

# A Practical Guide to the Freedom of Information Act 2000

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ISBN: 0 9527960 9 0

Published by The Constitution Unit  
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First published March 2001



## The Importance of Freedom of Information

“I do not believe that the instinctive Whitehall reaction to seek to withhold Government documents from public inspection is likely to change.”<sup>1</sup> Sir Richard Scott.

“Public authorities should begin to plan the process of adapting to the requirements of the Act in order to ensure a smooth transition.”<sup>2</sup> Elizabeth France.

The Freedom of Information Act (FOIA), which became law on 30 November 2000, is intended to foster a culture of openness - making government more accountable and enhancing public participation in the democratic decision-making process. It opens the door to more informed public discussion and understanding of the process of government.

The Act establishes a right of public access to information and imposes obligations on public authorities to disclose information, subject to a range of exemptions. It will assume a central role in government’s dealings with the public, applying equally to matters of routine and controversy.

The public will expect public authorities:

- To know about FOI
- To follow the set procedures
- To be helpful in overcoming problems
- To disclose information.

## Who is this guide designed for?

This guide is designed primarily for officials in central government departments who may be involved in the handling of FOIA requests, but who are not FOIA specialists.

It is intended to offer a succinct and easy-to-use introduction to the FOIA and to be complementary to more detailed official advice which will be available from the Home Office and the Information Commissioner.

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<sup>1</sup> Report of the inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions. London, 1995-96, HC115, vol. iv, para. K6.16

<sup>2</sup> 'Information Commissioner urges Public Authorities to start planning' News Release 30 Jan 2001.

It covers the essential information you need to know about the Act, and gives guidance on what you need to do in normal situations to apply it. It cannot, however, replace the need to take legal advice, as appropriate, on the proper application of the Act.

The guide will be revised and updated as more detailed information becomes available. If you spot any inaccuracies or omissions, please inform us so that we can correct the guide in later editions. **We would particularly welcome additional practical tips and examples of best practice.**

This guide has been produced by Jim Amos and Dick Baxter (Honorary Senior Research Fellows), Jeremy Croft (Senior Research Fellow) and Robert Hazell (Director) of the Constitution Unit, University College London. The Unit offers a range of training and consultancy services on the administration of FOI.

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## 1. Introduction

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The FOIA will replace the current Code of Practice on Access to Government Information, which has been in operation since 1994 (revised in 1997). The underlying principles are similar. Departments have been operating the code effectively for 6 years. Why then is the FOIA important and why is special attention and training needed?

There are four main reasons:

- The FOIA gives legal rights to applicants and imposes legal duties upon departments, as compared to the voluntary code where 'enforcement' had to involve an MP and the Ombudsman.
- Ministers have stressed repeatedly that they see it as a catalyst for change to a culture of greater openness.
- It is part of a wider group of policies to modernise government in the age of the internet, where much more information is expected to be published regularly and made available electronically.
- Public awareness of the opportunities and rights provided by the FOIA is likely to be much greater than is the case with the code, leading to many more requests including more contentious ones.

The public image of a department may be affected strongly by its publication policy and the way in which requests are handled, in particular early ones. Efficiency, courtesy and helpfulness in guiding applicants can be as important as the amount of information which is released. The FOIA provides an opportunity for a department to engage positively with its clients and with the wider public.

In addition to the differences between a code of practice and a law, there are some important practical differences between the FOIA and the current code:

- The requirement to adopt publication schemes, approved by the Information Commissioner.
- The wide role of the Information Commissioner to promote good practice, and to give information about (in effect promote) the Act to the public.
- An easy appeal process for a dissatisfied applicant to the Information Commissioner, and from her to the Information Tribunal.
- The ability of the Information Commissioner to impose her view of the balance of the public interest in disclosure over the judgement of a department.

- A code of practice on records management, establishing the standard which authorities across the public sector must reach.

