



This session builds on our introductory sessions – today we will look at the duties and processes in more detail, and will focus on what you and your organisations should be doing now to prepare for the coming on-line of the Order.

The big change since last time is that the Order that will bring registered social landlords under the scope of FOI law has now been passed by the Scottish Parliament on 4 April 2019, so we now have the detail on which bodies are covered in relation to which functions.

Before we look at the wording of the Order, however, here's a quick reminder of the 3 core FOI duties which will apply to all bodies covered by the Order, so you always have those in mind when thinking about what designation actually means for your organisations.



The first is the duty to respond to information requests.

This flows from the “right to information” provided by FOI, which is clearly set out in the very first section of the FOI Act. This says:

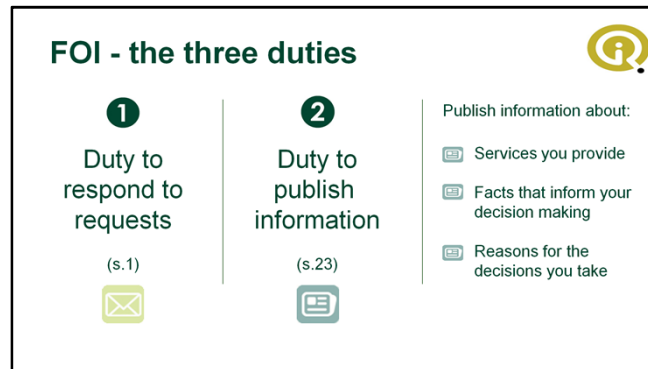
**“A person who requests information from a Scottish public authority which holds it is entitled to be given it...”**

The right to information is a right that we all have, and one that we can all make use of. If you or I request information from a public body, we’re entitled to receive it. We don’t have to say why we want it or what we want to use it for, and it can only be kept from us if there’s a very good reason for withholding it.

**The duty to respond to such requests applies to all written requests for information that an organisation receives. [Where it relates to functions to which the Act applies].**

If you receive a request for information under FOI you have a legal duty to respond promptly, and in any event within 20 working days in most cases.

Information requests can be refused, but only in certain circumstances, and only where the law expressly permits it, e.g. if an exemption applies such as substantial harm to commercial interests.



## **The second duty is the duty to publish information.**

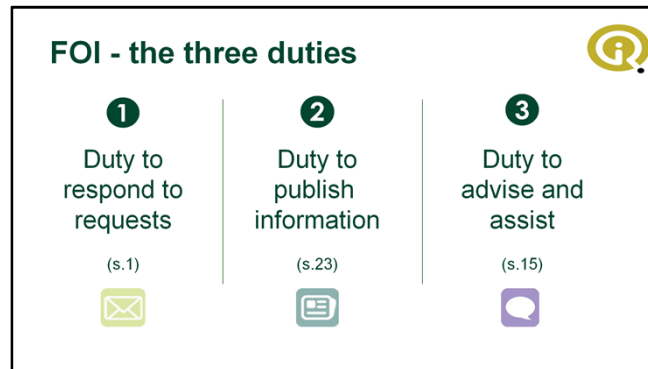
FOI requires organisations to proactively publish information into the public domain.

This duty is referred to as the 'publication scheme' duty, and is contained in section 23 of the FOI Act.

Under this section, organisations should be publishing information about the services they provide and the decisions that they take, to help the public better understand the costs and the standards of services, the reasons for decisions, and the facts/analysis on which decisions of importance to the public have been made.

By putting as much information as you can in the public domain, and publishing information whenever a public interest in that information is identified, you'll be providing people with a route through which they can access that information themselves, meaning they won't have to ask you for it.

A clear, helpful and user-friendly route to information also marks you out as an open and transparent organisation, and helps build trust with service users and the wider public.



The third duty is the **Duty to advise and assist**.

Section 15 of the FOI Act places a legal duty on organisations to advise and assist requesters.

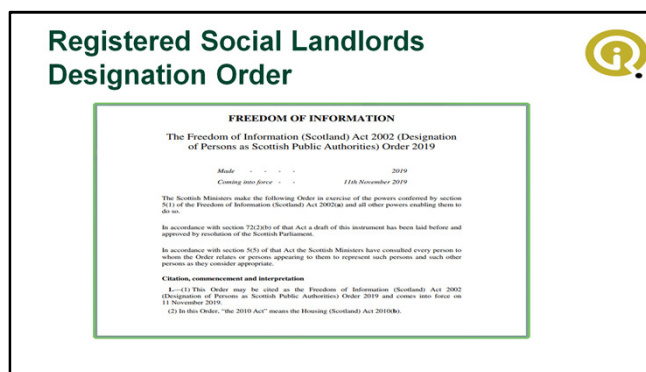
At it's best, FOI can help you build a positive relationship with your service users and stakeholders.

And, as with the publication scheme duty, taking your duty to advise and assist seriously can reduce the impact of FOI request, as well as building trust in your organisations.

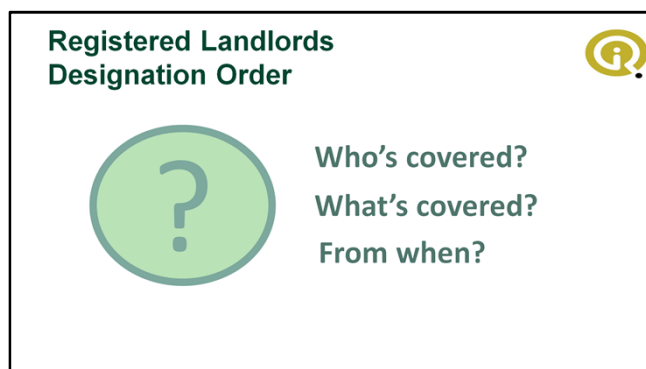
RSLs already have a great reputation with tenants, and are starting from a much better position than many other bodies. The 2017/18 National Report on the Scottish Social Housing Charter found that 9 out of 10 tenants are satisfied with their engagement with landlords, compared to 8 in 10 for local authorities, while overall tenant satisfaction sits at 91%.

This is a strong point to start from, and bodes well for the effective fulfilment of the FOI duty to advise and assist, and the benefits that this brings.

So that then is a very quick reminder of the duties which will be looked at in more detail later.



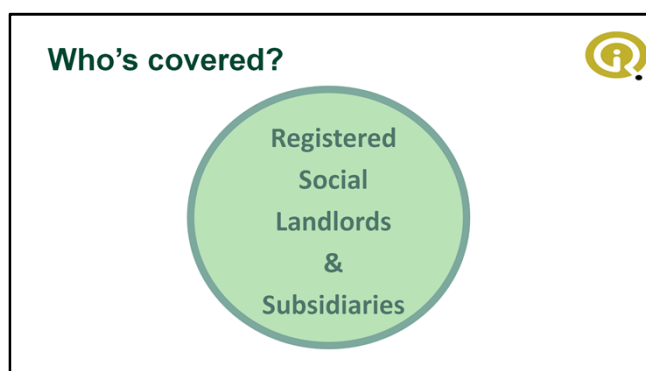
The Order designating RSLs was approved on 4 April. But what does the order tell us? We've been looking at its terms in detail and developing our understanding of it, and will be publishing guidance on our website shortly.



In general terms, however, the Order sets out the answers to three key questions relating to which bodies are subject to the FOI duties:

- Who is covered – as in which organisations are designated/brought under FOI by the draft Order
- What is covered – what information held by those organisations is covered by FOI law (the Order applies to certain functions)
- From when – the order also gives us an implementation date to work towards

We'll look at these in turn and consider the so-whats for your organisations as we go through today.



The Order unfortunately does not contain all the definitions in the one place, instead it refers to other pieces of legislation, so there are a number of hoops to jump through.

Organisations that are listed on the register kept by the Scottish Housing Regulator will be automatically be covered by the legislation. (This will include subsidiaries that are registered).

