



Freedom of Information (Scotland) Act 2002

Guidance for undertaking Reviews

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A) Reviews

1. Introduction: In terms of section 20 of the Freedom of Information (Scotland) Act 2002, an applicant who is dissatisfied with the way in which a public authority dealt with a request for information may require the authority to review its actions and decisions taken. This guidance deals with the procedures for undertaking a review within LVJB.

2. Reasons for an applicant to Request a Review

- a) Receipt of a Refusal Notice for an Absolute Exemption
- b) Receipt of a Refusal Notice for a Non Absolute Exemption
- c) Receipt of Notice that information is not held
- d) Failure of LVJB to respond to request within 20 working days
- e) Failure of the LVJB to provide suitable guidance and assistance
- f) Receipt of a Fees Notice

* A notice is not issued for excessive costs

3. Circumstances where a Refusal Notice is not issued

- Vexatious request.
- Excessive costs.

4. Time limits for requesting a review are within 40 working days

- Of receipt of a Refusal Notice.
 - From the end of the 20 working day period for responding to the original request
- LVJB has discretion to Review the decision if time limit exceeded, where appropriate.

5. Format of Request

- The request must be in writing (or alternative recordable format).
- The request must state the applicants name and an address for correspondence purposes (e-mail address is acceptable)*.
- The request must state the reason for the dissatisfaction (the applicant does not have to expressly request a review).

*pseudonyms are not accepted – refer to Notice Templates for sample letter to be issued.

6. Refusal to Review

- In terms of section 21(8) the authority does not have to carry out a Review if it has decided that it did not have to answer the request because it was one it has already dealt with (a repeated request) or was a vexatious request.
- If the applicant is dissatisfied with the decision not to carry out a Review they can make an application for determination by the Scottish Information Commissioner, within 6 months of receipt of the decision to refuse the Review.

7. The Review Process

The review procedure should be fair and impartial and it should enable different decisions to be taken if appropriate.

- Lanarkshire Valuation Joint Board's Reviewing Officer will carry out a review within 20 working days of receipt of the request for a review and will write to inform the applicant of the outcome of the review.
- The Reviewing Officer may seek advice from SLC Legal Services.
- The Review process must fully address the needs of Disabled applicants.

8. Reviewing Officer

- LVJB's Reviewing Officer will be a senior official who has not been involved in the original decision.
- The reviewer should record the process undertaken when considering the review request and produce a review report in order that LVJB can learn from any good or bad practices identified. Where the review report highlights procedural errors, LVJB should promptly take steps to prevent such errors reoccurring.

9. When an applicant complains that a response to their initial request has not been provided

An applicant may submit a complaint to LVJB if they have not received a response to their request within the statutory timescales. The complaint should be treated as a request for a review and LVJB will:

- deal with the procedural failure, apologise to the applicant and take the necessary steps to prevent a similar occurrence in the future; and
- make a decision on the initial information request itself, i.e. either provide the information requested or withhold it if appropriate, explaining which exemptions apply; and
- inform the requester of their right, if dissatisfied with the response, to make an application to the Scottish Information Commissioner

In such circumstances, LVJB may consider it appropriate for the original case-handler to continue dealing with the request and issue the review response, rather than appointing a separate reviewer to start the case afresh.

10. Outcome of the Review - the Reviewing Officer must

- Handle the requirement for a review within 20 working days after receipt of the request.
- Determine if the correct procedures have been followed. The officer should apologise to the applicant if the review finds that procedures have not been followed and consider how to prevent this happening again.
- Decide whether the information should be disclosed. Where the decision is that information should be disclosed then this must be disclosed promptly and no later than the 20 working day period for carrying out the review.
- Decide whether the information is exempt. They may decide to stick with the original decision or modify it or provide more information.
- Issue a Review Outcome Notice (refer to Notice Templates for sample notices)
- Whatever they decide to do they must tell the applicant and explain why they have decided to act as they have.
- inform the applicant of their right, if dissatisfied with the response, to make an application to the Scottish Information Commissioner

11. If the applicant is dissatisfied with the outcome, following the Review of the decision

They can make an application for determination by the Scottish Information Commissioner within 6 months. The Commissioner will then investigate the decision and determine whether the applicant should receive the information requested in full or in part. The applicant and LVJB will be notified of the decision.