This guide focuses upon the handling of requests made under the FOIA, and does not address in detail, related questions of records management, publication schemes, and charging policies. It does not apply to the different FOI regime that will apply to the devolved bodies in Scotland.

## **2. Overview of the Act**

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The Act can appear to be quite complex in the way in which different provisions inter-relate. However, in essence, it follows a basic structure common to FOI laws in other countries:

There is a general right of access to information ‘held’ by public authorities. This includes both a right to be told whether information exists as well as the right to receive information.

The applicant must provide: sufficient detail about the information to enable an authority to identify it; basic contact details to enable a reply to be sent; and must pay fees where these are required.

The right of access to information is subject to a range of exemptions, covering for example, security, international relations, formulation of government policy, and commercial confidentiality. A number of the exemptions are ‘absolute’. Once it is decided that the information is properly subject to an absolute exemption, no release is required under the FOIA (although discretionary release is still possible). In the case of the other exemptions, once it is decided that one or more of these exemptions should apply, the department is then nevertheless required to release the information unless the public interest in applying the exemption is greater than the public interest in disclosure.

There are arrangements for enforcement and appeal with a substantial role for the newly created Information Commissioner, who is charged with the promotion of good practice, and who will adjudicate appeals from dissatisfied applicants, and can require disclosure.



## 3. More detailed provisions

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### 3.1 General right of access

The right of access to information applies to anyone, natural or legal persons worldwide. There is no requirement to be a citizen, to be resident in the country or to give a reason for the request.

### 3.2 Which authorities

A very wide range of authorities are covered. They include all government departments, Parliament, local authorities, health authorities, educational establishments in receipt of state funding, police authorities, and over 400 other public bodies such as The Post Office, The Civil Aviation Authority, and the Tate Gallery, which are named separately. It has been stated in Parliament that the Act will apply to some 50,000 separate bodies.

#### **Practical Tip**

If you want to find out if a body is covered by the Act, look in Schedule 1. But note that the Secretary of State may by order amend this Schedule.

The Secretary of State also has powers to designate by order as a public authority subject to the FOIA, 'any person' who appears to be exercising functions of a public nature or is providing public services under contract with a public authority.

### 3.3 Charges

An authority may charge a fee for dealing with a request. This will have to be calculated according to 'Fees Regulations'. The current draft states that the maximum fee shall not exceed 10% of the prescribed costs and the disbursements. 'Prescribed costs' means the costs reasonably incurred in locating and retrieving the information. They do not include any costs spent deciding how much information to release, nor the costs of consulting with third parties. 'Disbursements' are the direct costs of communicating the information requested.

#### **Practical Tip**

Open a separate file for each FOI request which is likely to cause a significant amount of work. Keep a timesheet on the inside cover. Record on it the time spent in locating and retrieving the information, and the number of photocopies made.

Where the 'prescribed costs' are £500 or more, the authority is not obliged to comply with the request.

It would be prudent for an authority to work on the basis that such costs are calculated on the basis of reasonably organised and accessible records that are created, held and managed in compliance with the Lord Chancellor's Code of Practice on the management of records.

### **3.4 Publication schemes**

The Act places a duty on public authorities to adopt, implement and operate publication schemes. These must be approved by the Information Commissioner. Public authorities may develop their own schemes for the Information Commissioner's approval or make use of model publication schemes that the Commissioner proposes to develop. Such schemes must specify the classes of information the authority publishes or intends to publish, specify the manner of publication, and any charges.

In planning publication schemes, public authorities must have regard to the public interest in allowing public access to its information, and in the publication of reasons for its decisions.

At a minimum publication schemes must specify:

- the classes of information which the public authority publishes
- the manner in which information of each class is published
- whether the material is available free of charge or on payment.

Once approved, it will be up to the authority to decide how to publish information about its scheme. Publication schemes must be reviewed periodically.