For subsidiaries that are not listed on the register, the terms of the order mean that coverage is dependent on a range of factors, including:

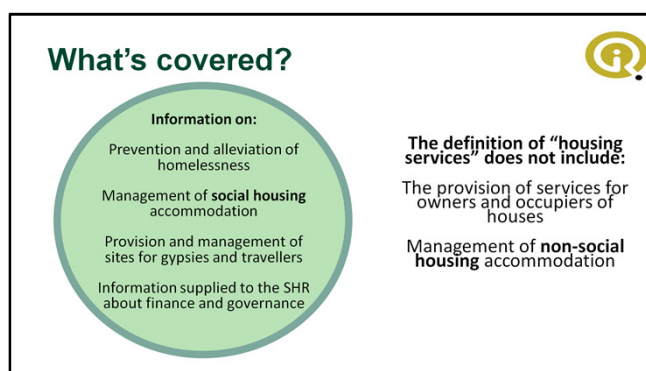
- **the corporate structure of the subsidiary and its parent RSL**  
(i.e. are they registered with the Financial Conduct Authority as registered societies, or are they companies or bodies corporate?)
- **the relationship between them**  
(e.g. does the RLS have voting rights, does it control composition of the board of directors?)

We anticipate that most subsidiaries will fall within scope of the definitions provided.

However, its really only you who can identify who your subsidiaries are – it is crucial that you do this asap so they can be trained and so both we as regulator, and public as potential requesters, can identify them.

Subsidiaries should also be detailed in your publication scheme Guide to Information.

RSLs must identify if they have any subsidiaries fall under the Order – they will be bodies subject to the Act, and we will expect them to comply with the 3 duties, including having a publication scheme and guide to information. They therefore need to be identified as soon as possible for their benefit as much as that of potential requesters.



While these organisations are covered, the terms of the order mean that not all information held by these organisations will fall within the scope of FOI law.

The Order sets out that FOI will apply to information held on any activities in relation to housing services, as defined in section 165 of the 2010 Housing (Scotland) Act.

There are, however two parts of the normal definition of housing services which are not included in the Order's definition.

- Information held in relation to the provision of services for owners and occupiers of houses – e.g. factoring services
- Information held in relation to the management of non-social housing – e.g. on private or mid-market rental accommodation.

**Rights WILL, therefore, apply to information held in relation to any activity in relation to the following definition of housing services:**

- The prevention and alleviation of homelessness
- Management of **social housing** accommodation (as you would expect, this is very wide)
- Provision and management of sites for gypsies and travellers

In addition, the Order makes clear that information supplied to the SHR about finance and governance will also fall within scope (information which is currently requestable from the Regulator, of course).






The third question answered by the order is the start date.

We know that the Order is to come into effect on 11 November 2019. This is a challenging timescale but also an achievable one.

In order to help RSLs meet their duties, my organisation will be supporting GWSF and SFHA to develop a range of materials, resources and events to help you prepare for FOI.

### The Importance of CEOs



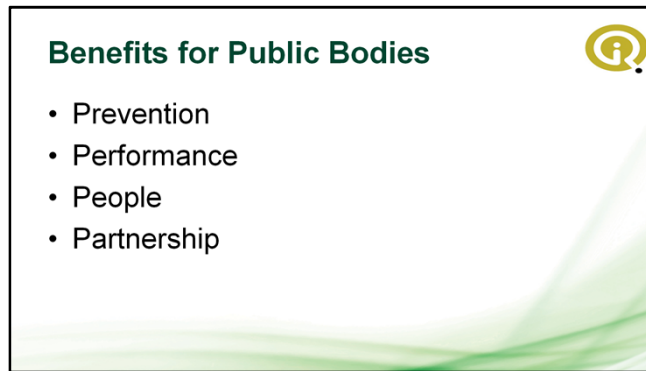
- Buy-in from the top is essential
- What is your organisational culture?
- The benefits of FOI to the organisation

Today's presentations will highlight some of the key points which you should be looking at now (and I appreciate that a number of you are already ahead of the game on this).

First though, we should emphasise the importance of CEOs to this process.

Top-level buy-in is of absolute importance to any change programme. If CEOs support and are seen to value FOI within their organisations, then staff are much more likely to support it, preparatory work is more likely to be done, and an organisation will increase its chances of meeting its statutory obligations. The lack of top level buy-in risks the opposite outcomes.

Your very presence here is a great sign of that buy-in, but I still want to spend a bit of time in pointing out some of the benefits of FOI, not only for requesters, but for your organisations themselves. This will show more tangible benefits for your organisation which you and your people can see, so that you have a culture that complies with FOI because it wants to, rather than because it has to.



So, what are these benefits? Well, I don't pretend to be able to identify them all, but they generally fall into 4 categories. This is the way my office sets them out in our strategic plan.

I'd now like to look at each of these.



Prevention relies on the simple premise that people are less likely to misbehave if they think they are more likely to be caught. At the top end of the scale, they are less likely to commit fraud or corrupt practices if accounts and contracts are made public for scrutiny, but the principle applies equally to decision-making – if the reasons for decisions are disclosed, then those making the decisions are more likely to have regard to only proper considerations.

A great example from Brazil involves encouraging children to take photos of their school meals as a way of identifying whether the contractors are supplying what they are meant to. Closer to home is the scandal of MPs and MSPs expenses, and I think it is worth looking at the two very different approaches.

The UK Parliament's response was to fight disclosure of expenses, a private members' Bill even being laid to prevent disclosure. It also appealed against the disclosure which caused the whole process to drag on for over 4 years, feeding the headlines.

The Scottish Parliament's response was for the Presiding Officer to champion openness and agree to publish all expenses claims in a structured way. The first Scottish Information Commissioner, Kevin Dunion, remarked "Rather than resist further disclosure, the Presiding Officer of the Scottish Parliament agreed to the extensive publication of all expense claims, which occasioned no further scandal."



There are 3 aspects to performance –

- demonstrating what you are doing/how you are providing services;
- being able to compare with other authorities' performance;

- being open to scrutiny about what has been done – sometimes painful, but it can identify short-comings, prevent waste, and allow for more focused delivery of services. In other words, view openness and transparency as a powerful tool to achieve the Best Value themes to build trust and relationships, inform **continuous improvement** and identify more **options** to achieve outcomes.

For example, Shelter Scotland made 'round robin' requests to local authorities for details of the number of homeless people housed in temporary accommodation. The data disclosed showed an important picture and allowed comparisons between different local authority areas. In 2017, after a few years of these requests, the Scottish Government saw the value in the data and introduced a mandatory requirement for local authorities to return the data that had been collected by Shelter as part of its campaigning work.

This data is now published annually as part of official reporting, ensuring it can be easily viewed, monitored, assessed and commented on by anyone with an interest. Importantly, it also allows authorities to see their own performance, compare it with others, and improve their own processes and services.



People – a culture of openness enables understanding and dialogue to foster good relations and support collaboration, helping to deliver better services for those they serve.

The example here involved a request back in 2009 by another charity, Inclusion Scotland - an organisation that works on behalf of people with disabilities - for information on the availability and quality of housing for people with disabilities from Scotland's 32 local authorities.

As a result, Inclusion Scotland discovered that:

- Many Councils were greatly underestimating the number of people with disabilities in their area  
(They asked local authorities for their own figures on the number of disabled people in each area, and then compared this with census data, concluding that housing needs were being assessed using unreliable and out of date data)
- Many houses had adjustments that had been made for people with disabilities removed following the person moving out, rather than rehousing an individual with similar needs in the property.
- Many Councils did not consult with people with disabilities when developing their housing strategies.

Inclusion Scotland's report (VC11004), compiled using FOI, was launched in Parliament with the support of the Communities Minister. It led to the development of new government guidance recommending that people with disabilities are consulted in the development of housing strategies, to encourage better, more informed decision making by authorities, and stronger relations with key service users.

