

## CROWN OFFICE CIRCULAR 2/2008

<b>Title</b>	<b>THE COPFS PUBLICATION SCHEME</b>
<b>Subject Heading</b>	<b>Freedom of Information/Data Protection</b>
<b>Principal Addressees</b>	<b>All Staff, particularly staff involved in preparing guidance material</b>
<b>Date of Issue</b>	<b>23 January 2008</b>
<b>Previous Circulars Cancelled</b>	<b>None</b>
<b>Contact for Enquiries</b> (Name, Division/Unit and Tel No)	<b>Carol McDivitt</b> <b>Business Policy and Development Division</b> <b>Tel : 0844 561 3691</b>

### Summary of Key Points

This circular clarifies the responsibilities of all COPFS staff under the Freedom of Information (Scotland) Act 2002 (FOISA) in terms of the COPFS [Publication Scheme](#).

As a Service, we are committed, where appropriate in terms of FOISA, to -

- ◆ Pro-actively publish information in the public domain; and
- ◆ Consider including any new or updated guidance materials in the COPFS Publication Scheme.

This circular explains the implications of that for the preparation of guidance and introduces a new FOI Checklist form which must be completed in respect of every piece of new or amended guidance.

## **Purpose**

1. This circular provides guidance for staff involved in the preparation of new or amended guidance materials. It explains the implications for such work of the provisions of the Freedom of Information (Scotland) Act 2002 (FOISA)

## **What is the Publication Scheme?**

2. FOISA provides a right for anyone, anywhere to request information held by Scottish public authorities. It also introduced an obligation for authorities to proactively publish information by way of a Publication Scheme. COPFS has had a Publication Scheme in place since 2004. This has been approved by the Scottish Information Commissioner and COPFS is committed to making information publicly available, where appropriate, in accordance with the Scheme. In terms of section 23 of FOISA, COPFS has a duty to maintain and regularly review its Publication Scheme from time to time. We are due to publish a revised Publication Scheme by June 2008 and are currently liaising with the Scottish Information Commissioner in preparation for that.

3. The Scheme sets out what types of information COPFS publishes or intends to publish, how that information is made available, and whether there is a fee for providing the information. The Publication Scheme can be accessed on the [Intranet](#) or the COPFS [website](#). It can also be provided in hard copy to members of the public on request.

4. The Publication Scheme provides a framework to pro-actively publish as much information as possible in the public domain, and make it simple for members of the public to locate and request information. The Scheme also serves to reduce the number of FOI requests to COPFS because information included in the Scheme can be released automatically. Requests for information that is not included in the Publication Scheme must be treated as a request for information in terms of FOISA or the Data Protection Act 1998.

## **What should be included in the Publication Scheme?**

5. The Publication Scheme is a living document which must be kept up to date. It can be added to at any time.

6. If you are embarking on a new area of work, preparing new or revised guidance, or for example, setting up a working group, it is important to consider at the outset what information can be made publicly available.

7. New or revised guidance might include, for example, Crown Office Circulars, updates to the Book of Regulations, production of practice or guidance manuals, or any other type of document which includes information about the role and responsibilities of COPFS.

8. The Scottish Information Commissioner's guidance on updating the Publication Scheme is not yet fully available, but it is likely to emphasise the

importance of publishing internal guidance such as staff manuals and procedures, particularly for human resource and financial functions, and decision-making at every level in the organisation. It will also promote publication of contract information and agreements with third parties, including protocols, memoranda of understanding, circulars, bulletins and newsletters exchanged with external organisations.

### **What about exemptions under FOISA?**

9. Sometimes, it will not be appropriate to publish information because it is exempt from disclosure. For example, where the release of internal guidance would prejudice substantially criminal investigation and prosecution of crime, it can be withheld under an exemption at section 35 of FOISA where this can be justified as being in the public interest.

10. A large part of the guidance materials produced by COPFS staff comprise general prosecution policy and guidance. Specifically in respect of this class of information, the Publication Scheme states that where members of the public wish to request information falling within this category, in general, this *will* be provided to requestors under FOISA, as long as it is not caught by the exemption under section 35 of FOISA, i.e. it will not prejudice the investigation or prosecution of crime. This class of information includes guidance on:

- ◆ The investigation of crime;
- ◆ Precognition work;
- ◆ The investigation of sudden and suspicious deaths;
- ◆ Guidance in relation to children as victims, witnesses or accused; and
- ◆ COPFS relationship with victims, witnesses and next of kin.

11. However certain guidance materials have been identified in the Publication Scheme as not being suitable for disclosure, even on request, because they are exempt in terms of section 35. This includes:

- ◆ Summary Proceedings Guidelines;
- ◆ National Case Marking Guidelines;
- ◆ High Court Marking Guidelines;
- ◆ Crown Office Circulars;
- ◆ Lord Advocate's Guidelines; and
- ◆ Chapter 3 (case marking) of the Book of Regulations.

12. In practice, however, the majority of the Lord Advocate's Guidelines have now been made available proactively and a number of Crown Office Circulars have been released in response to FOI requests. Therefore this information category will be reviewed when the Publication Scheme is updated within the course of the next few months (see paragraph 1).

### **What do I have to do to comply with FOISA when preparing guidance materials?**

### *Documents suitable for release*

13. If you are preparing guidance or other manuals (see paragraph 7), you should consider our obligation under FOISA to proactively publish as much information as we can in terms of the Publication Scheme. When preparing a new piece of guidance, you should consider whether it can be made publicly available and, where this is possible, prepare the guidance in a suitable form to be included, without edition, in the Publication Scheme on the COPFS website.