One of the benefits to an authority that will arise from a publication scheme is that an exemption in S.21 will apply to the information that is published (information accessible by other means). This is an 'absolute' exemption and extensive publication may assist an authority to reduce the costs it might otherwise incur in meeting the requirements of the FOIA. However, care will need to be taken in specifying the classes of information to be published, since an authority will be expected to publish exactly what it specifies in its scheme. This is an important aspect of the FOIA and the Information Commissioner is giving priority to the development of guidance for authorities in this area.

**Practical Tip:**

Publish as much as you can through your publication scheme. It will save you time having to respond to individual requests. You can decide what to publish as part of a regular process, rather than having to decide what to provide to an applicant within the timescale of the Act.

### 3.5 Responding to requests

Normally, public authorities will have to respond to requests within 20 working days. In cases where the information is subject to an exemption and the authority is required to consider the balance of the public interest, then the response must be within a 'reasonable' time. However the authority is still required within the 20 day period to issue a notice stating that an exemption applies, and including an estimate of the date by which a decision will be made.

Where the authority decides that the public interest requires that the information be withheld, it must supply the applicant with a notice giving its reasons within a reasonable time.

**Practical Tip:**

These deadlines are very tight. Where possible get the applicant's telephone number and email address. Establish direct contact. Find out what the applicant really wants. It can save a lot of time, and help fulfil your duty to advise and assist requesters.

### 3.6 Refusals

Public authorities are required to give notice of refusals within 20 days, specifying the exemption in question and stating why the exemption applies. Where a refusal is based upon the cost of compliance or where it judges the request to be vexatious or repeated, then it must give the applicant a similar notice with reasons.

These notices must contain particulars of any procedure the authority has for dealing with complaints, and particulars of the right to apply to the Information Commissioner for a decision.

**Practical Tip:**

The Information Commissioner in Ireland in his 1999 Annual Report stressed that better communication of decisions can cut out unnecessary

**Practical Tip: Severing Information**

- You must disclose information which is not exempt. This will sometimes involve disclosing some of the information requested, even if the rest is withheld.
- Make a photocopy of all the documents requested. Mask the passages which are not to be disclosed. Make a second photocopy so that these passages appear blank.
- Annotate in the margin against each blank passage the section of the Act under which this passage is claimed to be exempt.
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**3.7 Implementation**

All provisions of the Act must come into force by November 2005 at the latest. The Secretary of State may, by order, specify different dates by which the Act will apply in full to different authorities.

It is expected that the Act will apply to central government departments from mid 2002, local authorities from late 2002, with health authorities and education establishments to follow in later years.

Although authorities do not need to comply with the FOIA until brought within its scope, the Act is fully retrospective in terms of the information covered.

### **3.8 Exemptions**

There are two general categories of exemptions; those which are absolute and those where there is a duty to consider the public interest in disclosing information.

- *Absolute*

Out of the 23 exemptions listed in the Act, eigh

In the case of any of these absolute exemptions, there is no requirement on the authority to consider the public interest in possible disclosure.

This does not mean that disclosure is not required in all cases where one of these exemptions apply. It means that disclosure is not required by this Act. For example, disclosure of personal information may be required under the provisions of the Data Protection Act; and of information provided in confidence under exceptions to the common law duty of confidence.

In the event of a complaint about non-disclosure, the Information Commissioner will decide whether the information in question is properly subject to the exemption that has been applied.

*Subject to public interest test*

The majority of exemptions are subject to a public interest test:

S.22 Information intended for future publication

S.24 National security (excluding matters covered by the absolute exemption at S.23)

S.26 Defence

S.27 International relations

S.28 Relations with the UK (coect to t on their relations )]T15TD0.0016 Tc0.00031Tw[(S.27 L coe)-99cno req

- the public interest in government information being accessible
- whether the document would disclose reasons for a decision
- whether disclosure would contribute to a debate on a matter of public interest
- whether disclosure would enhance scrutiny of government decision making processes and thereby improve accountability and participation
- potential or actual embarrassment [to government] is not a valid criterion.

