

REPORT TO: Cabinet

MEETING DATE: 11 September 2012

BY: Executive Director (Support Services)

SUBJECT: Freedom of Information Policy

1 PURPOSE

- 1.1 To seek approval from Cabinet for the Freedom of Information Policy.

2 RECOMMENDATIONS

- 2.1 That Cabinet approve the Freedom of Information Policy and adopt it as a Council Policy.

3 BACKGROUND

- 3.1 The Freedom of Information (Scotland) Act 2002 came into force on 1 January 2005. The Act allows anyone to obtain information from Scottish councils and other public authorities. This is a legal right, which aims to ensure that everyone gets information to which they are entitled. This legal right of access includes all types of 'recorded' information of any date held by East Lothian Council. From 2005, any person making a request for information must be provided with it, subject to certain conditions.
- 3.2 In 2011, East Lothian Council received nearly 1000 freedom of information requests. It is good practice and important for reasons of transparency and openness that the council should have a Freedom of Information Policy in place. It will make it clear to those making requests for information how those requests will be handled.
- 3.4 The Freedom of Information Policy has been subject to Council Management Team consideration and approval as well as workforce and Trades Unions Consultation. The Freedom of Information Policy is not a collective agreement with the Trades Unions. The draft was commented

on and approved by the Head of Policy at the Scottish Information Commissioner's Office.

4 POLICY IMPLICATIONS

- 4.1 The Policy will provide clarity and consistency of approach for staff and members of the public.

5 EQUALITIES IMPACT ASSESSMENT

- 5.1 An EQIA has been undertaken and no negative impacts have been identified.

6 RESOURCE IMPLICATIONS

- 6.1 Financial – None.
6.2 Personnel – None
6.3 Other – None

7 BACKGROUND PAPERS

- 7.1 Freedom of Information Policy
7.2 Freedom of Information (Scotland) Act 2002

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EAST LoTHIAN COUNCIL

**Freedom of Information
and
Environmental Information Regulation
Policy**

DRAFT

East Lothian Council
Freedom of Information Policy



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Freedom of Information Policy

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East Lothian Council
Freedom of Information Policy

1. Introduction

- 1.1 This document sets out East Lothian Council's policy regarding Freedom of Information and the Environmental Information Regulations. As the Council's use of personal data is also affected by the Freedom of Information (Scotland) Act (FOISA), this policy should be read in conjunction with the policy on Data Protection.
- 1.2 FOISA came into force in 2005 and created significant new rights of access to information held by Scottish public authorities. Under the Act, there are two general rights relating to information: the right to be told whether or not the information requested is held; and the right to be given that information within 20 days, unless an exemption applies.
- 1.3 Each public authority has the duty to adopt and maintain a publication scheme that details the classes of information it will regularly publish. This publication scheme must be approved by the Scottish Information Commissioner, who has wide powers to enforce the rights contained within FOISA. East Lothian Council's publication scheme can be found on the Council's website: <http://www.eastlothian.gov.uk/site/scripts/downloads.php?categoryID=704>

2. Statement of Intent

- 2.1 East Lothian Council is committed to transparency about the way in which it operates and makes decisions and will favour disclosure of information whenever possible.
- 2.2 The Council will ensure that the public will have a general right of access to the information it holds, subject to certain conditions and exemptions.
- 2.3 The Council will adopt and maintain a publication scheme, approved by the Scottish Information Commissioner, which relates to the publication of information by the Council.
- 2.4 The Council will ensure that training (including refresher training) is provided to officers who may be required to provide information, and that these officers are familiar with the requirements of FOISA. The Council will ensure that all relevant staff attend briefing sessions on FOISA.

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- 2.5 This policy document applies only to information covered by FOISA and EIR and will be updated/amended as necessary.

