



# **Protocol for responding to requests under the Freedom of Information (Scotland) Act**

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## **1. Introduction**

The Freedom of Information Act (Scotland) 2002 (FOIA) gives people the legal right to obtain information from all Scottish public authorities, including NHS organisations.

This legal right of access includes all types of 'recorded' information held by Scottish public authorities. From 1st January 2005 any person who makes a request for information must be provided with it, subject to certain conditions which are outlined in this protocol.

The Act will be promoted and enforced by the Scottish Information Commissioner. He will have legal powers to ensure the public's right to freedom of information is upheld.

NHS Borders is committed to being open and honest in the conduct of its operations and in complying fully with the Act and the Scottish Ministers Codes of Practice.

## **2. Scope of the Protocol**

The information in this protocol applies to all NHS Borders employees and to all the information held by NHS Borders i.e. all the information created, received and maintained by staff of NHS Borders in the course of their work,

## **3. Definitions**

### **3.1 Requests**

Requests can be made by any person, anywhere in the world and they do not have to provide a reason for the request.

Requests may be made to any person within the organisation.

Requests must be provided in writing, this includes faxes and e-mails, for reference, monitoring and audit purposes.

If requests are made by other means, every effort should be made to provide advice and assistance to make the request in the appropriate manner.

### **3.2 Information**

The Act refers to recorded information,. This term applies to all forms of information, including, printed paper, audio and video recordings, electronic documents and papers.

The FOIA is completely retrospective, it does not only apply to information created after 1<sup>st</sup> January 2005.

Personal information will not be made public under the Freedom of Information Act. The Freedom of Information Act does not supersede the Data Protection Act or the Caldicott Principles. Policies and protocols for accessing personal information, including medical records, remain unchanged.

A list of the types of information most likely to be requested is provided in Appendix 1.

### 3.3 Records management

Records management applies to the filing, archiving, retrieval and retention of all types of information created, received and maintained by NHS Borders except medical records.

## 4. Responsibilities

See also Appendix 5.

### 4.1 All Staff

All staff should be familiar with this protocol and know what steps to take if they receive a request for information from a member of the public.

All staff are responsible for passing requests for information to the Corporate Services Manager.

All staff are responsible for processing information in accordance with the Act, and the policies, procedures and guidance as laid down by NHS Borders.

In order to ensure requests are responded to within the 20 working day timeframe, information should be readily accessible. Individuals should ensure that all information they are responsible for, including electronic information, can be accessed by at least one other person.

All staff should ensure that the electronic 'out of office' facility is used when taking leave, planned or unplanned, or that another member of staff manages their e-mails in their absence.

All staff should make every effort to assist the public in making requests under the Act.

All staff responsible for storing information, both in electronic and hard copy, are required to comply with the organisations current Records Management Policy.

Any member of staff handling a request for information should ensure that their manager and/or the Corporate Services Manager is kept informed at the earliest opportunity of any issues which may delay the response and result in a breach of the statutory deadline, including:

- The clarity of the request
- Whether the information is available or not
- Who is responsible for the information
- Concerns about confidentiality
- Difficulty in accessing the information
- The time it may take to collect the information

If the member of staff requested to provide the information is not able to provide it and passes the request to another member of staff to action, the Corporate Services Manager/Business Management Department should be informed immediately.

Requests for information made by the Business Management Department should be acknowledged with a confirmation of receipt of the request.

## 4.2 Managers

Managers should ensure all departments have a copy of this protocol and that their staff know what steps to take if they receive a request for information from a member of the public.

Managers should comply with requests for information from the Corporate Services Manager or the Business Management Department. This includes

- i. Acknowledging receipt of a request for information from the Business Management Department.
- ii. Locating the relevant information and forwarding copies to the Corporate Services Manager.
- iii. Identifying issues within the information which may contravene the Data Protection Act or may qualify as exemptions.
- iv. Liaising with the Corporate Services Manager with regard to any issues relating to the request.
- v. All managers should ensure that the electronic 'out of office' facility is used when taking leave, planned or unplanned, or that another member of staff manages their e-mails in their absence.
- vi. Managers should ensure they, and their staff operate effective records management systems.

Any manager handling a request for information should ensure that the Corporate Services Manager is kept informed at the earliest opportunity of any issues which may delay the response and result in a breach of the statutory deadline, including

- The clarity of the request
- Whether the information is available or not
- Who is responsible for the information
- Concerns about confidentiality
- Difficulty in accessing the information
- The time it may take to collect the information

If the manager requested to provide the information is not able to provide it and passes the request to another manager to action, the Corporate Services Manager should be informed immediately.

## 4.3 Corporate Services Manager

The Corporate Services Manager will act as the Freedom of Information Officer will be responsible for responding to requests and will ensure that requests are fulfilled within 20 working days of receipt.

The Publication Scheme will be maintained and amendments approved by the Scottish Information Commissioner and that a significant amount of information is published routinely on the website.

The Corporate Services Manager and the Planning & Performance Directorate will be responsible for monitoring FOIA requests and providing regular performance reports to the Information Governance Committee.

The Corporate Services Manager will be responsible for ensuring the Publication Scheme and the associated documents are kept up to date.

#### 4.4 Directors of Performance & Planning

The Director of Performance & Planning is the lead director for Freedom of Information and is responsible for ensuring compliance with the Freedom of Information (Scotland) Act 2002.