The result was – better for people with disabilities

- and better for the public authorities which made better decisions on more reliable information

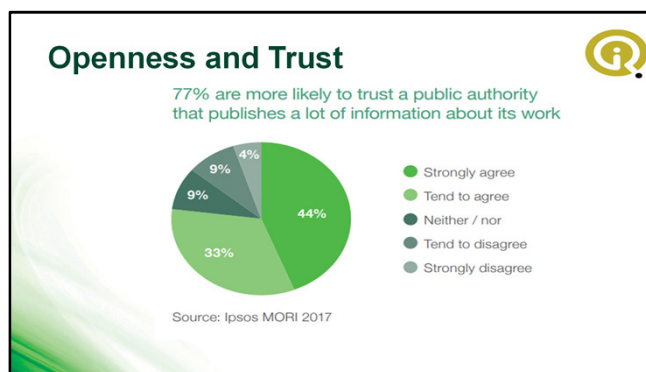
- and better for other service users as there was less waste.

### Benefits

- Prevention
- Performance
- People
- **Partnership**



The final group of benefits is under the heading “Partnership” – this is where “trust” comes in.



We often hear that access to information helps build trust and confidence in public services. In Scotland we wanted to test this, so in an IPSOS Mori Omnibus Poll we asked people – 77% responded that they are more likely to trust an authority that publishes a lot of information about its work.

This is not limited to public bodies – the Scottish Charity regulator (OSCR) carried out its own research in 2018 where 88% of respondents thought that knowing how much of their donations went to the cause would improve trust in a charity.

NB FOI can be a double-edged sword for trust – used positively and proactively it can help rebuild trust; but approaching it negatively and only providing information begrudgingly will do the opposite and damage trust.

Here are a couple of examples to illustrate this in practice.





I mentioned the Shelter example as highlighting the benefit of proactive publication. Here's another:

City of Edinburgh Council property repairs scandal in 2011. It was extremely serious: four council officials were later jailed for accepting bribes.

At the height of media coverage, the FOI team received as many as 70 requests a day for information relating to the fraud investigations. And we received more than 90 appeals from people unhappy because they hadn't received the information they were asking for.



Following contact with the Council, we encouraged it to release Deloitte internal management reports it had commissioned.

It had to redact a great deal of the reports to withhold personal information and information about continuing police investigations.

In the two weeks that followed the publication of these reports, the council went from receiving 70 requests a day to receiving none at all – not even for the redacted information.



The council learned from the property repairs.

When the Mortonhall crematorium baby ashes scandal broke, the Chief Executive ordered an independent inquiry. From the outset the council announced the report would be published and said when it would be published.

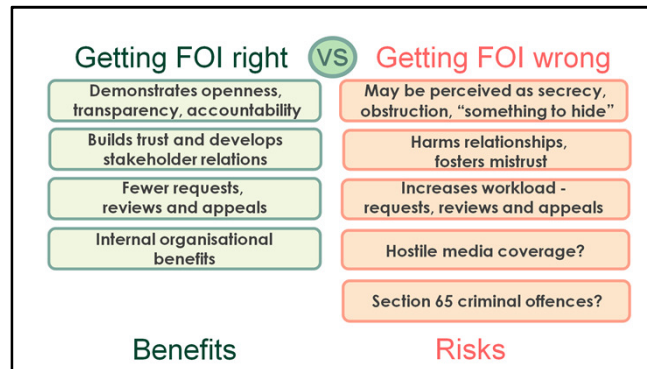
Over the whole of the period, the council received what it described as “a negligible number” of information requests about Mortonhall.

The examples I’ve given here show:

- There is a direct and positive relationship between requester behaviour and proactive publication.
- Interest rises when information is withheld in response to requests. People want to know what’s going on.
- If you have to withhold information, publish what you can and the public is more likely to understand why you can’t publish the rest.

Challenging FOI requests often come from people who are angry, upset or distressed about something. Publication of information is a particularly powerful tool for those requesters.

The more we can publish information the public wants to see, the more we reduce distrust.



So to summarise, getting FOI right – responding to requests on time, giving clear, reasoned decisions which helps the requester understand your actions, doing what you can to advise and support requesters access your information, presents an image of an organisation which is open, transparent, accountable, and working in the interests of service users and other stakeholders.

Getting FOI wrong, on the other hand can have a range of negative consequences – some of which can be extremely serious for your organisation or its staff.

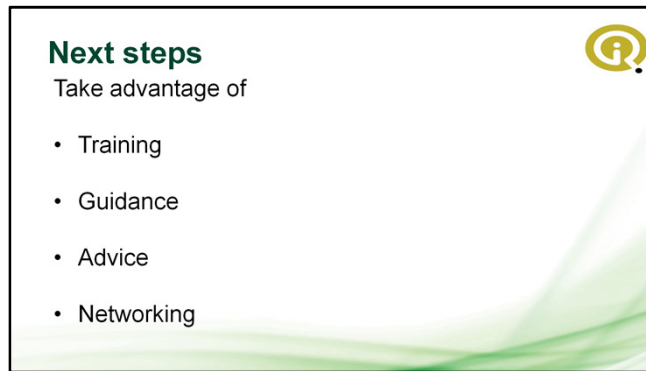
An organisation that fails to respond to requests, doesn't explain its reason for non-disclosures, or is obstructive or unhelpful in its responses will inevitably be perceived and an organisation which is overly-secret, or has something to hide. This in turn can damage relations and foster mistrust, while also leading to an increased workload, thorough follow-up requests, internal review requests, and appeals to my office.

These are inevitably more time-consuming for organisations to deal with, and will involve staff at a more senior level in the organisation. It's much, much easier to get an FOI response right first time, at FOI Officer level, than to get it wrong, then have more senior staff involved in a review of the same request, or even an appeal.

Poor performance can also lead to critical media coverage, which can in turn create a public perceptions which can be hard to shake off.

For example, the Scottish Government's recent problems meeting the FOI response timescales, largely due to convoluted internal procedures that required Ministers and senior advisers to sign off a wide range of even the most basic requests, has led to numerous press stories under the "Secret Scotland" banner. Thankfully, due to intervention work by my office the Scottish Government's performance is showing signs of improvement, but the reputational damage that arises can be harder to shake off.

Finally, at the extreme end, poor performance under FOI can even lead to a criminal prosecution in rare cases. Under FOI it's a criminal offence for staff to delete, change or conceal information with the intention of preventing its disclosure once a request has been received for it. We've been fortunate in that there have yet to be any prosecutions under section 65 in Scotland, but we don't want that statistic to change!



**Next steps**

Take advantage of

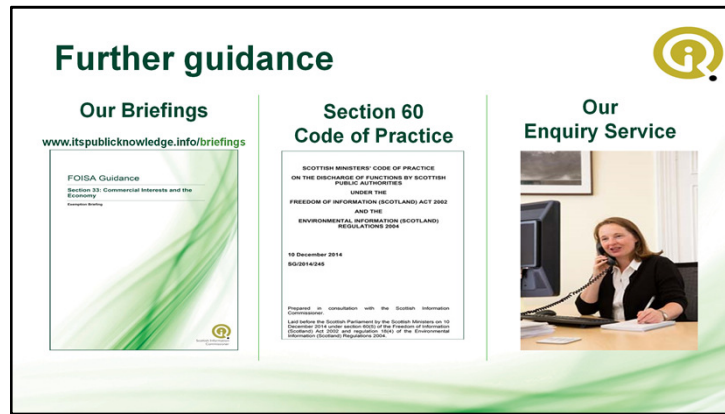
- Training
- Guidance
- Advice
- Networking

Please remember that we are here to help you. We will continue working with staff from GWSF and the SFHA to support the development of a range of resources, including training workshops, template letters, and a template to support the publication of information.

Some dates for your diaries: Following this week's CEO meetings we'll also be delivering full day training workshops in Edinburgh and Glasgow on 20 and 21 May for staff with responsibility for delivering FOI. Further workshops will follow later in the year.

Don't wait until then though. Start thinking now about what needs to be done, and today's presentation, combined with our new RSL web pages should really help you with that.

Also, please take advantage of all training and network opportunities. Take advantage of opportunities to attend events, sign up to mailing lists, read the guidance, do the preparation. The more you can do to prepare effectively, the easier and more straightforward the experience post designation.