3. Statutory Access Regimes

- 3.1 Access to information is principally governed by FOISA, the Environmental Information (Scotland) Regulations 2004 (EIR) and the Data Protection Act 1998 (DPA). All three provide rights of access to information with limited exceptions. In effect, the three pieces of legislation work together, the EIR enabling access to environmental information, DPA enabling access to one's own personal data and FOISA enabling access to all other information.
- 3.2 Any written request for information should initially be treated as a FOISA request. Section 39 of FOISA then exempts environmental information from being dealt with under FOISA and necessitates compliance under EIR.
- 3.3 East Lothian Council has produced a publication scheme as required by FOISA, and had it approved by the Scottish Information Commissioner in 2009. The scheme sets out the classes of information already available to the public, details of how the information can be obtained, its location and whether there is a charge for providing the information. All information available through the publication scheme is exempt from FOISA. The scheme is regularly reviewed so that any new classes of information to be made available to the public are included.
- 3.4 Anyone can make a request for information to the Council under FOISA, regardless of their nationality, location or motive. Any information held by the Council is eligible for release. However, a limited number of exemptions (see Appendix A) may be applied to protect some of the information held. FOISA requires that all requests must be in writing (which includes faxes and emails), must state clearly what information is required and must provide the name of the person making the request with an address for correspondence (an email address suffices). The EIR differ insofar as a verbal request is sufficient.
- 3.5 All FOISA and EIR requests received by any Council employee (including school staff) will be sent to the Data Protection and Freedom of Information Officer and will be logged and monitored on the database in the Law & Licensing department.

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- 3.6 On receipt of any request for information, the Council will as soon as possible, but within no more than 2 working days, acknowledge receipt of the request. Replies to the request will be sent out as soon as possible, but no later than within the legal timeframe. The reply to the request should either
- Provide the information that has been requested, or
 - Confirm or deny whether the Council holds the information.
- 3.7 If the information is held by the Council but not provided, the reply will explain why not, quoting a statutory exemption, the reasoning behind it and, where applicable, why the public interest in non-disclosure outweighs the public interest in disclosure. If confirming or denying will itself provide information which is exempt, then the Council does not have to confirm or deny that it holds the information.
- 3.8 If the request does not provide sufficient information for the Council to locate the information, the Council can ask for further details. The Council is under a statutory duty to advise and assist the applicant and therefore will provide reasonable assistance to enable the request to be properly made.
- 3.9 If the information requested is not contained within the publication scheme, the Council may only charge a fee as laid down in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (Appendix B)

4. Advice and Assistance

- 4.1 Under Section 15 of FOISA and under the provisions of the EIR, East Lothian Council has the duty to provide advice and assistance to applicants so far as it would be reasonable to expect the Council to do so.
- 4.2 East Lothian Council's procedure for dealing with requests is available on ELNet. A guide to making requests is available on http://www.eastlothian.gov.uk/info/704/data_protection_and_freedom_of_information/261/a_guide_to_the_freedom_of_information_scotland_act_2002. Advice and assistance by telephone can be obtained by contacting the Data Protection and Freedom of Information Officer.

5. Making Requests for Information

- 5.1 The public has a general right of access to any recorded information, however it is held. This includes electronic records, paper records, and audio or video recordings. There is no formal application procedure – applicants do not have to state that they make their request under FOISA. The only requirement is that the request is in writing, provides the applicant's name and is capable of being used for subsequent reference. If a person is unable to articulate their request in writing, East Lothian Council will provide advice to help them make their request. This does not apply to EIR, where no such requirement exists.
- 5.2 Under Section 14 FOISA, East Lothian Council is not obliged to comply with requests which are substantially similar to a request received from the same person where a reasonable interval has not elapsed between the previous and current request. Nor is it obliged to comply with requests that are vexatious.
- 5.3 If it is estimated that the cost of compliance would exceed the limit of £600 as set out in the Fees Regulations, the Council is not obliged to comply with the request. However, the Council will consider on a discretionary basis what information could be provided within the appropriate limit.

