Governance Risk and Best Value Committee

10.00am, Thursday, 23 April 2015

Freedom of Information – Code of Practice on the Discharge of Functions by Public Authorities

Item number	7.5
Report number	
Executive/routine	
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Executive summary

Scotland's freedom of information (FOI) laws provide a statutory right of access to information held by Scottish public authorities, subject to limited exemptions. These incorporate the Freedom of Information (Scotland) Act 2002 (FOISA), the Environmental Information (Scotland) Regulations 2004 (EIRS) and the INSPIRE (Scotland) Regulations 2009 (INSPIRE).

Under section 60 of FOISA and regulation 18 of the EIRS, Scottish Ministers may publish a Code of Practice (the Code) which describes the practice which they consider would be desirable for Scottish public authorities to follow in connection with the discharge of their functions under the legislation. The Code was originally issued by Scottish Ministers in September 2004 and re-issued in December 2010. Following consultation with the Scottish Information Commissioner a revised Code was laid before Scottish Ministers and re-issued on 10 December 2014.

On 29 January 2015, the Governance, Risk and Best Value Committee of the Council requested that a report was produced detailing the Council's compliance with the

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revised Section 60 Code and ways in which the Council's FOI processes could be streamlined.

This report highlights the principal features of the Code, and details the Council's compliance with the latest Code in terms of policy, process and practice.

Report

Freedom of Information – Code of Practice on the Discharge of Functions

Recommendations

1.1   To note the Council's compliance with the revised Code of Practice on the Discharge of Functions by Public Authorities under FOISA and the EIRS, and that the Council's processes are fit for purpose in responding to requests for information under FOI legislation.

Background

2.1   The Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (EIRS) provide a general right of access to recorded information held by the Council, subject to limited conditions and exemptions/exceptions. The Council is also required to prepare and maintain a Publication Scheme, setting out the information that it routinely makes available. The Scottish Information Commissioner (SIC) is responsible for enforcing and promoting both regimes.

2.2   Under section 60 of FOISA and regulation 18 of the EIRS, Scottish Ministers may publish a Code of Practice (the Code) which describes the practice which they consider would be desirable for Scottish public authorities to follow in connection with the discharge of their functions under FOISA and the EIRS. The Code was issued by Scottish Ministers in 2005. Following consultation with the SIC, a revised Code was laid before Scottish Ministers and re-issued on 10 December 2014.

2.3   The INSPIRE (Scotland) Regulations 2009 provide a right of access to any spatial datasets or spatial data services about the environment together with the meta data related to these, subject to certain conditions and limitations. There is no requirement under INSPIRE to publish a code of practice.

2.4   The revised Code recognises that since FOISA came into effect on 1 January 2005, a considerable body of guidance has been developed by the SIC. As a result, the Code sits between the regimes and the Commissioner's guidance and focuses on providing guidance on what an authority can do to ensure that best practice is demonstrated at every stage of dealing with a request for information. It is not intended to provide detailed, comprehensive guidance on the regimes. Such guidance is already available from the SIC.

2.5   In addition to the Section 60 Code, Scottish Ministers issued a [Code of Practice on Records Management under Section 61 of FOISA](#) which provides authorities with guidance on the creation, keeping, management and destruction of records. The Council's arrangements for ensuring compliance with the Public Records (Scotland) Act 2011, including the submission of a Records Management Plan for approval by the Keeper of the Records of Scotland, will help the Council meet the requirements detailed in the Code.

2.6   The SIC promotes observance of both codes and can serve a practice recommendation on any authority whose practice does not conform to the Code. Should an authority fail to comply with the codes it may be considered to be failing in its duties under FOI legislation. The SIC has a range of powers to address any such failures to comply.

2.7   To ensure that the Council's FOI are arrangements are effective and compliant, the FOI process was centralised under the Information Governance Unit in April 2013. This structure ensures a consistent and resilient approach in responding to requests.

2.8   On 29 January 2015, the Governance, Risk and Best Value Committee of the Council requested that a report was produced detailing the Council's compliance with the revised Section 60 Code and ways in which the Council's FOI processes could be streamlined.

Main report

3.1   The Code outlines 11 areas of recommended good practice. These are set out below with details of the Council's approach and FOI practices.

Responsibility for FOI within an authority

3.2   The Code recommends that FOI should be recognised as a specific statutory corporate function within an authority, with necessary levels of organisation support at strategic and operational levels, as well as sufficient resource to ensure compliance with Scotland's access to information regimes.

3.3   On 30 September 2014 the Corporate Policy and Strategy Committee of the Council approved an FOI Policy as part of the Council's information governance arrangements. The policy defines FOI roles and responsibilities within the Council, and provides a framework to ensure that FOI procedures and practices are effective in handling requests for information. The Policy is subject to the Council's annual policy review process and is owned and monitored by the Information Council as part of its remit to develop effective information governance arrangements across the Council.