The Commissioner can be contacted at the following address: -

Scottish Information Commissioner,
Kinburn Castle,
Doubledykes Road,
St Andrews, Fife
KY16 9DS

Telephone: 01334 464610
Fax: 01334 464611

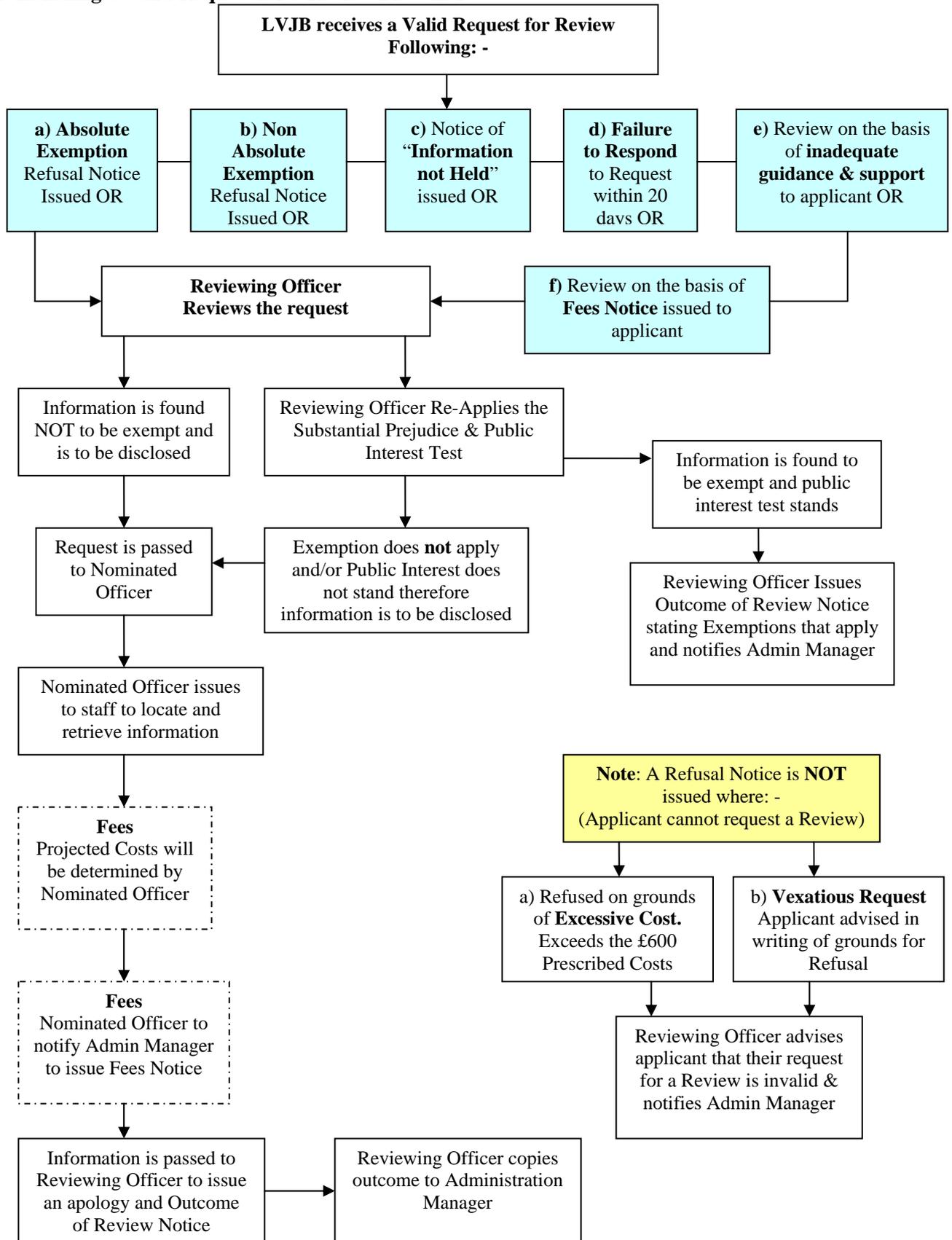
12 Appeal Rights (Section 56)

Following the Commissioners decision both the applicant and LVJB may appeal to the Court of Session on a point of law.

13 Criminal Offences

It is a criminal offence for the LVJB or any of its employees to destroy or erase information after a request has been received. Such cases are dealt with by the Sheriff Court and the offence carries a fine of up to £5,000.