The Information Commissioner in Ireland, in his 1999 report weighed the public interest in a number of his decisions:

- In a case brought by a newspaper relating to the expenses paid to members of the Irish Parliament, he decided that the public interest in ensuring accountability for the use of public funds greatly outweighed any right to privacy in relation to details of expense claims.
- In a case brought by vehicle suppliers to

- promote good practice
- promote public authorities' compliance with the Act
- disseminate information and give advice about the Act
- with consent, assess whether a public authority is following good practice
- report annually to Parliament.

The duty to promote 'good practice' goes wider than the enforcement of the right of access. The Information Commissioner may promote access to information held by public authorities in general, and give advice, for example on the handling of requests and the management of records. The Information Commissioner may also provide consultancy services and advice to authorities in return for payment.

She has a duty to promote observance of good practice in records management, under the code of practice to be issued by the Lord Chancellor; and good practice in advising and assisting applicants, transfers of requests, consulting with third parties and handling of complaints under the code of practice to be issued by the Home Secretary.

A complainant may apply to the Information Commissioner for a 'decision' that a request for information has not been dealt with in accordance with the requirements of the Act. The Information Commissioner may issue a decision notice to an authority requiring compliance.

The Commissioner may issue an 'information notice' requiring an authority to provide specific information to help the Commissioner determine a complaint.

Where the Commissioner is satisfied that the authority has failed to comply with the Act, she may issue an 'enforcement notice' requiring the authority to comply within a specified timescale.

### *The Information Tribunal*

The Tribunal can receive appeals either from an applicant or from a public authority. There is no right of appeal for third parties. The Tribunal may allow or dismiss an appeal or substitute a notice that could have been served by the Information Commissioner.

An appeal from the Tribunal is to the High Court and can only be made on points of law.

## **3.10 Appeals and enforcement**

### *Four tiers of appeal*

There are four tiers of appeal for dissatisfied applicants:

- The internal complaints system of the authority



- The Information Commissioner
- The Information Tribunal
- The Courts (on a point of law).

*'Executive override'*

In exceptional cases an 'accountable person', may issue a certificate stating that they have formed, on reasonable grounds, the view that the authority did not fail to comply with the

“ (a) the state of any water or air, the state of

### **4.3 Local Government**

Under the Local Government (Access to Information) Act 1985, local authorities have been under a statutory duty to disclose information for more than 16 years. The statute gives the public rights of access to meetings, reports and documents subject to specified confidentiality provisions; and gives local authorities duties to publish certain information. In some senses, this puts local government ahead of central government in terms of openness. But the powers and duties of the 1985 Act are limited.

The 1985 Act provides access to meetings of principal council and their committees or sub-committees (except where confidential or exempt information would be disclosed). The public also has a right to inspect copies of the agenda for such meetings and any associated reports and background papers at the offices of the council at least three clear days before the meeting. The report can be severed and the background papers withheld to exclude information that will be discussed in private at the meeting. After the meeting, the public has a further right to inspect the minutes (minus any items discussed in private) and to be given a written summary of the proceedings dealing with exempt information.

The Local Government Act 2000 (S.22) extends this openness regime to meetings of a local authority executive, or a committee of such an executive. The Secretary of State may, through regulations, require them to disclose prescribed information in a given way or form before decisions are made. A written record must be kept and these, together with such reports, background papers or other documents as may be prescribed, must be made available to members of the public in accordance with regulations made by the Secretary of State. Such regulations may prescribe information that can be exempt from disclosure.

Details of the information covered and the specific exemptions are included in the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 (SI 2000 No. 3272) which came into force in January 2001.

The FOIA, however, will extend to all other information held by local authorities.

