

## **EAST AYRSHIRE COUNCIL**

### **SPECIAL MEETING OF THE POLICY AND RESOURCES COMMITTEE 23<sup>rd</sup> MAY 2001**

#### **Report by the Director of Corporate Resources**

#### **CONSULTATION BY SCOTTISH EXECUTIVE ON FREEDOM OF INFORMATION (SCOTLAND) BILL**

### **1.0 PURPOSE OF REPORT**

The purpose of this report is to advise of the terms of proposed legislation on freedom of information from public authorities in Scotland and to propose interim action in preparation for its introduction.

### **2.0 BACKGROUND**

- 2.1 The Local Government (Access to Information) Act 1985 amended the Local Government (Scotland) Act 1973 to give rights of access to information to the public – where that information consisted of, or formed the background to, items appearing on the agenda of council, committee or sub-committee meetings
- 2.2 Other legislation (e.g. Data Protection Act 1984 (now 1998), Access to Personal Files Act 1987 and Access to Health Records Act 1990 dealt with the rights of an individual to access to information held about him/herself.
- 2.3 In contrast, the proposals in the draft Freedom of Information (Scotland) Bill would create a statutory right to access to information held by Scottish public authorities. This is not restricted to local authorities – a wide range of public bodies will be covered by the proposed Act.

### **3.0 SUMMARY OF THE TERMS OF THE BILL**

The Bill provides for the following:

- Statutory right of access to information
- Establishment of a Scottish Information Commissioner with powers to promote and enforce
- Public authorities to specify (and review) categories of information they intend to publish – schemes for the publication of information require to be approved by the Commissioner
- Rules and timescales for the request and provision of information
- Charging system
- Codes of Practice to be issued by Scottish Ministers
- Categories of exempt information

- Tests for the provision or refusal to provide information

#### **4.0 REQUESTS FOR INFORMATION**

- Information must be supplied in the form requested, if practicable (e.g. information may not be in documentary form) – reasons for non-compliance must be given
- Information must be provided (or refused) within **20 working days**
- Information may be of any age i.e. there is a right to retrospective or historical information
- Further information clarifying the request (in order to identify and locate the information) may be asked for – this delays the start of the 20 day period
- If a fee is to be charged (see later section on charges) the authority requires to issue a “fees notice” – the time between doing so and receiving the fee is not counted as part of the 20 days

#### **5.0 REFUSAL OF REQUESTS:**

- If the request is “vexatious”
- Repeated requests from same applicant (unless a reasonable time had elapsed)
- Information to enable the public authority to locate the information had not been provided
- The fee requested had not been paid
- The cost of providing the information was estimated to exceed the amount prescribed (to be prescribed by Regulations)
- The information is exempt from disclosure (i.e. meets all the tests – see section on exemptions) – the public authority is required to issue a refusal notice within the 20 day period.

#### **6.0 OTHER NOTICES**

- If authority would otherwise require to provide the information, were it held by the authority, it may issue a notice that it does not hold the information.
- If the authority would be entitled to refuse to supply the information, were it held by the authority, but the authority does not wish to inform the applicant either that it does or does not hold the information, in some circumstances the authority may issue a notice under section 18. This only applies to the following exempt categories, of which further details are given at paragraph 11 below:

- i. Section27
- ii. Section28
- iii. Section30
- iv. Section31
- v. Section33
- vi. Section34

- vii. Section38(1)
- viii. Section40

## 7.0 INTERNAL REVIEW PROCEDURES

- An applicant for information who is refused it has the right to ask for an internal review of the decision
- This must be asked for within 20 working days of the last day for the initial response (or the day actually received, if later)
- The result of the review must be intimated to the applicant within 20 working days of the request for review
- “vexatious” requests for review need not be dealt with – although applicants must be notified to this effect in writing

*NB – this procedure would allow vexatious correspondents to achieve an objective to disrupt the authority’s operations – a) their original request would have to receive a notice on grounds that it was vexatious and b) a subsequent request for review would also require the authority to respond in writing. Vexatious applicants using email could also create technical difficulties for an authority – and email systems designed to weed out multiple, vexatious emails could put the authority at fault in terms of the proposed legislation.*

## 8.0 PUBLICATION OF SCHEMES

- Public authorities must specify the categories of information they will publish. This published scheme is subject to approval by the Commissioner
- The scheme may either be general or specify particular items of information
- The following **must** be included in schemes:
  - ◆ Classes of information which the authority intends to publish
  - ◆ **How** the information in each class is intended to be published
  - ◆ Whether the information will be free of charge or subject to a fee
- Particular attention needs to be paid, when drawing up schemes, to the public interest in the reasons for decisions taken by an authority, in information relating to services, their costs and standards achieved and in the facts and analyses on which decisions were based.