14. Handling a Valid Request for a Review Flowchart



15. Sample Outcome of Review Notice – Previous Exemption

Our Ref: Your Ref:
Tel: (01698) 476004 Fax: (01698) 476010
Date.
If phoning or calling please ask for

Dear Sir/Madam,

Freedom of Information (Scotland) Act 2002: Section 21(4) Outcome of Review Section.... *(input the original exemptions applied and add any additional if appropriate)*

I refer to your request for a review received on the following the Exemption notice issued to you on the

In terms of section 21 (4) of the Act the authority may:

- a) confirm a decision complained of, with or without such modifications as it considers appropriate:
- b) substitute for any such decision a different decision: or
- c) reach a decision, where the complaint is that no decision had been reached.

I have undertaken a review of your original request and the exemptions applied and I am satisfied that the.....*(restate the original reason and if appropriate add any further exemption/s)*

Appeal to Scottish Information Commissioner

If you are dissatisfied with the outcome following the Review of the decision you can make an application for determination by the Scottish Information Commissioner, within 6 months of receipt of notification. The Commissioner can then investigate the decision and determine whether you should receive the information requested in full or in part. The Commissioner can be contacted at the following address: -

Scottish Information Commissioner
Kinburn Castle
Doubledykes Road,
St Andrews, Fife
KY16 9DS

Telephone: 01334 464610
Fax: 01334 464611

In terms of section 56 both the applicant and Assessor may Appeal to Court of Session, on a point of law, following the Commissioners decision.

Yours sincerely,

Assessor and Electoral Registration Officer

16. Sample Outcome of Review Notice – Previous Disclosure

Our Ref:
Your Ref:
Tel: (01698) 476004 Fax: (01698) 476010
Date: .
If phoning or calling please ask for

Dear Sir/Madam,

Freedom of Information (Scotland) Act 2002: Section 21(4) Outcome of Review

I refer to your request for a review received on the following the disclosure of information to you on the

In terms of section 21 (4) of the Act the authority may:

- a) confirm a decision complained of, with or without such modifications as it considers appropriate:
- b) substitute for any such decision a different decision: or
- c) reach a decision, where the complaint is that no decision had been reached.

Your request, received on the was for

I have undertaken a review of your original request and the information provided to you on and I am satisfied that the information provided to you is the information held.
(*expand explanation where appropriate*)

Appeal to Scottish Information Commissioner

If you are dissatisfied with the outcome following the Review of the decision you can make an application for determination by the Scottish Information Commissioner, within 6 months of receipt of notification. The Commissioner can then investigate the decision and determine whether you should receive the information requested in full or in part. The Commissioner can be contacted at the following address: -

Scottish Information Commissioner Telephone: 01334 464610
Kinburn Castle Fax: 01334 464611
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In terms of section 56 both the applicant and Assessor may Appeal to Court of Session, on a point of law, following the Commissioners decision.

Yours sincerely,

Assessor and Electoral Registration Officer

B) Exemption Guidance

1. Introduction

Section 2 of the Act details the effect of exemptions where a public authority may refuse a request for information. Information is exempt from the Act where it falls under a particular exemption and there are two main categories of exemption (as listed in Part 2 of the Act):

2. Absolute Exemptions:

These exemptions identify instances where there is no legal right under the Act to access the information. These exemptions are **not** subject to the public interest test:

- Section 25 – Information otherwise accessible;
- Section 26 – Prohibitions on disclosure;
- Section 36(2) – Confidentiality;
- Section 37 – Court records etc;
- Section 38(1) (a), (c), (d) – Personal information.
- Section 38(2)(a)(i) – Personal information (where the data protection principles are not contravened);
- Section 38(2)(b) – Personal information (where disclosure of information would contravene any of the data protection principles if the exemptions in section 33A(1) of the DPA were disregarded).