## 5. High volume areas and areas that are likely to be contentious

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### 5.1 Requests for personal data (subject access requests)

Experience in some overseas countries indicates that most requests for information concern personal data. These requests will continue to be treated as subject access requests under the Data Protection Act 1998. This Act has been extended to cover all personal information held by public authorities.

Personal information will be the subject of an absolute exemption under the FOIA (S.40) which channel requests via the Data Protection Act. The FOIA will, however, apply to requests for third party information. If disclosure of third party information would breach any of the data protection principles this information is the subject of an absolute exemption and there is no requirement to consider disclosure in the public interest.

Applicants are not expected to specify whether a request for personal information is submitted under the DPA or FOIA. The authority receiving the request should determine the correct path (see flowchart at annex B).

#### **Practical Tip**

Most requests for information will concern personal data:

- Personal data is exempt under the FOIA (S.40). Requests for 'my personal file' should be treated as subject access requests under the Data Protection Act.
- Requests for information about third parties are covered by the FOIA but data protection principles apply.
- The public authority receiving the request decides how it should be handled. Some requests will need to be handled under both the Data Protection Act and the FOIA.

## **5.2 Requests for commercial information**

Requests for commercial information may be contentious and of high volume. In many countries, requests for information of commercial value have been the highest or next highest category.

Examples include requests for information about:

- public contracts and their performance
- public grants and the results
- licences granted, the conditions that apply and any periodic reports provided
- details of submissions made in consultation exercises
- regulatory activity.

While a number of possible exemptions could apply to some of this information, the exemptions most likely to be considered are those that relate to:

- information provided in confidence (S.41)
- commercial interests. (S.43)

The exemption for information provided in confid

be vital where, in effect, a department sits between an applicant using the FOIA, and a third party, often a company, concerned that its confidential information may be revealed.

It will be especially valuable for clear notice to be given to submitters of information to government departments about the terms upon which their information is given, and the steps they would be advised to take to ensure that their genuinely confidential information is protected. It is important to avoid misunderstandings and situations where an implied rather than an explicit duty of confidence may reasonably be claimed.

#### **Practical Tip**

When receiving commercial information from a third party:

- Ensure that the terms on which it is provided are recorded and clearly understood by all parties
- Understand, agree and record the reasons for accepting information 'in confidence'.
- Advise providers of commercial information on how to separate exempt information from that which could be released
- Question providers who appear to label large quantities of information as 'commercial in confidence' without a convincing reason.

### **5.3 Reports and advice in sensitive areas of policy**

Reports and advice from experts in sensitive areas of policy information is exempt if it relates to the formulation of government policy (S.35), or 'would or would be likely to prejudice' the effective conduct of public affairs (S.36). These exemptions cover any communication between Ministers, including papers of Cabinet and Cabinet committees; advice by the law officers; and information about the operation of Ministerial private offices. But once a policy decision has been made, the statistical information which informed the decision cannot be withheld under the exemption in S.35. In assessing the balance of public interest, S.35(4) tilts the balance towards disclosure of factual information which has been used to inform the decision.

There is a separate exemption for information if its disclosure would be likely to inhibit the free and frank provision of advice, free and frank exchange of views, or would 'otherwise prejudice the effective conduct of public affairs' (S.36). This exemption is also subject to a balancing public

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#### **Practical tip**

When preparing policy advice, separate as much as possible

- statistical information
- factual information
- recommendations and advice

This makes it easier to sever statistical and factual information for release

## 6. Handling requests under the Freedom of Information Act

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### 6.1 The request process

Public authorities should publish their procedures for dealing with requests for information and be prepared to offer advice and assistance to persons making requests.

Requests must be made in writing. If an applicant is unable to do so, the authority should refer the person to others who might be able to help or make a written note of a verbal request which the applicant may verify and then return as a written request.

The applicant does not have to give reasons for the request or any indication of the use to which any information disclosed might be put.