## 9.0 FEES

Regulations will prescribe a fee structure, expected to be as follows:

- No charge where costs are less than £100
- Discretion to charge where costs are between £100 and maximum – maximum likely to be around £500 – discretion probably intended to cover the excess over £100.

- If cost is over the maximum, there would be no obligation to supply the information, but a discretion to provide and charge (or not to charge the full amount)
- A fee notice of the fee to be paid must be issued
- Costs that can be included cover not only copying, postage etc. but also the costs of locating the information
- There is a right to a review of costs and to appeal against them to the Commissioner

## 10.0 EXEMPT INFORMATION

- There are 17 categories of exemptions
- Some of these are “**class exemptions**”, some “**content based exemptions**” and some “**absolute exemptions**”. Some exemptions are technical only in that the information requires to be supplied under a different requirement (e.g. Data Protection legislation)
- Tests are to be applied to determine whether information in an exempt category should still be provided: the “harm” test of “substantial prejudice” and the “public interest” test. These apply to different categories of exemptions:
  1. “substantial prejudice”: information is subject to exemption unless it would or would be likely to prejudice substantially the matter resulting in the exemption
  2. “public interest test”: in most cases the authority requires to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Application of tests: the authority must apply either or both of the tests:

- (a) “**class**” **exemptions**: there is a general presumption that information would not be released because disclosure would normally result in substantial prejudice (i.e. the harm test is assumed to have been met) **however** the authority would still require to consider the public interest test
- (b) “**content based**” **exemptions**: information would require to be disclosed **unless** disclosure would cause substantial prejudice – there is no presumption that this is the case (unlike (a)) and this issue requires to be considered by the authority. Even if substantial prejudice would be caused, the authority must still then consider the “public interest” test
- (c) “**absolute**” **exemptions**: where disclosure in the public interest would be neither appropriate nor sensible – no need to consider tests

## 11.0 EXEMPTIONS AND CATEGORIES

1. Information otherwise accessible (*class-based and absolute*) (*Section 24*)
2. Prohibitions on disclosure – i.e. disclosure prohibited by statute, incompatible with a Community obligation or in contempt of court (*class-based and absolute*) (*Section 25*)
3. Information intended for future publication – must be so intended within 12 weeks (*class-based – i.e. public interest test only*) (*Section 26*)
4. Relations within the United Kingdom would be prejudiced substantially (*content-based i.e. both tests to be applied*) (*Section 27*)
5. Formulation of Scottish Administration policy – i.e. the information relates to this, ministerial communications, provision of advice from Law Officers and the operation of a ministerial private office (*class-based*) (*Section 28*)  
*N.B. this test is not available to local government.*
6. Prejudice to effective conduct of public affairs – i.e. information would prejudice the convention of collective ministerial responsibility (*content-based*) (*Section 29*)
7. National security and defence (*content-based*) (*Section 30*)
8. International relations:- two parts:
  - i) prejudicial to relations with other states/international organisations or courts or the interests of the UK abroad (*content-based*)
  - ii) information obtained in confidence from other states, international organisations or courts (*class-based*)(*Section 31*)
9. Commercial interests and the economy – commercially sensitive information, disclosure of which would or would be likely to prejudice substantially the commercial interests of any person or body. There are two situations:
  - i) Where the prejudice is to an individual or body (*class-based*)
  - ii) Where the prejudice is to the country i.e. UK or part (*content-based*)(*Section 32*)
10. Information from or for investigations by a public authority obtained for either criminal or civil proceedings or a Fatal Accident Inquiry etc. (*class-based*) (*Section 33*)