There's more information in our briefings – we have detailed guidance on all of the exemptions under FOI.

- Lots more guidance can be found in the Scottish Minister's section 60 Code of Practice. Covers several areas, but there is a whole chapter dedicated to procurement and contracts. It gives guiding principles and best practice advice.
- Also - use our enquiries service

## Contact us



### Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews  
KY16 9DS



T: 01334 464610

E: [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

W: [www.itspublicknowledge.info](http://www.itspublicknowledge.info)



## **Managing FOI**

Paul Mutch  
Policy & Information Officer



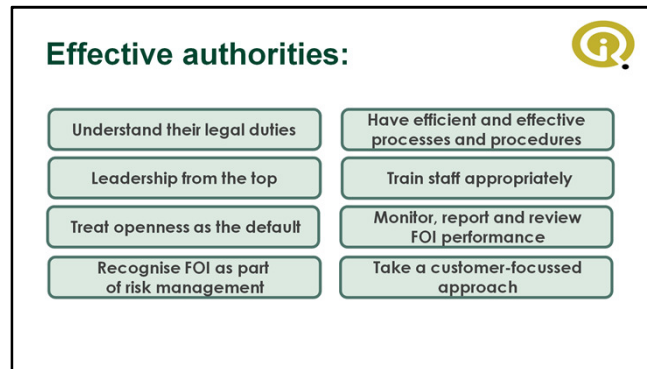




As part of our work to prepare bodies for FOI, we've been some work to look at what marks out an organisation which performs well on FOI. Are there any common features that organisations exhibit which supports and enables them to meet their FOI duties effectively?

FOI's been in force for over 14 years, and in that time the Commissioner has received more than 6,000 appeals and issued around 3,000 decisions in relation to those appeals, as well as responding to more than 23,000 enquiries, from public bodies and members of the public.

As a result, we've seen a huge range of FOI practice by authorities, both good and bad, and have been able to identify a range of features which organisations perform well will commonly share.



Here they are.

These will, I'm sure, come as no surprise. The characteristics that mark out organisations that perform well under FOI are similar to those characteristics that help organisations succeed in other areas.

Typically, an organisation that performs well under FOI will:

### **Understand their legal duties**

- There will be a general awareness of the legal requirements of FOI across the organisation, while key staff – those with direct responsibility for FOI - will have a good understanding of the detail of FOI law.
- Importantly, understanding won't just be limited to FOI and EIR law. Staff will also have a good understanding of the Scottish Ministers Codes of Practice and our own guidance.
- A broad understanding of these codes and a familiarity with our key guidance is as important as an understanding of the law itself.

### **Leadership from the top**

- Culture and practice filter down through an organisation, and organisations that demonstrate a positive commitment to the core FOI principles of openness, transparency and accountability at the top of the organisation will find themselves in an excellent position to ensure that these principles inform the day to day handling of information requests, or considerations around the publication of information.
- Effectively performing organisations are typically those where senior managers lead by example on FOI, taking a positive approach to FOI culture and commitments. That work can start now - for example, by making clear the organisation approach to FOI principles in staff newsletters, briefings and training.
- The Scottish Ministers section 60 Code of Practice on FOI also advises that organisations recognise FOI as a specific statutory corporate function, and provide leadership accordingly. It also advises that organisations put in place an FOI policy which clearly defines roles and responsibilities.
- A senior member of staff should also have strategic responsibility and be accountable for the management of the FOI function.

### **Have openness as the default position**

- It's always much easier for organisations to disclose information than to withhold it.
- In withholding information, an organisation will typically have to look carefully at the FOI exemptions or EIR exceptions, work through the practical tests that must be considered for the exemption to apply, and build a case for non-disclosure of information, explaining to the requester why the information is being withheld. Refusals may also be followed by reviews and appeals.
- Conversely, in disclosing information, you just have to provide it.
- Try and view disclosure as your default position. Ensure that the first question you ask when considering a request isn't "How can we withhold this?" but instead is "Can we disclose it?"
- Another tip: Encourage staff to create information with a view to publication at some point. Try and write for disclosure (it's easier to create documents this way than have to change them later).

### **Recognise FOI a part of risk management**

- Effectively performing authorities recognise the risks of getting FOI wrong and the benefits of getting it right and set up their systems, processes and procedures accordingly.
- They seek to avoid unnecessary reviews and appeals, and the risk of disgruntled stakeholders and potential bad press that can arise.

### **Have efficient and effective processes and procedures**

- Effectively performing authorities have efficient and effective processes and procedures. There's more guidance on this in the s.60 code but these should, for example:
- Enable requests to be identified easily and passed quickly to the right person for a response
- Make clear who is responsible for what, and what authority they have to progress requests quickly
- have effective timelines in place to ensure you meet the response timescales
- Your records management system should also support the fast identification of requested information
- One thing to bear in mind – try and avoid procedures that are too "top heavy" too early in the process. You don't need your CEO or senior management team to be involved in decision-making on every request – indeed doing so will only serve to create bottlenecks and increasing the likelihood of missing your FOI deadlines.
- This was an issue in the Scottish Government intervention carried out by the Commissioner, where procedures required that a large proportion of requests be signed off by Ministers or Special Advisors. Individuals who often had difficulty fitting the time to do so into their busy schedules.

### **Train staff appropriately**

- A key word here is appropriately. Different staff will have different training needs.
- Not every staff member has to be an expert in FOI, but everyone in your organisation should be trained to recognise an information request, and should know what to do with it.
- Key staff with responsibility for FOI should, of course, have a strong understanding of the legal duty and, as mentioned, the knowledge and authority to carry out their role.
- Key staff also need support from colleagues to cover absences - whether planned or unplanned - and those colleagues need to know what to do.
- Make FOI awareness part of your staff induction, and give regular refresher FOI training to all staff.

### **Monitor, report and review FOI performance**

- Monitor performance and report this to senior management, so that performance can be reviewed, and senior staff can respond to issues, learn lessons and identify efficiencies.
- Also put in place measures to regularly review your procedures, performance, training, communications, etc. Build review into your procedures.

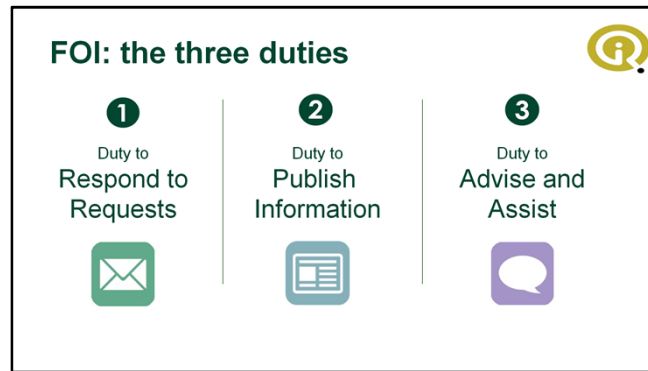
### **Take a customer-focussed approach**

Put the requester and their needs at the centre of your FOI practice. More on this in a moment.

So these are the signs of effectively performing organisations. The flip-side of this of course is that those organisations that perform poorly under FOI will commonly exhibit:

- A poor grasp of the requirements of FOI law
- Poor leadership on FOI or a failure to grasp the importance of FOI's relationship to risk management
- A culture of secrecy rather than a culture of openness, disclosing information on a "need to know" rather than a "right to know" basis
- Poor customer engagement
- Lack of clear procedures
- Poor staff training and awareness, little staff cover
- Little monitoring, reporting or reviewing to drive improvement.

Aim for the former, not the latter!



Going to talk you through key aspects of the 3 duties, with a particular focus on steps that you, as managers, can take to help your organisations fulfil these duties within minimum fuss and maximum benefit.

The three duties are:


Respond to requests

Publish information

Advise and Assist


I'll discuss the last of these first – the duty to advise and assist

## FOI: the three duties



3

Duty to Advise and Assist



**Section 15(1):**  
A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

**Section 15 (2):**  
A Scottish public authority which conforms to the **Section 60 Code of Practice** is to be taken to comply with the duty.