Where insufficient information is given to identify or locate information, the authority should attempt to help the applicant to describe more clearly the information being sought. If it is still not possible to identify or locate the information, the authority should disclose what information it can and explain why it cannot take the request any further. An authority may decline to provide assistance to applicants whose requests are considered 'vexatious' within the meaning of S.12 of the Act.

#### **Practical Tip**

- It will be important to make the procedure for an applicant as clear and straightforward as possible. It will save misunderstandings, time and effort.
- The Information Commissioner in Ireland has reported a common problem was time wasted because what an applicant really wanted was misunderstood.
- Where possible get the applicant's telephone number or email address. Establish direct contact. Talk to them: find out what they really want.







## **7. Preparing for the FOIA**

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FOI is not a new phenomenon for the many authorities already subject to the existing Code of Practice on Access to Government Information, nor for local government. While guidance and advice will be available from the centre and the Information Commissioner, authorities will be expected to exercise ownership of the FOIA.

The FOIA is a complex piece of legislation that imposes greater demands on public authorities than the existing code of practice. There will

**Practical Tip**

No one structure will serve the needs of all authorities, but obvious elements to be considered include the need for:

- an adequately resourced 'Information Coordinator' explicitly supported by senior management
- designated officers in each part of the authority to work with the 'Information Coordinator'
- an implementation plan and timetable
- the early development of a publication scheme
- a rational and consistent approach in interpreting exemptions and exercising discretion to release information in the public interest
- awareness and functional training in the requirements of the FOIA
- the overhaul of record management systems and procedures for weeding and disposing of documents
- testing of the procedures put in place with possible requests
- a willing and positive attitude to assist applicants.

## **8. Sources of further information and advice**

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Home Office (FOI team): [www.homeoffice.gov.uk/foi/index.htm](http://www.homeoffice.gov.uk/foi/index.htm)

Freedom of Information Act 2000

Freedom of Information Act 2000, Explanatory Notes

Draft Code of Practice on the Discharge of Functions of Public Authorities, under Part I of the Freedom of Information Act 2000.

Report of the Advisory Group on Openness in the Public Sector, report to the Home Secretary, December 1999.

Draft Statutory Instrument, Freedom of Information, The Freedom of Information (Fees, Appropriate Limit and Time Limits) Regulations 2000

Lord Chancellor's Code of Practice on the Management of Records under Freedom of Information. (21 July 2000)

Information Commissioner: [www.dataprotection.gov.uk](http://www.dataprotection.gov.uk)

Introduction to the Freedom of Information Act 2000

Public Record Office: [www.pro.gov.uk/recordsmanagement/](http://www.pro.gov.uk/recordsmanagement/)