3.4   To ensure that the Council's FOI arrangements are effective and compliant, the FOI process was centralised under the Information Governance Unit in April 2013. The Unit operates under the Council's internal FOI procedures and uses a dedicated FOI case management system to log, track and assign requests. This approach ensures a consistency of approach with quality assurance controls in place.

3.5   Critically, the structure also provides resilience to ensure that staff absence (whether planned or un-planned), does not affect the Council's ability to respond to requests for information, and requests for review, within statutory timescales. In addition, the majority of FOI contacts within the Council (over 600) have generic email addresses that ensure assigned requests are actioned timeously.

3.6   The Council's internal FOI procedure was initially approved by the Office of the Scottish Information Commissioner in September 2010, as part of an assessment carried out by the Commissioner's Office. Since this time, the Council's FOI procedures and practices have been continuously assessed and revised (where appropriate) to reflect decisions and guidance issued by the Office of the Scottish Information Commissioner.

3.7   A key element of the Council's FOI Policy is the requirement that staff with operational responsibility for responding to FOI requests have appropriate skills and knowledge. Within the Information Governance Unit, all staff with FOI responsibilities have a Practioner Certificate in FOI – a qualification endorsed by the Centre for FOI Studies at the University of Dundee.

3.8   More widely, Council staff have access to FOI guidance through the Council's information governance intranet pages and FOI e-learning module, as well as tailored training provided by information governance staff. However, to ensure that all staff have sufficient levels of knowledge throughout the organisation, mandatory information governance e-learning modules are currently being developed and will be introduced in May this year. The modules will not only detail FOI processes, but will also highlight the need for an FOI culture which values information and associated rights of access to Council information.

Monitoring compliance, collecting and recording statistics about request handling

3.9   The Code recommends that authorities must ensure provide adequate statistical information to monitor performance effectively. The Council's FOI case management system provides detailed performance information which is regularly reported to Council senior management teams and to the Corporate Management Team. FOI performance statistics are also submitted to The Scottish Information Commissioner on a quarterly basis.

3.10   Any information risks or issues captured through this process are reported to the Information Council and directorates to improve practice and reduce risk. Where appropriate, service areas will record and mitigate risks through the Council's Risk Management Framework.

Proactive publication of information

3.11   The Council is required to prepare and maintain a Publication Scheme under section 23 of FOISA, setting out the information that it routinely makes available. In line with the recommendations set out in the Code, the Council has adopted the Scottish Information Commissioner's Model Publication Scheme and created its own guide to the information it makes available under the model scheme. The publication scheme is currently under review to align with changes to the Council's website structure and format.

3.12   The Code also recommends that It is good practice for an authority to also consider regularly what other information is likely to be of interest to the public and could be published proactively, in particular environmental information. In this context, the Council has been proactive in a number of areas: planning information is available through the planning portal; and Council policies can be accessed through the on-line policy register. In particular, reports and information relating to subjects of public interest and concern (e.g. Mortonhall and statutory repair notices) have been proactively published – an approach publicly endorsed and welcomed by the Scottish Information Commissioner.

3.13   The Council's publication of all FOI responses has also been praised by the Scottish Information Commissioner as a positive commitment to openness and transparency. The Council is one of very few public authorities in Scotland who publish their FOI responses. Open data initiatives and the introduction of a Council public performance portal in 2015 will provide further positive means to make more information available for reference and re-use.

Receiving a request for information

3.14   The Code recommends that it is good practice for authorities to provide guidance for the public which explains how to make a valid information request, and the procedure the authority will follow once a request has been received.

3.15   The Council's approach to receiving requests is detailed in the Council's FOI Policy and internal FOI toolkit and covers all the areas detailed in the code, including: dealing with valid and invalid requests; requests made through social media; requests made on behalf of third parties; reporting request progress to applicants; and acknowledging requests.

3.16   For applicants who make requests to the authority, the Council's website provides guidance on how to make an FOI request (including an on-line application form for applicants) and explains the FOI process, including applicant rights of appeal. This information is also available in a hardcopy format if required.

3.17   To assist applicants, the Council provides a central point of contact for applicants through the Information Governance Unit with dedicated email and phone details; however, requests can be received anywhere within the Council and do not need to reference FOI legislation. To support staff in recognising and processing requests, guidance and training is available on the ORB. This is supported by regular staff communications.

Providing advice and assistance to applicant, seeking clarification of requests, charging a fee

3.18   The Code emphasises the statutory requirement for authorities to offer assistance and advice to applicants at all stages of a request (section 15 of FOISA), with particular reference to seeking clarification of requests and charging fees.