The effect of this duty is to put customer service and customer engagement at the centre of FOI practice

You'll remember that taking a customer-focussed approach to FOI was one of the key-indicators of good FOI performance.

Section 15 of the FOI Act places a duty on organisations to advise and assist people who want to access its information. There's an equivalent duty under the EIRs for requests for environmental information (regulation 9).

The duty to advise and assist is about your organisational culture towards those who seek to access your information. It's about your approach you take towards the tenants, stakeholders, citizens and communities who want to engage with you.


If you can put the duty to advise and assist at the centre of your FOI practice, it will help inform the way that you work – how you develop your procedures, how you engage with requesters, how you respond to requests, what you publish and how you publish it.

You'll notice as well, that Section 15(2) states that an organisation which conforms to the Scottish Ministers Section 60 Code of Practice will be complying with the duty to advise and assist. The section 60 Code contains a lot of guidance on meeting this duty effectively. As stated before, effective organisation understand their legal duties, and the Section 60 Code is a key part of this.

## Managing FOI

**3**

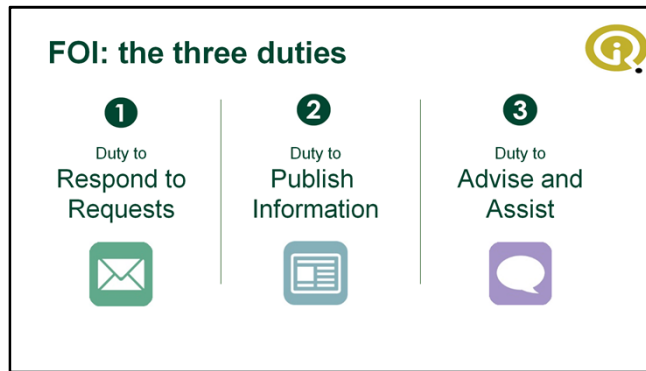
Duty to  
**Advise and Assist**



- Promote a positive, customer-focussed FOI culture
- Make sure the duty is embedded throughout your procedures
- Establish a central point of contact
- Train staff appropriately
- Encourage clear language in communications

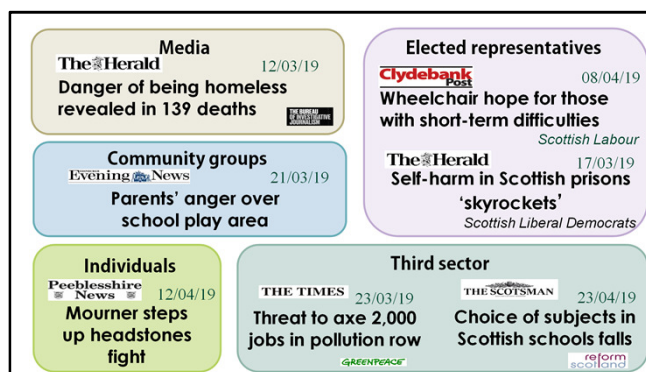
What can senior managers do help staff meet the duty?

- Promote a positive, customer-focussed FOI culture from the top down** – as before lead by example
- Make sure the duty is embedded throughout your request-handling procedures**
- Establish a central point of contact for those seeking to access information**, and promote this on your website, etc - make it easy for people to ask for information – be seen to encourage engagement
- Train staff** – even if you do have a central point of contact, requesters aren't required to use it. A request can come in at any point. Make sure all staff are aware of the duty to help requesters
- Encourage your staff to put themselves in the shoes of the requester.** Are you doing everything you can to help? What would they want or expect in a similar situation?
- Encourage clear language in communications - is there anything you can do to make the information you're providing clear to the requester? If you're withholding information have the reasons for this been clearly communicated to the requester. If a requester understands your decisions because they're clearly explained and can see why they're reasonable, they're far less likely to ask for a review or make an appeal.
- Encourage the provision of helpful additional information and context
- Take account of the requester's specific needs



Our next duty, is the one most commonly associated with FOI. The duty to respond to requests.

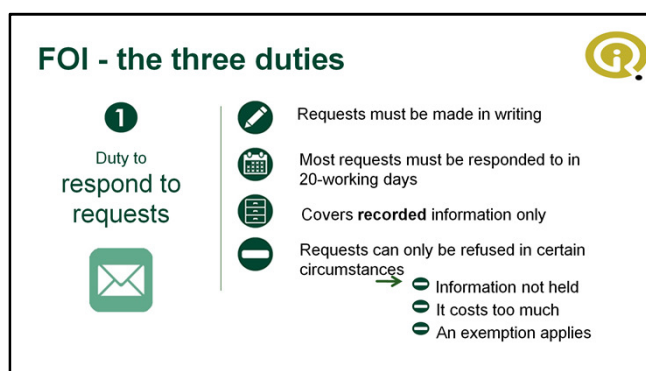




This aspect of the FOI right is certainly the one with the highest public profile. Not least because of the daily press coverage where we see stories generated as a result of FOI being used people to access information in the public interest.

Here's just a small number of the hundreds of requests that we've seen reported in the press over the last few weeks, showing how FOI has been used by a wide range of individuals and organisations.

Important to note that it's not just journalists – 75% of our appeals come from members of the public, and typically around 15% from journalists.



A quick overview of the duty to respond:

### **Requests under the FOI Act must be made in a recordable format**

For example, by email, letter or audio file. If the requested information is environmental, the EIRs allow requests to also be made over the phone or in person.

*Make sure staff are able to identify requests.*

### **Information requests must be responded to promptly, and within 20 working days**

Your authority must respond within 20 working days, providing the information or setting out why, according to FOI law, it can't be provided.

If the information is environmental timescales can be extended by another 20 working days, but only in rare cases where requested information is both "voluminous and complex"

This is a key area to be aware of in the management of your FOI. Failing to respond to a request within the timescales can turn what might have been a simple and quick issue to resolve into a protracted and time consuming one, as reviews and appeals are made, with knock-on reputational issues for your authority.

Approximately one fifth of our appeal caseload each year relates to failures to respond.

*Focus on meeting the timescales.*

### **FOI law applies to recorded information**

FOI law applies only to recorded information that the authority holds. Authorities aren't required to create new information to respond to requests.

### **Requests can only be refused if FOI law allows it**

Authorities can only refuse requests if the law allows them to:

Requests can be refused, for example where you don't hold it. If you don't hold it, you can't

provide it. There's no requirement under FOI to create new information in response to requests.

Under the duty to advise and assist, however, staff should tell the requester if there is information held which might meet their interest – taking that customer focussed approach to FOI.

FOI requests can also be refused where it would cost an authority more than £600 to respond. Regulations set out what can and can't be charged for.

Under the EIRs, there's no upper cost limit, but requests can be refused if they're 'manifestly unreasonable'.

In both cases, authorities must remember their duty to advise and assist – is there info that can be provided within the limit?

Requests can also be refused if an exemption applies. There are 17 categories of exemption in the FOI Act.

While a small number of exemptions are "absolute" meaning that information can automatically be withheld if it falls into the particular category, most are subject to a public interest test.

This means that, even if an exemption applies, information can only be withheld if the balance of the public interest favours non-disclosure.

The categories of exemption contain protections for information ranging from personal data, and law enforcement to things like international relations or communications with the Royal Family.

You'll obviously rely on some exemptions more than others. I'm not sure how many of you hold information which, if disclosed, would substantially prejudice international relations, nor whether any of you are in regular communication with members of the Royal Family.

There will be some exemptions that you're likely to consider more commonly, and I'll finish up by mentioning a couple of these, to give you an introduction to some of the key principles.

## Personal information



The first of these is the exemption that protects personal information.

RSLs will inevitably receive requests for personal information. If a requester is asking for their own personal information then the request is, of course, responded to under Data Protection Law and not FOI.

Where the information involves a third party's personal data, however, then the request should be responded to under FOI.

FOI law contains firm protections for personal information.

In this case, information should be withheld if disclosing it would breach the data subjects rights under data protection law.

There are clear tests to consider when assessing whether or not information can be disclosed, and our guidance on this provides a step-by-step guide to these tests.