11. Law enforcement – e.g. crime prevention or detection, apprehension of offenders, prosecutions, administration of justice, assessment and collection of tax, and also civil proceedings regarding compliance with the law and health and safety at work. (*content-based*) (Section 34)
12. Confidentiality:- two parts:
- i) Where confidentiality could be claimed in legal proceedings (*class-based*)
  - ii) Where information obtained by a public authority would, if disclosed, constitute an actionable breach of confidence (*absolute*)(Section 35)
13. Court Records  
Any document lodged with or in the custody of a court in proceedings served on or by a public authority (*class-based and absolute*) (section 36)
14. Personal Information  
Three parts: Information otherwise available under Data Protection Act; census records; health records:-
- i) Personal data relating to the person making the subject access request is otherwise available. Third party personal information will remain exempt if disclosure would contravene the Data Protection Act.
  - ii) Census records will continue to be exempt for 100 years (*absolute*)
  - iii) Health records as defined in the Access to Health Records Act 1990 and data Protection Act 1998. Third party information will remain exempt for 100 years (after the individual's death). (*absolute*)(Section 37)
15. Health, safety and the environment:- two parts;
- i) Where information would be likely to injure the physical or mental health or safety of an individual (*content-based*)
  - ii) Information to be made available under Regulations which may be made by the Scottish Ministers in terms of the Aarhus Convention (*class-based*)(Section 38)
16. Audit functions  
Where the audit functions of or in relation to the economy, efficiency or effectiveness of a public authority would be prejudices (*content-based*) (Section 39)
17. Communications with the Crown  
Communications with the Queen, Royal Family or Royal Household or in relation to any honour. (*class-based*) (Section 40)

## **12.0 INFORMATION COMMISSIONER**

A Scottish Information Commissioner is to be appointed to promote and enforce the Act. The commissioner will deal with appeals for refusal or omission to provide information. The commissioner will have the power to demand information and to issue decision notices and enforcement notices. Ultimately refusal to co-operate with the commissioner could lead to action in the Court of Session, with penalties akin to contempt of court. The commissioner may also issue practice recommendations where he or she considers that a public authority was not complying with a Code of Practice issued by the Scottish Ministers – e.g. in relation to procedures for dealing with requests.

## **13.0 INTRODUCTION OF THE ACT**

It is intended that the Act be introduced, possibly on a phased basis, with effect from Spring 2003.

## **14.0 PRACTICAL IMPLICATIONS**

There are a number of implications for operational practice and procedures, and for costs, for public authorities in compliance with the Act:

- The requirement to provide information is fully retrospective: this has important implications for record management and retrieval arrangements.
- The time limits in the Act will necessitate good systems for both indexing and storage of records. The recent arrangements approved by Council for a records storage facility should assist in this.
- Should requests for information be frequent, there could well be staffing implications for public authorities.
- Additional archivist services may require to be drawn upon to ensure that the Council is best placed to operate in compliance with the Act. ASLAWG (the professional Archivists' association) is expected to produce a model records policy and common standards for record-keeping to assist public authorities.
- An action plan should be prepared in advance of the Act coming into force.
- All relevant policies (e.g. data security policies) should be reviewed to ensure compliance.

## **15.0 FINANCIAL IMPLICATIONS**

Depending on the number of requests received there could be considerable additional costs for the Council, unquantifiable at present.

## 16.0 RECOMMENDATIONS

It is recommended:-

- 1) That the Committee note the potential problems in respect of the need to correspond with vexatious applicants and agree that this be drawn to the attention of the Scottish Executive and
- 2) That officers be authorised to pursue an audit of existing records management practices within the council in conjunction with the current development of the records storage facility and drawing upon advice from the Archivist and also to ensure that arrangements will be in place to meet the future requirements of the Act.

Barbara Haughan  
**Head of Administrative and Legal Services**  
14<sup>th</sup> May 2001

### BACKGROUND PAPERS

Consultation paper issued by Scottish Executive

For further information on the contents of the report contact Barbara Haughan, Head of Administrative and Legal Services on 01563 576061.

Any person wishing to inspect the background paper should contact Bill Walkinshaw on 01563 576135

**Implementation Officer:** Barbara Haughan, Head of Administrative and Legal Services

**AGENDA**