3.19   Where a public authority has received a valid request, but needs more information from the applicant to identify and locate the information, the authority can ask the applicant to clarify what information is sought, but should do so as soon as is reasonably possible.

3.20   To ensure that clarification can be provided as quickly as possible, all service areas are asked to complete an assessment form when a request for information is allocated to them. The form asks them to confirm that they are clear about what information is being requested, and that they hold the requested information. Under the Council's FOI processes, the form must be returned to the Information Governance Unit within five working days to ensure that clarification, if required, can be sought without delay.

3.21   Under FOI legislation, authorities are entitled to charge for the direct and indirect costs incurred in locating, retrieving and providing information. It is Council policy to charge for responding to FOI requests. In line with the recommendations contained within the Code, the Council uses a set formula to ensure that projected costs and fees notices, when applied, are accurate and detailed. This is set out in the Council's FOI assessment form.

Locating and retrieving information and record keeping

3.22   The Code emphasises the importance of good records management to allow staff to locate and retrieve information easily, and to provide reassurance that all

relevant sources where the information might be held within the organisation have been checked.

3.23   The Public Records (Scotland) Act 2011 places obligations public authorities (including the Council) to adopt and maintain a records management plan (RMP). The Council's RMP will be submitted to the Keeper of the Records of Scotland in May 2015 and will be a key driver in improving records management practices across the Council. Records management developments and risks will be monitored and assessed by the Information Council, in line with the Council's Information Governance Strategy and Records Management Policy.

3.24   To provide assurance that all that all relevant sources of information have been checked, Council services are routinely asked to complete a search form, particularly when services state that they hold no relevant information. The form is a key element of the Council's FOI process and provides sufficient evidence that appropriate searches of hardcopy and electronic records has been carried out. This form has also been adopted for use by three other Scottish Councils and has been highlighted by the Office of the Scottish Information Commissioner as an example of best practice.

Consulting third parties

3.25   Under FOI there is a presumption in favour of disclosure, subject to limited exemptions and exceptions. This also applies to information which has been supplied to the Council from third parties (e.g. tenderer information). As highlighted in the Code, there is a requirement to ensure that third parties which supply information to the Council are aware of the Council's duty to comply with FOI legislation. The Council's corporate tendering and contract documentation contain appropriate FOI clauses detailing the Council's obligations under FOI.

3.26   The Code also provides guidance on the circumstances surrounding the possible need to consult with third parties, particularly around the effect that the disclosure of information may have on a third party. This consideration is detailed in the Council's FOI Policy with the appropriate actions to be taken detailed in the Council's FOI toolkit.

The disclosure of information relating to contracts or procurement processes

3.27   The Code provides guidance in dealing with and making available contractual and procurement-related information, whether proactively or in response to an information request. The Council has guidance and a checklist concerning the disclosure of procurement related documentation to provide consistency in this area, ensuring that the public's right to information is balanced with the need to protect legitimate commercial interests. However, the revised Code has set out clear expectations concerning the disclosure of information concerning long term

and high value contracts. The Council's guidance is currently being revised to include additional advice.

Responding to requests

3.28   The Code makes reference to a number of areas and practices when responding to requests, including where excessive costs apply; where information is otherwise accessible; where information is not held; and dealing with business as usual requests. All of these areas are covered in great detail through the Council's FOI Policy, procedures and training, and are subsequently followed in practice.

3.29   In a practical context, the Code highlights the importance of template letters to ensure a consistent approach in responding to requests for information. The Council has over 80 template letters which ensure that key rights are always provided to applicants at each stage of the FOI process (e.g. the right to a review). They also provide explanations where exemptions or exceptions are being used (including where applicable consideration of the public interest test) to ensure that all refusal notices meet with the requirements of the FOI regimes.

3.30   When formulating responses, the Code highlights an expectation that authorities will put in place measures to achieve both consistency and rigour in their responses to requests and requests for review. As part of the Council's FOI process, all responses are checked for accuracy and quality before they are issued.

Handling reviews

3.31   If an applicant writes to the Council expressing dissatisfaction with the way in which the Council has dealt with their request following a response, the Council should treat this as a formal request for review, provided it meets statutory requirements. The applicant does not need to specifically ask for a review.

3.32   In line with the requirements detailed in the Code, the Council has appropriate and accessible procedures in place for handling reviews. Statutory rights to request a review are clearly stated in all correspondence and guidance; all reviews are routed directly to the Council Review Officer to ensure prompt action; all relevant documentation and associated correspondence pertaining to a request are held in the FOI case management system, helping to ensure timeous responses; and the review process is completely independent to ensure objectivity in deciding if a request has been dealt with appropriately.