3. Qualified (Non Absolute) exemptions:

These exemptions **are** subject to the public interest test. Where a public authority has identified a possible exemption the authority must consider whether there is a greater public interest in providing the information to the applicant or in maintaining the exemption:

- Section 27(1) – Information intended for future publication;
- Section 27(2) – Information intended for future publication (this exemption is also subject to the harm test);
- Section 28 – Relations within the United Kingdom (this exemption is also subject to the harm test);
- Section 29 – Formulation of Scottish Administration policy;
- Section 30 – Prejudice to effective conduct of public affairs (this exemption is also subject to the harm test);
- Section 31(1) – National security and defence;
- Section 31(4) – National security and defence (this exemption is also subject to the harm test);
- Section 32(1)(a) – International relations (this exemption is also subject to the harm test);
- Section 32(1)(b) – International relations;
- Section 33(1)(a) – Commercial interests and the economy;
- Section 33(1)(b) – Commercial interests and the economy (this exemption is also subject to the harm test);
- Section 33(2) – Commercial interests and the economy (this exemption is also subject to the harm test);
- Section 34 – Investigations by Scottish public authorities and proceedings arising out of such investigations;
- Section 35 – Law enforcement (this exemption is also subject to the harm test);
- Section 36(1) – Confidentiality;

4. The Public Interest Test

The public interest is not defined within the Act but it has been variously described as something which is of serious concern and benefit to the public and not merely something of individual interest. It has also been held that public interest does not mean “of interest to the public” but “in the interest of the public”, i.e. it serves the interests of the public. Consider the circumstances of each case in light of emerging guidance or best practice. Is the public interest in disclosure outweighed by the public interest in withholding the information.

5. Absolute Exemption Substantial Prejudice Harm Test: Is it real, actual and of significant substance.

6. Applying the public interest test

Where a **qualified (non absolute) exemption** applies to information that is held (e.g. substantial prejudice would result from disclosure of the requested information), a public authority will still be required to consider the public interest in making the material available. A public authority will need to make a judgement based on the circumstances of each case and in the light of any emerging guidance or best practice.

Where a qualified (non absolute) exemption is claimed under Part 2 of the Act a public authority must, in addition, consider whether to release the information in view of the public interest. This is best viewed as a two stage test:

Stage 1: Does the information fall under the terms of the exemption? If no, then the information should be released. If yes, go on to consider the public interest test.

Stage 2: Apply the public interest test, and if the public interest in disclosing the information is greater than the public interest in withholding the information, the information must be released. Where competing public interests have to be considered and the public interest in disclosing or not disclosing information is judged to be evenly balanced, public authorities should always decide in favour of disclosure.

Where a decision is made not to release information because the information is considered to be exempt under Part 2 of the Act, LVJB must provide reasons for its decision (including, where applicable, the consideration of the public interest test) in a formal refusal notice to the applicant.

The refusal notice must also tell the applicant about their right to request a review of the authority's decision and then to seek a determination from the Scottish Information Commissioner.

7. Scottish Information Commissioners Guidance on Factors which may inform a decision about the public interest include:-

a) The general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation. This goes to the heart of freedom of information legislation. Without an adequate knowledge of the basis upon which decisions are made, the public will not have an opportunity to call public authorities to account; nor can they hope to participate in the decision-making process and contribute to the formation of policy and legislation if that process is hidden from view.

b) Whether disclosure would contribute to the administration of justice and enforcement of the law including the prevention or detection of crime or the apprehension or prosecution of offenders. The public interest must be paramount in situations where a person considering whether to withhold or disclose information has reasonable grounds for believing that a failure to make the information available would be likely to prejudice the prevention or detection of crime. In such an instance it is not enough simply to believe that that an individual to whom the information applies may have been involved in fraudulent activity, there must be a substantial chance rather than a mere risk that harm would occur if the information was not disclosed.

c) Whether disclosure would affect the economic interests of the whole or part of the United Kingdom. This may include instances where the release of information would impede the financial operations of the Scottish Parliament or where the UK government's ability to run the economy would be affected. Where it is claimed that the economic interests of the whole or part of the UK would be affected an authority would have to establish a clear and direct link between the disclosure of the specific information and the probable harm that is likely to result from that disclosure. The information could consist of documents that contain sensitive financial details of exchange rates, interest rates or taxes.

d) Whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money. Public authorities should consider the public interest in ensuring maximum openness in relation to the use of public funds. The Irish Information Commissioner has stated, "Such openness is a significant aid to ensuring effective oversight of public expenditure, to ensuring the public obtains value for money, to preventing fraud and corruption and to preventing the waste or misuse of public funds".

e) Whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment. As always with the consideration of the public interest test, much will depend of the circumstances of the case in question, and this can be seen with two relatively similar Canadian cases. Where a journalist requested records from Transport Canada in relation to violations of the Aeronautics Act and Regulations by commercial pilots, the Commissioner was not convinced that the public interest served by disclosure would be outweighed by the invasion of privacy that would result. He accepted the argument that Transport Canada's regulatory role adequately serves the public interest in airline safety without the need for the public to intrude into the privacy of pilots. On the other hand, when a journalist requested information from the Transportation Safety Board concerning air traffic control tapes and transcripts relating to a plane crash, the Commissioner decided that the Board had not considered the public interest properly and that public interest in air safety outweighed any privacy considerations.

f) Whether disclosure would impact adversely on safeguarding national security or international relations. Examples of potential harm to international relations include the risk that disclosure would impede negotiations, undermine frankness and candour in diplomatic communications, and impair confidential communications and candour between governments or international bodies. Where information relates to ongoing activities, some of that information may remain sensitive for many months or years after a particular decision is made. However, it should be recognised that the sensitivity of such information generally reduces over time. It should also be noted that the test is one of *adverse* impact.

g) Whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions. Where disclosure would allow the public to assess the performance and scrutinise the activities of a public authority and there is a risk of danger to public health or safety, such as in the regulation of nuclear power plants, public concerns are unlikely to be allayed by an authority simply advising the public that reviews of operations are conducted against the highest possible standards. The authority should instead provide enough information for the public to assess the adequacy of such a safety program itself in meeting its objectives. Similarly, the existence of other accountability mechanisms should not be used as an argument for the non-disclosure of information under the Act in relation to the legal responsibilities of a public authority.

8. Absolute & Non Absolute Exemptions, Content of Refusal Notices:

- Issue within 20 working days of receipt of information request
- Advise the applicant we do not hold the information (section 17)
- Advise the applicant that we hold the information but are Refusing to disclose as an Exemption applies
- Inform the applicant which Exemption applies and Why
- Inform the applicant they can "Request a Review"
- Inform the applicant of Appeal procedures
- On the grounds of National Security you can refuse to disclose and you do not need to advise whether or not the information is held. (applies to Sect 28-35, 39(1) and 41
- For non absolute exemptions you should state the reason for claiming the public interest in maintaining the exemption outweighs the public interest in disclosure (sect 60 part 71)

a) Request is Vexatious/Too Costly

If refused on basis of **Vexatious Request** or **Too Costly** the Public Authority need not issue a Refusal Notice but you have to write and advise applicant of the **grounds** for refusal. In this circumstance you would **not** include the right to request a Review.

b) LVJB Exemption Notice Templates: sample exemption notices for us by LVJB have been created and are available on the I drive under Management/Freedom of Information.

c) Responsibility: determination and application of Exemptions are dealt with by LVJB's Administration Manager acting as the Information Officer.

d) SIC Exemptions Briefing Notes: available on the I drive under Management/Freedom of Information.

9. FOI Bank Holidays: What is meant by "working day"?

Section 73 of FOISA defines "working day" as any day other than a Saturday, a Sunday, Christmas Day or a day which, under the Banking and Financial Dealings Act 1971, is a bank holiday in Scotland.

The 1971 Act sets out the bank holidays for Scotland as follows:

- New Year's Day (unless New Year's Day happens on a Sunday, in which case 3rd January is treated as a bank holiday)
- 2nd January (unless 2nd January happens on a Sunday, in which case 3rd January is treated as a bank holiday)
- Good Friday
- The first Monday in May
- The first Monday in August
- St Andrews Day
- Christmas Day (unless Christmas Day happens on a Sunday, in which case 26th December is treated as a bank holiday).

In addition, special days can be appointed under the 1971 Act as bank holidays (either additional or in place of bank holidays which fall on a Saturday or Sunday) subject to Royal Proclamation each year. These include Boxing Day, which has been an additional bank holiday in Scotland since 1974 and the last Monday in May which has been a bank holiday since 1978.

The 1971 Act also enables the Queen to appoint substitute bank holidays in any one year by Royal Proclamation. Substitute days are customarily appointed for all UK bank holidays which fall on a Saturday or Sunday. Where any of the dates fall on a Sunday, the Act substitutes the following Monday for that date. If any fall on a Saturday (or if Boxing Day falls on a Saturday or Sunday), the Royal Proclamation includes substitute days for these days. The statutory bank holidays for Scotland are set out in a table on the Scottish Government website.

