

PUBLIC ACCESS TO INFORMATION ABOUT THE COMMISSIONING OF WORK & SERVICES

Public rights under the Freedom of Information (Scotland) Act

- 01** The Act applies to all public bodies in Scotland which exercise responsibility for devolved matters. These are **(54d; 3, 6 & Sch 1)**
- ¥ all local councils
 - ¥ all joint boards
 - ¥ all police boards and chief constables
 - ¥ the Strathclyde Passenger Transport Executive
 - ¥ all publicly owned companies. A company is publicly owned if all its members are a public authority, other companies wholly owned by that authority, or other people acting on behalf of the authority or companies which it wholly owns.
- 02** A person who requests information from a public authority is entitled to be given that information within not more than 20 working days of being asked **(54d; 10)**
- 03** 'Persons' for this purpose include corporate bodies **(15a; Sch 1)** and non-residents.
- 04** In Scotland, public bodies which do not exercise responsibility for devolved matters are subject to the Freedom of Information Act 2000, as now described by reference to English & Welsh authorities. There are only minor differences of substance between the two Acts.

The Data Protection Act 1998

- 05** Both Freedom of Information Acts contain innumerable cross references to the Data Protection Act. The former Acts are of course primarily about **disclosure** (of information about the body and its decisions) whereas the latter is primarily about the **privacy** (of individuals). The different terms of both sets of legislation therefore have to be kept in mind.
- 06** The DPA defines **(44g; 1)**
- ¥ data as being information recorded for the purpose of processing it
 - ¥ personal data as being data about a living person who can be identified from that data
 - ¥ processing as including disclosure.

Qualified exemptions

- 07** Authorities enjoy exemption from the duty to comply with a request for information of a number of types **if** the public interest in maintaining the exemption outweighs the public interest in disclosure **(54d; 16(2))**.
- 08** The balance between exemption and disclosure is in the first instance for the public authority in question to decide. Applicants disappointed by these and other decisions may however ask authorities to review these decisions **(54d; 20(1))**. Authorities are then required to give applicants notices of their decisions, with statements of their reasons **(54d; 21)**. Applicants who are dissatisfied with such notices may ask the Information Commissioner **(54d; 47)** to decide whether authorities have complied with their duties under the Act. The Commissioner may then serve enforcement notices on authorities requiring them to take specified action **(54d; 51)**.
- 09** Cases in which qualified exemption is available include those where
- ¥ the information is a **trade secret (50a; 43(1)) (54d; 33(1))**
 - ¥ disclosure would be likely to **prejudice anybody's commercial interests (50a; 43(2)) (54d; 33(2))** (for example any information about a tender **before** the date of contract award)
 - ¥ a claim to **confidentiality of communication** could be maintained **(50a; 42) (54d; 36)** (for example legal advice received, though this exemption is restricted to advice which requires legal knowledge) **(1183)**

- ¥ the information is data which part 4 of the DPA **exempts data controllers from having to communicate** to data subjects (**44g**; 7(1)(c) & Part IV) (**50a**; 40(4)) (**54d**; 39(3))
- ¥ **the estimated cost** of ascertaining whether the specified information is held exceeds a limit to be specified by ministers (**50a**; 12) (**54d**; 12)
- ¥ the application is **vexatious** (**50a**; 13) (**54d**; 14) (where for example the same applicant prolongs controversy and publicity by repeatedly asking slightly different questions about a subject which has already been well ventilated)
- ¥ the application **repeats a substantially similar request from the same applicant** before a reasonable interval has elapsed (**50a**; 13) (**54d**; 14)
- ¥ it is information which would be likely to (**54d**; 30)
 - inhibit the provision of **free and frank advice**, or the **free and frank exchange of views** (for example about the likely abilities of third parties)
 - or
 - prejudice the effective **conduct of public affairs** (for example about the likely nature of decisions currently under consideration).

Absolute exemptions

- 11** Authorities enjoy **absolute** exemption from the duty to give information (**54d**; 2(1)) if
- ¥ it was obtained from somebody who would be able to bring an action for **breach of confidence** if it is disclosed (**50a**; 41) (**54d**; 36) for example
 - a referee who had responded to a request to give a reference in confidence
 - a tenderer who had asked for an innovative method or technique to be treated as given in confidence
 - ¥ its disclosure (**50a**; 44) (**54d**; 26) is **prohibited** by any enactment; this does not itself cover information (such as Part 2 minutes) for which authorities currently have discretion (**11**; Part VA) (**22**) to withhold publication, although qualified exemption may still be possible, as described in paragraph 9
 - ¥ if it is (**50a**; 40) (**54d**; 38) **personal data about the applicant**
 - ¥ if it is (**50a**; 40) (**54d**; 38) **personal data** whose disclosure would **infringe any of the rights of data subjects** under the DPA (**44g**; Sch 1, principles 1 to 8).
- 12** Absolute exemption means that the public body cannot be required to consider the balance of public interest, as between disclosure and exemption.

Other Acts

- 13** If any Act other than the DPA or the FOIAs requires disclosure, none of the restrictions on disclosure in the DPA apply (**44g**; 35(1)) (**50a**; 72) (**54d**; 66).

Sources

- 15a** Interpretation Act 1978
- 11** Local Government Act 1972
- 20a** Local Government (Access to Information Act) Act 1985
- 44g** The Data Protection Act 1998
- 50a** Freedom of Information Act 2000
- 54d** Freedom of Information (Scotland) Act 2002
- 1183** Three Rivers District Council & others vs Bank of England CA 2004