6. Prompt Replies to Requests

- 6.1 FOISA and EIR require East Lothian Council to comply with all requests for information promptly, but no later than on the 20th working day after receipt of the request. The Council does not expect every request to take 20 working days and will, wherever possible, provide the information at the earliest opportunity.
- 6.2 For environmental information, should the information requested be particularly extensive and/or should there be a need to consult third parties, the Council may need more than 20 working days. In this case, the Council will have a further 20 working days maximum to comply. The Data Protection & Freedom of Information Officer will notify the applicant in writing and provide an estimate of a date by which it expects to have gathered the information.

7. Charging Fees

- 7.1 The Council may only charge a fee to applicants in accordance with the Fees Regulations made under sections 9, 12 and 13 of FOISA (see Appendix B). No fee may be charged unless the cost of compliance exceeds £600. The Council may however charge photocopying and postage costs. If these costs are high, for example because of the volume of information requested, the Council may meet its obligations under FOISA by permitting the applicant to inspect the material or by providing a summary of the information requested. The Council will, however, take into account the applicants preferred method of access to the information and will, where practical, attempt to provide the information in the way requested.
- 7.2 Under EIR a charge can be made provided that it does not exceed the actual costs of supplying the information. Thus the Council will ensure that charges are based only on the actual costs of retrieval and production of the information and will calculate and advise the applicant of any fee before the request is met. Any fees will be based on the officer time spent in retrieving the information, plus any expenses in providing the information, such as photocopying.

8. Transferring requests for information to another public authority

- 8.1 If the Council receives a request for information which it does not hold, but which it knows is held by another public authority, the Council will provide as much assistance as possible to the applicant in transferring their request to the other authority. This may be by simply directing them to the appropriate public authority or, for environmental information, by transferring the request directly to the other authority, informing the applicant if this is to be done.
- 8.2 If the Council holds part of the information that has been requested it will treat that part of the request as an FOIA request and process it accordingly. At the earliest opportunity the Council will inform the applicant of the information it does not hold and provide reasonable assistance to enable them to locate it elsewhere.

9. Refusal of a Request

- 9.1 If East Lothian Council relies on an exemption or does not hold the requested information, the applicant will be notified as soon as possible with the appropriate explanations. Appendix A lists the exemptions most commonly applied to information held by the Council. In cases where an explanation would result in disclosure of information which in itself would be exempt, no explanations will be given.
- 9.2 For qualified exemptions, East Lothian Council will explain the public interest considerations, which lead to the decision not to disclose the requested information, in the refusal letter.
- 9.2 In cases where only parts of a document are covered by an exemption, East Lothian Council may redact the exempt parts in order to ensure that exempt information is not disclosed.

10. Elected Members and Freedom of Information

- 10.1 Where Elected Members work on behalf of the Council, this policy applies to them.
- 13.2 Where Elected Members work for their constituents, they are not considered part of the Council. As such, they are not public authorities under FOISA and any FOI request they receive must be considered invalid.

11. Reviews

- 11.1 If an applicant is unhappy with the way in which his/her request has been handled or is dissatisfied with the decision made regarding disclosure or non-disclosure of the information, or is of the opinion that ELC is not compliant with its publication scheme, s/he is entitled to ask for an internal review. The request for a review must be made no later than 40 working days following the expiry of the period for responding to the request for information.
- 11.2 The review must be carried out within 20 working days from the day of receipt by individuals who had no input into the original decision.
- 11.3 Where a request for review is received, then immediately upon receipt this should be passed to the appropriate Chief Officer together with a copy of the original request and the correspondence to the applicant.

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- 11.4 For more complex cases, a panel of senior officers may be appointed to carry out the review.
- 11.5 Where the determination of the review is that the information previously withheld should be disclosed, then the information must be provided no later than 20 working days from receipt of the request for review.
- 11.6 Where the determination of the review upholds the original decision, it should be notified to the applicant for review within 20 working days of the receipt of the request for review. This notification will contain particulars about the right to appeal to the Scottish Information Commissioner for a decision.
- 11.7 If the Scottish Information Commissioner issues a decision in favour of the Council, the applicant then has the right to appeal to the Court of Session. Likewise, if the decision is in favour of the applicant, the Council has the right to appeal to the Court of Session.