In many cases, the test may involve a balancing exercise, balancing the rights and freedoms of the data subject against the legitimate interests of the requester in accessing that information.

## Personal information



- Work life vs home life
- Seniority of staff
- Likelihood of harm or distress
- The expectations of data subject

Factors which may play a part in this assessment include:

- Consideration of whether the information relates to an individual's **work life or home life** – information that relates to someone's private life normally generally deserve more protection than information that relates to someone carrying out official business in a professional capacity.
- **Seniority of staff** – in general, the more senior a staff member is, the more appropriate it may be to disclose information about their work.
- Likelihood of harm or distress
- The expectations of data subject – what expectations do they have – e.g. through your privacy notice, or any legislative power under which data was collected?

Get key staff thinking about which exemptions they're most likely to apply, and start familiarising themselves with the relevant exemptions guidance.



Other exemptions you may find yourself considering are those that relate to commercial information.

Aware that RSLs may have concerns about the impact of FOI on your relationships with existing contractors, or in relation to your own commercial activities.

FOI contains appropriate provisions to protect information which is genuinely commercially sensitive while also ensuring that there is scope for more openness around contracts and contracting procedures, to ensure transparency and accountability in relation to how public money is spent.

1. Information can normally be withheld where it's disclosure would either:
  - i. cause substantial harm to an organisations commercial interests
  - ii. or where disclosure would breach the law of confidentiality.

We have detailed guidance on each of these exemptions on our website.

**Preparation is the key...**


- Before contract made:
  - Discuss FOI with contractors
  - FOI schedules in tenders
- Making the contract:
  - Build FOI into contract terms
  - Set out what you need from contractor if a request is made



Sections 7 and 8 of the Section 60 Code of Practice contains a large amount of information and guidance on both consulting with third parties on requests that involve them, and disclosing information about contracts and procurement.

Ensure that relevant staff review this. The more your organisation can do to prepare now, the better.

Procurement staff should be thinking about what information can be made available about contracts, and publishing what they can in advance. At the same time, think about what might be genuinely harmful were it to be disclosed.

Some tips to help your relationship with contractors run smoothly:

#### Before the contract is made:

##### **Discuss FOI with contractors**

- Raise awareness of FOI with third parties who provide information to you
- Most public authorities are subject to FOI and have been for the past 13 years, so FOI shouldn't come as a surprise to them.

##### **Put FOI schedules in tenders**

- Ask third parties providing you with information to identify what is commercially sensitive and what is confidential.
- Think about how long that sensitivity and/or confidentiality is likely to last for. This will save you time and effort in the event of a request.

#### Making the contract:

##### **Build FOI into contract terms**

- Acknowledge information may be requested under FOI Act.
- Use contractual terms that clearly set out what information is confidential and/or

commercially sensitive.

**Set out what assistance and co-operation will be required from the third party in the event of a request**

- e.g. do you want them to come back with comments in, say, 5 days?

Ultimately though, remember that....



**It's your decision...**



**It's your decision:**

- While you can take into account what a contractor says, ultimately the decision about whether information is subject to an exemption is yours, and yours alone to make.
- Don't give contractors the impression that they have decision making powers.
- Set out clearly what their role will be in the event of a request, while keeping it clear that the discretion about applying exemptions is yours.



Finally, a quick word about timing

When considering whether commercial or confidential information is appropriate for disclosure, time is a significant factor. The passage of time will often mean that exemptions protecting commercial information are less likely to apply.

As a general rule, the closer you are to the events which make the information confidential and/or commercially sensitive, the more likely it is that the tests setting out the appropriate use of that exemptions can be met.

For example, disclosure is more likely to harm commercial interests immediately after a contract is negotiated, or a tendering process is completed, than years later. The further away you get from an event, the less likely it may be that the exemption applies.

The issue of timings underlines one of the fundamental principles of FOI, that each request must be considered on a case by case basis.

Information which at one point in time might be highly sensitive, could be suitable for **publication** at a later point.

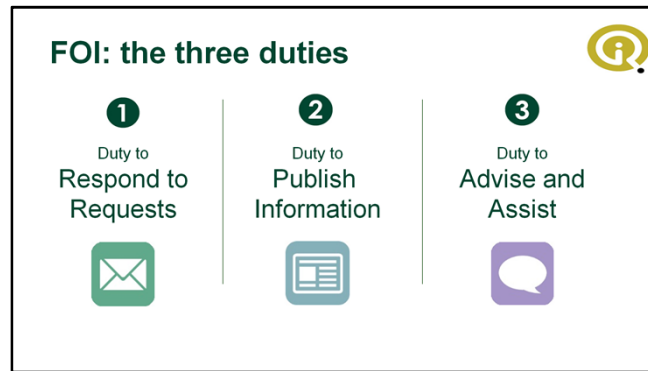
And on that note...



## **The Duty to Publish**

Sarah Hutchison  
Head of Policy and Information





Publishing information is an awful lot easier to do than answering information requests and it's something entirely in your gift.

Publish information and people will trust you more – they're much less likely to be suspicious of your organisation.

Publish and let people access your information without having to make an information request for it. Save yourself the job of having to respond.

### The s23 duty

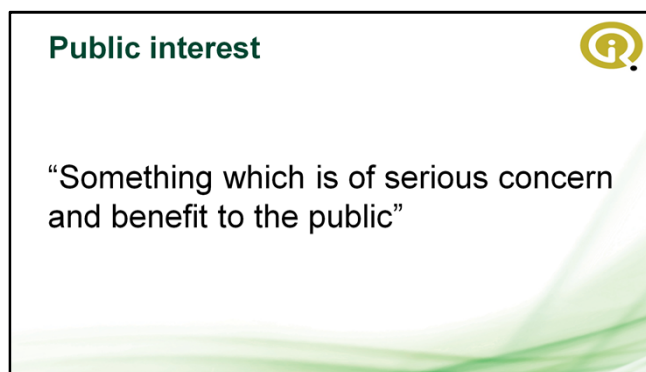


- a) Adopt and maintain a publication scheme approved by the Commissioner
- b) Publish information in accordance with the publication scheme
- c) From time to time review the scheme

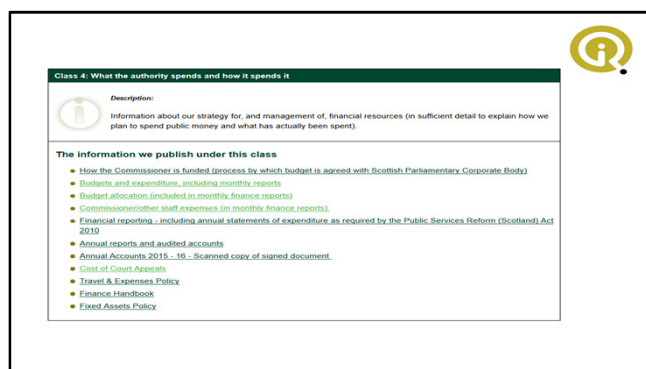
1. Here are the three statutory requirements for publication
2. Adopting a scheme is easy because we give you an approved Model Publication Scheme. All Scottish public authorities use the same Model and it's scalable to size. It sets out principles e.g., on formats and costs which you have to follow when publishing information and a list of classes, or types, of information that you must publish.
3. For publication we will support the Federation and Forum to develop a the Open All Hours as a template Guide to Information which ensures all the minimum standard is met. Your organisation will need to populate this Guide to Information with links to the information you publish and you have to publish the guide on your website. You also need to identify any additional information you want to publish, beyond the minimum standard (I'll explain shortly why this is important)
4. Then you simply set a regular review period – someone needs to check those links are still working and you need to consider afresh whether there is new information that should be published.



