specific observations, which are set out below in response to the specific consultation questions.

Answers to the consultation questions

1. How well does the draft code meet your expectations and/or requirements?

While we welcome the provision in paragraph 7 that authorities 'may wish to consider' designating a specific individual as information officer, we would like to see this strengthened. We think that the code should explicitly provide that public authorities *should* appoint a designated freedom of information officer (or officers in larger authorities, perhaps one in each department) to help people frame their applications.

While it is essential that someone in each authority or department has responsibility to assist applicants and potential applicants with their information requests, it is also vital that responsibility is given to someone at a senior level for overall implementation of FOI within each authority. In the words of the Scottish Freedom of Information Implementation Group:-

³ *Response to the Scottish Executive Freedom of Information Consultation on Draft Legislation*, Scottish Consumer Council, September 2001

'From a 'changing the culture' perspective, authorities should consider nominating someone at a senior level within the organisation to be responsible for ensuring that implementation of FOI is being treated seriously and that the authority has the structure required to meet the challenge of FOI and comply with the requirements of the legislation'.⁴

We would suggest that it might be helpful to incorporate something to this effect in the code's introduction.

2. Does the code provide sufficiently clear guidance to authorities on their responsibilities under the Act?

Publication schemes (Paragraph 13)

We would suggest that the code should refer authorities to the detailed guidance on publication schemes issued recently by the Scottish Information Commissioner. It would also be helpful to include a reference to the requirement under section 23(3) of the Act that an authority should have regard to the public interest in allowing public access to information and the publication of reasons for decisions made by it. This might then refer to the list of factors to be taken into account in considering the public interest set out at Paragraph 65 of the draft code.

Information intended for future publication (Paragraph 51)

We would suggest that the code could be stronger here. We welcome the provision that where there is a delay in publication, the authority should contact the applicant and explain the reason for the delay and the revised date of publication, if known. The draft code also states that significant delay in publication would be likely to remove the ability to withhold information because it is intended for it to be published. However, 'significant delay' is not defined, and it should be made clear under what circumstances the authority would lose the right to withhold information under this exemption.

3. Is there more that authorities might reasonably do to enable applicants to access the information they seek?

Transferring requests for information (Paragraphs 28-32)

While we appreciate that the Act does not provide for procedures for the transfer from one authority to another, we consider that authorities should do their very best to help applicants so far as possible, in keeping with their duty to provide advice and assistance under section 15 of the Act.

⁴ *First Annual Report of the Scottish Freedom of Information Implementation Group, April 2001*

We see real potential for confusion among potential applicants as to which of four separate regimes - the Scottish and UK freedom of information regimes respectively, the UK Data Protection regime, and the forthcoming regime for environmental information - applies in relation to a particular request. We accept that this problem is partly addressed through the lack of any requirement on the applicant to quote the Act under which they are applying for information. To that extent, the onus is on the public authority to provide the information, regardless of which Act applies.

However, this will only be the case where the applicant knows which public authority holds the information. Where they are unsure, applicants will need assistance in finding the appropriate authority to deal with their request. It is important that they are not dissuaded from persisting with their request simply because they do not know where to go.

We appreciate the difficulties that providing for the transfer of requests would cause, particularly in relation to data protection, and also in calculating when the 21-day time limit begins and ends. That said, we would suggest that, where an applicant is willing to have their request transferred, authorities should be encouraged to consider ways of addressing any potential data protection difficulties, including how they might ensure in practice that applicants indicate in writing whether they consent to the transfer of their request if necessary.

We would suggest that there is a need for a change of emphasis in relation to this section of the code. The first sentence states: 'The Act does not include procedures for the transfer of requests from one authority to another, and it will not generally be appropriate for authorities to do so'. This sets a somewhat negative tone for the rest of the section. We would like to see a more positive approach, encouraging authorities to provide as much assistance as possible to applicants in locating the correct authority, rather than concentrating on the issue of transfers.

We think the code should encourage authorities to help the applicant so far as possible to identify which authority holds the information, and to give the applicant the contact details for that authority, and if possible the name of the relevant person/department that they should contact. The code should point out that this will be expected of authorities if they are to comply with their duty under section 15 of the Act to provide assistance to applicants.