12. Review of Policy

- 12.1 This policy will be reviewed every three years from the date of approval.

APPENDIX A

EXEMPTIONS UNDER FOISA

Whilst the Freedom of Information Act provides for the right of access to information held, it also affords a number of exemptions from this right in order to permit public authorities to withhold some or all of the information requested where a justifiable reason exists.

The exemptions fall into two categories:

- those that are absolute exemptions where the Council may withhold the information without considering any public interest arguments, and
- those that are qualified i.e. that, although an exemption may apply to the information it will nevertheless have to be disclosed unless the public interest in withholding the information is greater than the public interest in releasing it.

In respect of the absolute exemptions, the Council does not have to confirm or deny that it holds the information if to do so would in itself provide exempt information.

Absolute Exemptions

The absolute exemptions that are most likely to apply to the Council are:

- Information which is reasonably accessible by another means, i.e. through the Council's Publication Scheme or via existing access regimes (Section 25)
- Personal information relating to the person making the request. Such requests will continue to be dealt with under the Data Protection Act 1998 (Section 38)
- Personal information about a third party where disclosure of that information would contravene the data protection principles contained in the Data Protection Act 1998 (Section 38)
- Information provided in confidence – this exemption only applies to information where disclosure would result in an actionable breach of confidence (Section 36)
- Information that is prohibited from disclosure by law (Section 26)

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Qualified Exemptions

The qualified exemptions most likely to apply to the Council are:

- Information intended for future publication (Section 27)
- Investigations/proceedings conducted by public authorities (Section 34)
- Law enforcement (Section 35)
- Prejudice to the effective conduct of public affairs (Section 30)
- Health & Safety (Section 39)
- Environmental Information (Section 39)
- Legal professional privilege (Section 36)
- Commercial interest (Section 33)

A full list of the exemptions under the Act is available from the Scottish Information Commissioner's website at <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.asp#exemptions>

For further guidance on the application of exemptions and the public interest test please contact the Data Protection and FOI Team at foi@eastlothian.gov.uk.

APPENDIX B

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

Citation and commencement

1. - (1) These Regulations may be cited as the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004.

(2) These Regulations shall come into force on 1st January 2005.

Interpretation

2. In these Regulations-

"the Act" means the Freedom of Information (Scotland) Act 2002;
"prescribed amount" means the amount prescribed in regulation 5; and
"projected costs" has the meaning set out in regulation 3.

Projected costs

3. - (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.

(2) In estimating projected costs-

(a) no account shall be taken of costs incurred in determining-

(i) whether the authority holds the information specified in the request; or

(ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and

(b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

Fee payable

4. - (1) For the purposes of section 9(1) of the Act (fees), the fee which a Scottish public authority may charge is to be determined in accordance with paragraphs (2) to (4).

(2) Where the projected costs do not exceed £100, no fee shall be

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payable.

(3) Where the projected costs exceed £100 but do not exceed the prescribed amount, the fee shall not exceed 10% of the difference between the projected costs and £100.

(4) The fees notice shall set out the manner in which the fee has been calculated.

Excessive cost - prescribed amount

5. The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

Aggregation of costs

6. Where two or more requests for information are made to a Scottish public authority by different persons, the authority need not comply with either or any of those requests where-

(a) the information sought in the requests covers the same subject matter or overlaps to a significant extent;

(b) the authority estimates that the total cost of complying with both or all of the requests would exceed the prescribed amount;

(c) the authority considers that it would be reasonable to make the information available to the public at large and elects to do so;

(d) within 20 working days of receipt by it of the first of the requests the authority notifies each of the persons making the requests that the information is to be made available in accordance with paragraph (e); and

(e) the authority makes the information available to the public at large within the period specified in paragraph (d).