1. You will need to think about the public interest in publication - constantly




1. S23 requires an authority to have regard to the public interest in the information it holds when it decides what information to publish.
2. “Public interest” has the same meaning for publication as for requests for information: it means “something which is of serious concern and benefit to the public” or “in the interest of the public” not merely of interest to the public.
3. S23 says authorities should pay particular attention to allowing access to information about:
  - i. The provision of services by the authority
  - ii. The cost of providing those services, or
  - iii. The service standards attained, or
  - iv. The facts or analysis behind decisions of importance
  - v. The publication of reasons for decisions taken by the authority
4. The Commissioner’s Model Scheme sets out a series of classes of information to capture this and we give you guidance on what should be published under each class.



1. Here's a screenshot of one of the classes in our own Guide to Information to let you see what a Guide looks like. Each of the links on this website page takes you to the information.
2. Authorities must meet the minimum standard in the Model Scheme in terms of the information they publish. But they must also think about the public interest in other information they might hold.
3. If you can see the detail of this page, you'll see that we publish the cost of court appeals. This is something that relates only to the Scottish Information Commissioner. It's something we get asked about a lot. So we know it is of serious concern and benefit to the public, so we've added it to our Guide to Information.
4. Another example is Commissioner and senior staff expenses. The Model Scheme says these should be published, but it doesn't say at what level – an annual or quarterly cost or actual expenses forms. We've decided there is a public interest in our expenses forms. Here's mine.







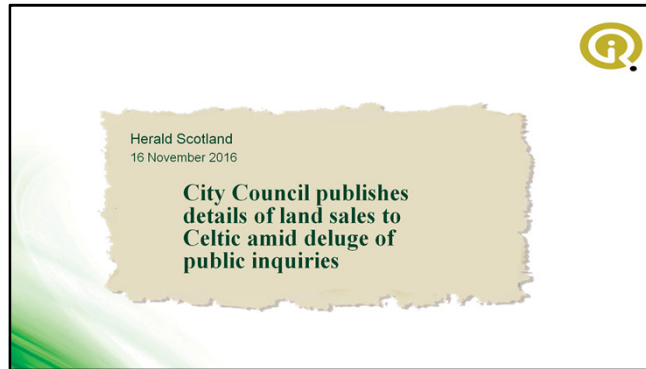
Dec. No.	Applicant	Public Authority	Description	Outcome	Issued	FOIA	FOIA Exemptions / Sections	FOIA Exemptions / Regulations
903/2019	Mr N	Children's Hearings Scotland	Expenses claimed	For applicant	11 Jan 2019	12	12	n/a
116/2018	Mr L	Scottish Prison Service	Expenses of Prison Governor	For authority	06 Aug 2018	12	12	n/a
110/2017	Ms Katy Sutherland	Scottish Ministers	Travel Expenses, failure to respond within statutory timeframes	For applicant	11 Jul 2017	12	10, 21	n/a
044/2017	Malcolm Primary School Parent Council	Highland Council	Travel and expense claims, failure to respond within statutory timeframes	For applicant	23 Mar 2017	12	10, 21	n/a
217/2014	Mr Peter Christie	Scottish Court Service	Judicial travel and expenses	For authority	08 Oct 2014	12	12	n/a
203/2014	Mr Simon Johnson	Scottish Ministers	Travel Expenses, failure to respond within statutory timeframes	For applicant	22 Sep 2014	12	10, 21	n/a
197/2014	Mr Paul Hutchison	Scottish Fire and Rescue Service	Gifts, Hospitality and Expenses, failure to respond within statutory timeframes	For applicant	10 Sep 2014	12	10, 21	n/a
075/2014	Mr W	Scottish Criminal Cases Review Commission	Legal expenses	For applicant	26 Mar 2014	12	32(1)(b)	n/a
254/2013	Mr Peter Mowbray	General Cerebral Palsy Council	Expenses claimed	For authority	14 Nov 2013	12	32(1)(b)	n/a
126/2013	Ms Nicola Friel	University of Aberdeen	Revised breakdown of expenses	For authority	28 Jun 2013	12	32(1)(b)	n/a
078/2013	Mr Sandy Longmuir	Ards Council	Authorities and expenses of the Council employees	For authority	29 Apr 2013	12	17, 32(1)(b)	n/a
201/2012	Ms A	Strathclyde Council	Guidance relating to travel expenses	Partially agreed	06 Dec 2012	12	15, 17, 21	n/a
195/2012	Mr Andrew Sharp	Scottish Ministers	Breakdown of expenses for various travel	Partially agreed	29 Nov 2012	12	12, 15, 21	n/a
063/2012	Mr X	Crown Office and	Total expenses claimed by	For authority	10 May 2012	12	32(1)(b)	n/a

1. If there's a public interest in the information, you can almost guarantee you're going to get requests for it and if you refuse, your response is likely to be appealed to us. The public don't like being refused this kind of information.
2. To illustrate this, here's a snapshot of the decision notices the Commissioner has issued on expenses in recent years. The number of such appeals has declined over time as authorities are more wise to the importance of publishing the information – and it might also be to do with them knowing we'll require disclosure in most cases.
3. So by publishing this type of information, you'll avoid or at least reduce requests and, importantly, you'll send a clear message to the public that you are open. As Sir George Reid, Presiding Officer of the Scottish Parliament is reported to have said to MSPs in 2005 "If you have nothing to hide, you have nothing to fear".
4. Intriguingly, we also hear from requesters they're simply not all that interested in published information – published information is very rarely ever challenged. By contrast information that's withheld has cachet and some view it as "low hanging fruit" – an easy win to get damning headlines about an authority.



**“of interest to the public”**

1. I’m going to give you two examples to show why it’s in your interests to consider not just the public interest in publication, but also the value of thinking about what is “of interest to the public”. You don’t *have* to do this under FOISA, but equally, there’s nothing to prevent you. And your new Guide to Information will be a great vehicle for it.



1. 10 years ago, Glasgow City Council sold Westhorn Recreation Ground to Celtic Football Club for £675k.
2. The deal was the subject of criticism that the Council had favoured Celtic over its football rivals. Allegations of state aid were made to the European Commission.
3. The Council received “more than 150” information requests about the issue and an appeal to the Commissioner who decided in the Council’s favour (we didn’t order it to disclose information).
4. In 2016 requests for the same information started up again and the Council realised these were going to rise.
5. It decided to disclose information (that it didn’t have to). The information showed that in fact Celtic FC had paid more than three times the Council’s valuation for the recreation ground.
6. In less than 24 hours the disclosed information was viewed more than 2000 times. So that’s 2000 people who might have made requests for the information. And no information requests. End of story.



A story about Perth and Kinross Council. Like many local authorities, it stages an annual Christmas light switch on to attract business to the city centre. The lights are switched on by a major celebrity.

In 2014 someone asked the council how much it paid its major celeb. It refused, saying if it divulged the price, it would not be able to attract other star acts.

The Commissioner disagreed, and after months of media speculation, the disclosed information led to this headline.



Not a happy headline for the Council.

We waited with baited breath for what would happen the next year. Would the council's fears come to pass?



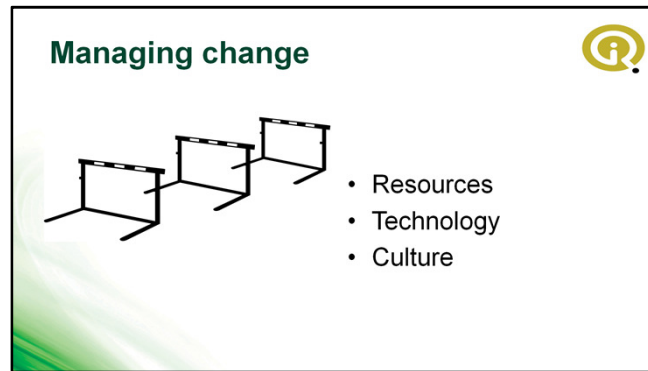
First of all, the disclosure of the celeb fees didn't deter others from contracting the next year.

In 2015, the council announced that Showaddywaddy (sadly minus the late Les Gray) and Billy Ocean would front the event. It decided to disclose the amount paid to the star acts alongside contextual information about the value of the the investment.

By contrast to the previous year's media fest, there was just this one anodyne headline.