Fees for the provision of information (Paragraphs 52-53)

We would suggest that the code should provide that, where an applicant indicates that they are not prepared to pay the fee notified in any fees notice given to them, the authority should consider whether there is any information that may be of interest to the applicant that is available free of charge. Such a

provision appears in the analogous code of practice under the UK Freedom of Information Act.⁵

4. How well does the code deal with any concerns you may have about inclusion/equality mainstreaming?

We consider that the current draft of the code clearly tackles some important equality issues in paragraphs 10-12, and also in paragraphs 16-18, in relation to assistance in making a request for information. These sections address some of the concerns which we have previously expressed. It remains to be seen, however, whether public authorities actually follow the code in relation to these issues in practice.

5. Are there other areas on which it would be helpful to provide guidance?

Fees

We note that paragraph 53 states that charges made for information should be made in accordance with other legislation and within the terms of any relevant guidance issued by the Scottish Executive. We consider that guidance should be issued on the charging of fees under the Act.

Applicants should be entitled to expect that any fee they are charged should be roughly the same regardless of which authority holds the information they require. We are concerned that the costs of compliance could vary significantly depending on the degree of efficiency and good record keeping exercised by individual authorities. Accordingly, there is a need for guidance or regulations in relation to Section 12(3) of the Act to prescribe the costs to be estimated and how they should be estimated, to ensure uniformity among authorities.

Requirement for review /complaints procedures

We consider that the code could provide clearer guidance on the procedures to be adopted when dealing with a requirement for review. If applicants are to exercise their right to a review, it is essential that public authorities have in place effective, easily accessible and easy to use complaints machinery. Good complaints procedures are of benefit to both consumers and public authorities. However, the Act is silent on this matter, beyond laying down the review procedure and stating that the refusal notice issued to the applicant by the authority must give details of its complaints procedure.

⁵ Lord Chancellor's Code of Practice on the Discharge of Public Authorities' Functions under Part 1 of the Freedom of Information Act 2000, issued under Section 45 of the Act at paragraph 13

The draft code of practice does contain some general guidance on dealing with requirements for review, stating that a 'requirement for review' is distinct from any general complaints procedure the authority may have in place. It also stresses the importance of putting in place appropriate procedures for handling reviews.

The complaints procedure should deal with handling complaints as well as reviewing decisions. The code should clearly set out in which circumstances the complaints procedures might be invoked. The UK code states that the complaints procedure may be used by:

- ? anyone who thinks that the authority is not complying with its publication scheme⁶
- ? applicants who consider that their request has not been properly handled
- ? applicants who are otherwise dissatisfied with the outcome of the consideration of their request⁷

In respect of the first category of complaint, we would like to see specific reference to such complaints in the Scottish code. The UK code states that if such complaints cannot be resolved informally, the public authority should give the person details of its internal complaints procedure, and how to contact the Information Commissioner. It also states that the authority should explain that, although the complainer cannot make an application to the Commissioner under the Act, the Commissioner may investigate the matter at his/her discretion. We think there should be similar provision in Scotland.

We would suggest that the complaints procedure under which public authorities deal with these various categories of complaint should follow the principles for complaints handling set out by Service First,⁸ the successor to the Citizen's Charter Unit. The code should also offer a definition of what should be treated as a complaint, following the guidance produced by Service First, which describes a complaint as "any expression of dissatisfaction that needs a response".

6. Is the tone appropriate?

We consider that the tone of the draft code is appropriate, given that it is intended as a high-level guide for those with overall responsibility for freedom of information within public authorities. It may be necessary for authorities to provide simplified guidance for frontline staff on the parts of the code which are relevant to their work on a day-to-day basis.

⁶ Lord Chancellor's Code of Practice on the Discharge of Public Authorities' Functions under Part 1 of the Freedom of Information Act 2000, issued under Section 45 of the Act at paragraph 52

⁷ As above, at paragraph 53

⁸ *How to Deal with Complaints: Service First-The New Charter Programme*, Cabinet Office, 1998 (<http://www.cabinet-office.gov.uk/servicefirst/>)