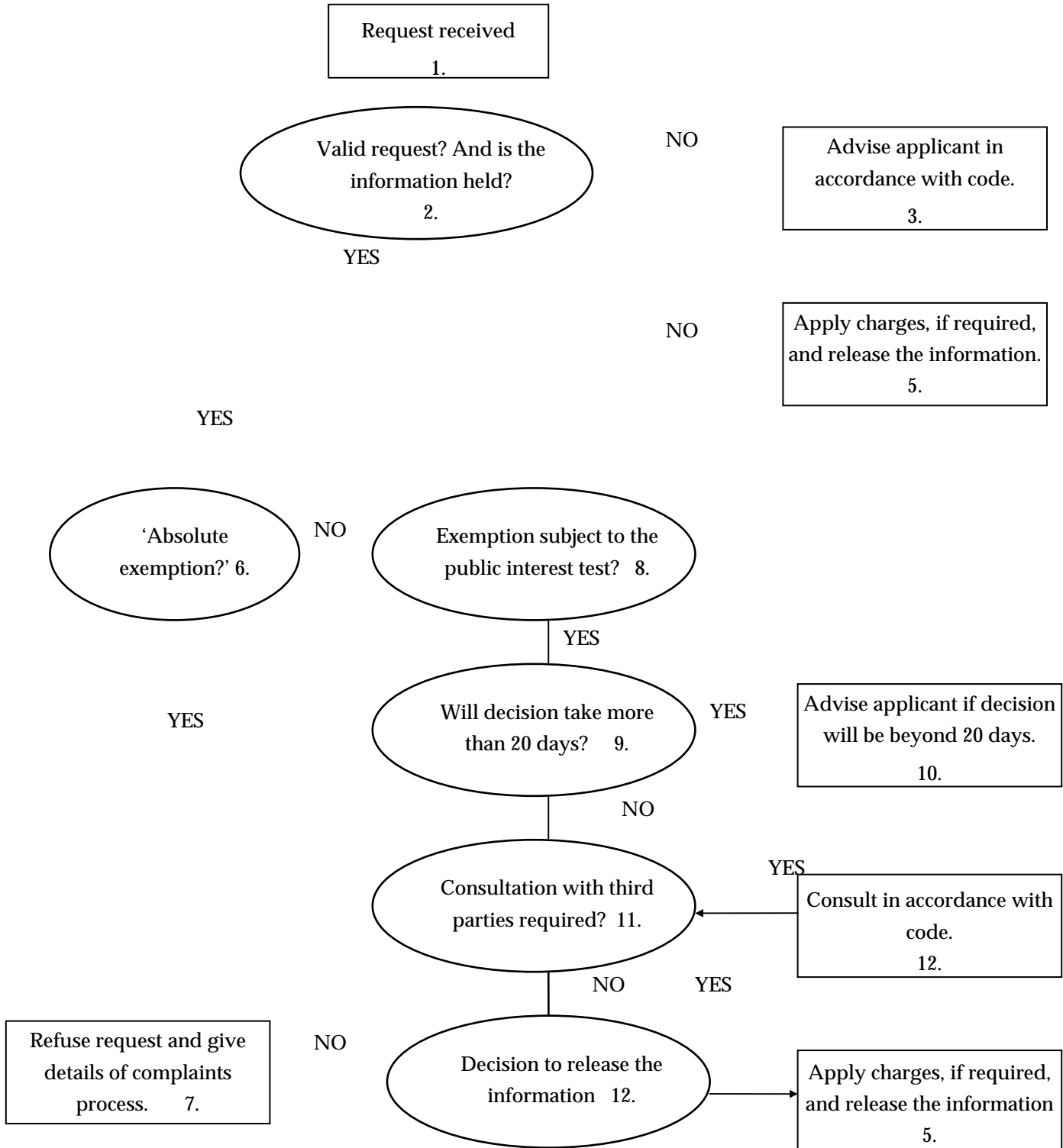
Campaign for Freedom of Information: [www.cfoi.org.uk](http://www.cfoi.org.uk)

Constitution Unit: [www.ucl.ac.uk/constitution-unit](http://www.ucl.ac.uk/constitution-unit)



## 9. Annex A

### Handling Requests Under the Freedom of Information Act 2000



These notes relate to numbered boxes in the chart:

1. Request received. This is the defined starting point for this decision chart

2. Valid request? And for information which is 'held'?

This is a request which complies with the conditions specified in S.7. Essentially a request in 'writing', which includes name and address details for the applicant, and a description of the information requested.

It is a request for information which is 'held' by the department

This is also a request which is not vexatious or repeated as defined in S.14.

An applicant may require advice and assistance to frame a valid request, and sometimes to address it to another department where the information is held. This should be provided in accordance with S.16 and the code of practice.

3. Does any exemption apply?

It may be that more than one exemption applies. In this case follow the process for all those that most clearly apply.





## 10. Annex B

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FREEDOM OF INFORMATION ACT 2000<sup>3</sup>  
PROVISIONS GOVERNING ACCESS TO PERSONAL INFORMATION HELD BY PUBLIC AUTHORITIES

ISBN: 0 9527960 9 0