If you're interested, in 2016, the Council's star Christmas turn was Slade (though sadly Noddy Holder and Jim Lea were no longer part of that line up), and there were "turns" from Professor Green and Basil Brush.

The point here is that you can decide to publish over and above the requirements in FOISA. Instead of thinking only about the public interest, I encourage you to think about what is going to be of "interest to the public" and be proactive about it.



1. As leaders of your organisations, you're going to come across three hurdles when you're pushing for more publication.
2. **Resources:** Your organisations aren't set up for publication – you're going to have to find the staff capacity to publish lots more information and to make that publication as efficient and everyday as possible. It's a spend to save in terms of reducing requests for information (which are a much less efficient way to get information out because it reaches only the requester). There will also be staff who genuinely think you can't publish anything until the full back archive of information is ready – that's not true. Simply start as you mean to go on.
3. **Technology:** everyone gets frustrated with the capacity and capability of their websites. Your Guide to Information doesn't have to look beautiful, as I've shown you with ours. A simple website page is enough, with links to other content.
4. **Culture** is the hardest of all to crack. Attitudes that get in the way of publication include:
  - i. a misplaced sense of sole ownership – "it's our information and how very dare they want it?". The risks of not publishing are far greater than the risks of providing access.
  - ii. a concern that the information isn't complete or accurate or ready to share – anyone here use Google Maps in their early days? We used it because it was handy, even if it took us up cul-de-sacs. Just give some caveats with the information.
  - iii. a fear of being found out: this is a very strong emotion and difficult to overcome. The evidence points to positive public responses to published information. Yes, someone might suggest an extra bit of information you could collect or a better way of collecting it, but it will be in the spirit of helpfulness rather than challenging the authority for being secretive.
5. Often it helps to start conversations by referencing information that's already available (and the world hasn't come to an end). It's surprising how much information is already in the public domain and your staff probably don't realise it. For example,

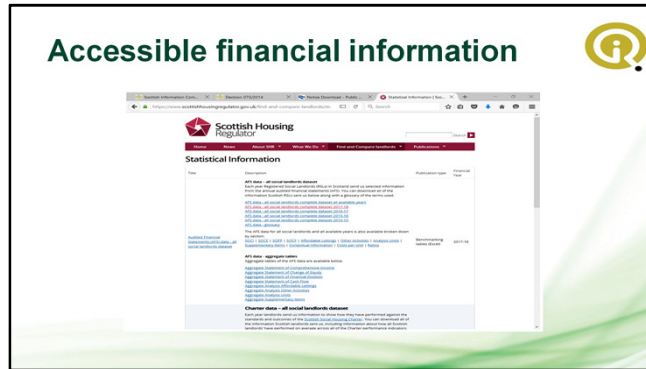


## Accessible procurement information

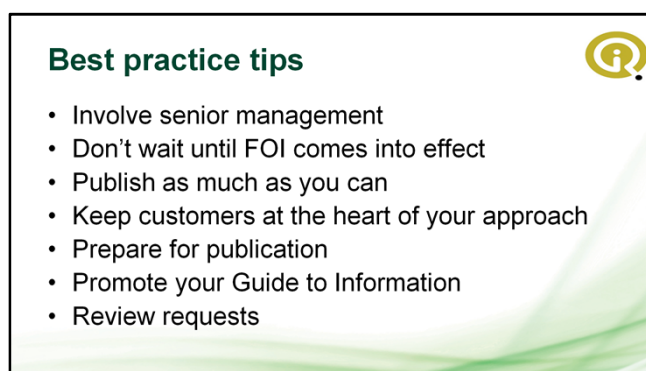


Sl. No./Project Name	Sl. No./Project Name	Tender/Description	Sl. No./Project Name	Sl. No./Project Name
1. Weslo Housing Association Ltd Broomfield Housing Association Ltd	Insurance Tender (Provision of Insurance Contract & Ancillary Services)	Material Damage, Buildings Insurance including Loss of Rent/Alternative Accommodation including Property Owners Liability Insurance being in accordance with the terms of the contract.	100000	GBP
2. Albyn Housing Society Limited	Provision of Legal Services - Tenancy Management	Albyn would like to procure a legal services provider to provide expert advice and support to its customer service teams in relation to all aspects of tenancy management and enforcement action, in particular, this provider will support Albyn in the recovery of rent, service charge and failing areas and in responding to anti-social behaviour. The anticipated length of contract is 4 years with the option for a 3 year extension.	100000	GBP
3. Weslo Housing Management Ltd	Bathroom Replacement Contract	Generally the works will comprise of the removal of the existing bathroom suite, pipe boring and hydro-jets, where required and re-plumbing the wastes and supplies to a suitable point to allow for re-connection. The replacement of hot and cold supplies to the w.c., bath and shower and the installation of a cold supply to the w.c. tank, forming new sub-mains and pipe boring as required. Supplying a proprietary wall unit and fitting wall unit panels round the bathroom vanity to dark wood approximately. Working and fitting new extract fan and bathroom light. It is anticipated that 600 bathrooms in total will be replaced, this will be spread approximately 200 per annum over the next 4 years in the above contract and future areas.	3361765	GBP
4. Weslo Housing Management Ltd	Landscaping Maintenance Contract	Generally the works will comprise the regular maintenance of grassed areas, rough ground areas, shrub beds, isolated trees and woodland in accordance with a maintenance schedule which will be attached to the main contract documents, the contract period will be from March to October annually for the duration of the contract. A tree survey will be undertaken at the end of every growing season and the results of this survey submitted during the annual report to accordance with our tree management plan. As a guide, the grassed area requiring maintenance is approx. 134,000sqm. The rough ground area requiring maintenance is approx. 13,000sqm. The shrub bed area requiring maintenance is approx. 13,000sqm. The trees requiring maintenance and survey are approx. 1,000 in number. The verges requiring maintenance is approx. 1,100m. The hard standing areas requiring weed clearance is approx. 65,000sqm.	261000	GBP

1. This information is already available about housing association procurement through the Open Contracting Transparency Information on the Public Contracts Scotland website.
2. I can see that:
3. Weslo Housing Management Ltd has just awarded a bathroom replacement contract worth £3.5m
4. Albyn Housing Association has awarded a contract to a legal services provider, worth £100k



1. And on the SHR's site I can see for every RSL in Scotland how much their staffing costs and what proportion of that cost is accounted for by key personnel. If I know the number of key personnel in a housing association (this is often on your websites), I can work out the average cost per person. So why be afraid of disclosing salaries? After all, everyone advertises salaries in job adverts too.



1. These are all in our new guidance for RSLs online:

- i. **Involve senior management** – make sure senior staff have the information they need to promote the benefits of publication to staff across the authority
- ii. **Don't wait until FOI comes into effect** – start publishing information now
- iii. **Publish as much as you can** – the more you publish, the fewer requests you'll receive
- iv. **Keep customers at the heart of your approach** – think about what they want to see and make sure information is clearly described in a way that will make it easy to find
- v. **Prepare for publication** – whenever you're creating new information, think about publication. Create new documents that are "publication ready", reducing the work involved in publishing
- vi. **Promote your Guide to Information** – let service-users and staff know about your Guide to Information and how they can use it
- vii. **Review requests** – regularly review the information requests you receive. Can you publish information that's asked for routinely? You get requests now – what information do people want?

Finally, a personal view. I've worked on good practice in publication for 16 years with the Commissioner. My perception is that housing associations are really good at all this – much better than many established public sector organisations. I think you'll excel at this part of FOI and I'm looking forward to the lessons you're going to teach us all. I wish you the greatest of success.

## **Resources and support**



## Online Guidance



[www.itspublicknowledge.info/rsls](http://www.itspublicknowledge.info/rsls)

## Other Resources



- FOI Workshops – May and September
- Centre for FOI Practitioners' Conference
- FOISA Forum Knowledge Hub
- Decisions Round-up
- @FOIScotland
- Get it right first time Poster

## Contact us



### Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews  
KY16 9DS



T: 01334 464610

E: [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

W: [www.itspublicknowledge.info](http://www.itspublicknowledge.info)



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