14. When the guidance material is ready to be issued to COPFS staff, you should pass it, together with a completed **FOI Checklist** (attached at [Annex A](#)) to the Crown Office Library to be placed on the Intranet, and at the same time advise the Knowledge Manager (Sue Sandeman) that the guidance can also be added to the Publication Scheme on the COPFS website.

15. The FOI checklist form ensures that staff consider freedom of information issues whenever guidance is produced. It enables staff to decide whether the information can be proactively placed in the public domain, whether only some of the information is suitable for release or whether the information is exempt from release because of one of the FOISA exemptions, most notably, that it would prejudice substantially criminal investigation and prosecution of crime. This form must be completed in respect of every piece of guidance.

### *Documents suitable for partial release (in an edited form)*

16. It may be that the guidance is, in general, suitable for inclusion in the Publication Scheme but that part of it is caught by an exemption in FOISA (for example, information which if released would be likely to prejudice the investigation or prosecution of crime). In these circumstances, it is recommended that, where possible, the 'exempt information' be drafted into one or several specific sections which can easily be identified and edited to produce a releasable version of the guidance. The [Freedom of Information Guidance](#) which is available on the Intranet provides detailed guidance about the use of exemptions.

17. Parts of guidance which are not considered suitable for release to the public should be clearly marked "Internal Guidance - For Staff Only". This will allow relevant parts of the guidance to be removed easily when preparing a suitable version for publication in the Publication Scheme. If a request is later made for the edited version, it will be the responsibility of the drafter of the guidance, who has the expertise in that particular area, to prepare a version suitable for release, although the Information and Records Management Team is available to provide advice on Freedom of Information considerations. Once an edited version has been prepared, it can then be placed on the Publication Scheme for the benefit of others. The following wording should appear at the top of the edited version:

**"This document omits material which is considered to be exempt from publication under the exemption set out in Section [X] of the Freedom of Information (Scotland) Act 2002."**

18. This position differs slightly from the guidance relating to the Book of Regulations (see General Minute3/2008). As the Book of Regulations has been listed on the Publication Scheme we have already undertaken to provide a releasable version. Updates to the Book of Regulations will be placed on the Publication Scheme electronically and where an edited version of a chapter is required, the drafter must consider this at the time of drafting. Where other guidance is being placed on the Scheme proactively, only the guidance which is completely releasable will be added to the Scheme with an electronic link. The Scheme will indicate that all other guidance must be requested from COPFS. If a request is made, it will be at that stage that the drafter will prepare an edited version. Therefore, the only process which the drafter requires to consider at the point of issuing other new guidance onto the Intranet is, whether the information could be released in an edited form or not at all in the event of a request being received.

19. When the guidance material is ready to be issued to COPFS staff you should pass it, together with a completed FOI checklist form to the Crown Office Library to be placed on the Intranet. The drafter should advise the Library that the guidance should only be placed on the intranet, but that the Publication Scheme should be updated to show that the guidance can be made available publicly in an edited version. The FOI checklist should be completed to this effect.

#### **Documents exempt from release**

20. There will be circumstances whereby you consider that the guidance is not suitable for inclusion in the Publication Scheme because it is exempt from disclosure in terms of the FOISA exemptions (for example, because it would prejudice substantially criminal investigation and prosecution of crime).

21. When the guidance is ready to be issued to COPFS staff you should pass it, together with a completed FOI checklist form, to the Crown Office Library to be placed on the Intranet. The form should be completed to show the exemption(s) being relied upon to withhold the information. This will be of assistance in the future, should FOI requests be made for the information.

22. The [Freedom of Information Guidance](#) which is available on the Intranet provides detailed guidance about the use of exemptions.

#### **How do I update existing guidance on the Publication Scheme?**

23. Before updating existing guidance staff should check to see whether it is already available on the Publication Scheme. In these circumstances, where it is possible the guidance should be revised and/or updated in such a way that allows it to continue to be releasable as a whole as part of the Publication Scheme, or at least, in an edited form (e.g. national protocols with criminal justice partners, business plans and finance policy and guidelines). In the main, unless guidance is completely overhauled, it is highly unlikely that an item already listed in the Publication Scheme will need to be removed in its entirety because it has become exempt as a result of updates and/or revisions.

24. However where it is not possible to revise guidance in such a way that it is still releasable as part of the Publication Scheme, the revised and/or updated guidance should be approached initially in the same way as a *new* piece of guidance in terms of deciding whether it is suitable for partial release or whether it is wholly exempt from disclosure. Where it is considered suitable for partial release, an edited version of the guidance should be prepared which can be included on the website as part of the Publication Scheme.

25. When the guidance has been updated and/or revised, an FOI checklist form should be completed in the usual way as set out above, and the revised version of the guidance, along with the FOI checklist form should be passed to the Crown Office Library who will arrange for the revised version to be placed on the Intranet, and, where appropriate, on the COPFS website and/or listed in the Publication Scheme.

### **Further Information**

26. Further information and advice is available from the Information and Records Management Team at Crown Office.

Information and Records Management Team  
Business and Policy Development Division  
January 2008

FOI CHECKLIST	X
<p><b>1. Full text of document can be placed on internet</b></p> <p>i) Advise Knowledge Manager</p>	
<p><b>2. Document requires to be edited before release</b></p> <p>i) Advise Knowledge Manager to update Publication Scheme to show that an edited version can be made available if requested</p> <p>ii) List here exemptions to be considered if release is requested</p> <p><b>When a request is made for edited version:</b></p> <p>iii) Drafter to prepare edited version</p> <p>iv) Advise Knowledge Manager to update Publication Scheme to include redacted version</p>	
<p><b>3. Document is exempt from disclosure under FOI</b></p> <p>i) Which exemption(s) applies?</p>	