3.33   To prevent recurrence of any failures, all reviews are discussed at weekly FOI Team meetings to ensure lessons are learnt. When appropriate, issues are fed back to service areas to improve practices.

<u>Appeals to the Scottish Information Commissioner</u>

3.34   Where an appeal has been made to the Commissioner regarding an authority's handling of an information request, the Commissioner will provide the authority with an opportunity to comment on the application.

3.35   To ensure compliance with the legislation and the recommendations detailed in the Code, the Council follows the Scottish Information Commissioner's investigations: A guide for Scottish public authorities. In particular, the FOI Review Officer prepares for potential appeals to the Scottish Information Commissioner at the review stage to ensure that detailed submissions (if required) can be provided within the 10 working day timescale set out by the Commissioner.

3.36   All review decisions are discussed at weekly FOI Team meetings, including decisions issued to other public authorities, to ensure best practice recommendations are incorporated into the Council's approach to FOI. All decisions issued in relation to the Council are highlighted to senior management, including improvement actions (if required).

<u>Self-assessment modules</u>

3.37   In October 2014, the SIC launched a self-assessment toolkit consisting of a number of stand-alone modules to help authorities review and improve their FOI performance. Two modules have been launched to date concerning compliance with statutory timescales and searching for, locating and retrieving information. The Information Governance Unit has undertaken the self-assessment exercise for both modules with very good to excellent level of effectiveness recorded.

3.38   The Information Governance Unit will continue to use the self-assessment toolkit as further modules are launched. This process will be monitored by the Information Council and will be used to identify improvement areas, ensuring that the Council's FOI arrangements remain compliant and fit for purpose.

<u>FOI performance</u>

3.39   Council compliance with FOI legislation and associated codes of practice is reflected in improved performance levels. During 2014, the Council received 2517 requests for information which required a formal response under FOI. Of those responses, 90% were answered within statutory timescales. The current response rate for 2015 is 94%. This figure is the highest Council average since the introduction of FOI legislation in 2005.

3.40   Similarly, in responding to applicant requests for review there have been significant improvements. During 2014, 123 requests were dealt with at the internal review stage – 5% of the total requests received by the Council. Of those requests 95% were answered within statutory timescales. The current response rate for 2015 is 98%. While improved response times are encouraging:

a 100% response rate within statutory timescales is not a target, but a statutory obligation.

3.41 During 2014, 16 requests were referred to the Scottish Information Commissioner – 0.6% of the total requests received by the Council. Of the 16 requests: 5 were found in favour of the applicant; 6 were found in favour of the Council; and 5 were partially up-held for the Council.

Measures of success

4.1 The promotion of an FOI culture is less tangible and difficult to measure. To provide a more complete measure of success and improvement, FOI will be included as part of an information governance maturity assessment to determine progress (on an annual basis) against the Council's Information Governance Framework and associated policies.

Financial impact

5.1 There are no direct financial impacts as a result of this report.

Risk, policy, compliance and governance impact

6.1 There are positive impacts, including increased accountability, transparency and efficiencies concerning Council actions and operations; however, there are also significant risks around reputational damage to the Council and non-compliance with legislation.

Equalities impact

7.1 There are no equalities impacts as a result of this report.

Sustainability impact

8.1 There is no sustainability impact as a result of this report.

Consultation and engagement

9.1 The nature of the FOI process necessitates regular engagement with Council services to ensure that statutory obligations are met.

9.2   FOI performance is reported to the Corporate Management Team on a quarterly basis.

9.3   Revisions to FOI arrangements are facilitated through the Information and Data Councils – groups with Council-wide representation.

Background reading/external references

[City of Edinburgh Council of 9 December 2004 – FOI Charging of Fees](#)

[Finance and Budget Committee of 6 June 2013 – Freedom of Information Update](#)

[City of Edinburgh Council of 31 January 2013 – Governance Review: Operational Governance – Information Compliance](#)

[Corporate Policy and Strategy Committee of 30 September 2014 – Information Governance Policies](#)

[Corporate Policy and Strategy Committee of 2 December 2014 – Information Governance Update](#)

[Environmental Information (Scotland) Regulations 2004](#)

[Freedom of Information (Scotland) Act 2002](#)

[INSPIRE (Scotland) Regulations 2009](#)

[Office of the Scottish Information Commissioner](#)

[Public Records (Scotland) Act 2011](#)

[Code of Practice on Records Management under Section 61 of FOISA](#)

[Code of Practice on the Discharge of Functions by Public Authorities under Section 60 of FOISA and Section 18 of the EIRS](#)

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Links

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Council outcomes	
Single Outcome Agreement	CO25 – The Council has efficient and effective services that deliver on objectives.
Appendices	None