The Director of Performance & Planning will lead the internal review process.

#### 4.5 All Directors of NHS Borders

Any Director may be required to approve a response being provided under the Freedom of Information (Scotland) Act.

Decisions not to provide information under any of the exemptions, excessive cost of compliance or confirming that the information does not exist can only be made by a Director of NHS Borders.

Any Director may take part in or lead an internal review of a decision or actions taken in responding to a request.

#### 4.6 Non-Executive Directors

Non-executive Directors are responsible for ensuring governance of the process.

Any Non-executive Director may be requested to take part in an internal review of a decision or actions taken in responding to a request.

## 5. Records Management

A national group has been working to develop a policy for records management for NHS Scotland. There have been delays in the publication of this policy due to issues around the retention periods of certain clinical documents. NHS Borders has published a Draft Records Management Policy which is compliant with the Scottish Ministers Code of Practice on Records Management (Code 61). All staff should manage records in accordance with this policy.

## 6. NHS Borders Publication Scheme

NHS Borders Publication Scheme is available on the web at: [www.nhsborders.org](http://www.nhsborders.org) or in hard copy from Corporate Services Manager

The Publication Scheme sets out the classes of information which NHS Borders makes available routinely to the public via the website.

## 7. Receiving requests for information

### 7.1 Information listed in the publication scheme.

- i. If the request is for information which is listed in the publication scheme, the person making the request should be directed to the website.
- ii. If they do not have access to a computer, hard copy will be provided.
- iii. Any member of staff receiving this type of request can handle the request or pass it to the Corporate Services Manager.

### 7.2 Information not listed in the Publication Scheme

- i. Information not already made available in NHS Borders Publication Scheme will be accessible from 1st January 2005 by making a specific request for information. In this regard the Act establishes two related rights:

- the right to be told whether information exists, and
- the right to receive the information (subject to exemptions)

These rights can be exercised by anyone anywhere in the world, without specifying the reason for the request.

- ii. To ensure compliance with the Data Protection Act, specific requests for information which is not listed in the publication scheme will be co-ordinated by the Corporate Services Manager in liaison with the Data Protection Officer and Caldicott Guardian as appropriate.
- iii. Any request must be made in a permanent form (for example in writing, by fax or by email). Any member of staff receiving a request should fax or e-mail it to the Corporate Services Manager at [foi.enquiries@borders.scot.nhs.uk](mailto:foi.enquiries@borders.scot.nhs.uk) or fax number 01896 828298.
- iv. Any member of staff receiving a request should pass the request on to the Corporate Services Manager by fax or e-mail as a matter of urgency to ensure we can meet the 20 working day deadline.

### 7.3 Requests made by telephone or in person

- v. Where a verbal request is made, either by telephone or in person, the person making the request should be asked to submit the request in writing. If they are unable to do so, the proforma attached in Appendix 3 can be used. This should only be used when the person making the request cannot provide a request in writing.
- vi. If the request is made in person, they should check and sign the proforma. The proforma should then be faxed to Corporate Services Manager.
- vii. If the request is made by telephone, the proforma can be completed. The person making the request should be informed that the proforma will be sent to them with instructions to check, sign and return it. The proforma should then be faxed to Corporate Services Manager who will send the form to the person making the request for checking.

## **8. Processing requests for information**

The flow chart in Appendix 2 sets out the process for processing requests for information.

### **8.1 Requests for information held jointly with another organisation.**

Under the Freedom of Information Act, the organisation is required to provide any information which it holds, regardless of where the information was created. Therefore, where NHS Borders receives a request for information which is held jointly with Scottish Borders Council, NHS Borders will respond to the request, but will inform the relevant Scottish Borders Council department of the request, the intention to respond or claim exemption and will provide a copy of the response.

The response will be open for discussion, however, the legal responsibility will remain with the organisation which received the request and the final decision should rest with that organisation.

### **8.2 Information not held**

If NHS Borders does not hold the information, it is not required to provide it. For example, if the information is held by Scottish Borders Council, we do not have to obtain the information from Scottish Borders Council to fulfill the request. However, if we know which public body does hold the information, the request should be passed to that public body with a covering letter and the applicant should be informed of this action.

If it is not known who holds the information, the applicant should be informed that NHS Borders does not hold the information.

## **9. Charges**

Unless otherwise specified in NHS Borders Publication Scheme, information made available through the Publication Scheme will be free of charge.

NHS Borders may however charge an appropriate fee for dealing with a specific request for information not listed in the publication scheme. This charge will be calculated according to the published 'Fees Regulations' and the person making the request will be informed of the charge prior to the request being fulfilled.

## **10. Exemptions under the Act**

There are 17 exemptions under the Act, some which are absolute exemptions where the information is protected under law. Other exemptions will be subject to applying the public interest test. The full list of the exemptions taken from the Act are attached in Appendix 4.

Absolute exemptions include information which is protected by the Data Protection Act. The Data Protection Officer and/or the Caldicott Guardian will be consulted on all issues relating to this type of exemption.

NHS Borders may decide that some information it holds could be regarded as exempt information under the Act and decide to withhold it. Where an exemption is considered, NHS Borders will undertake the public interest test, i.e., determine whether the benefit to the public of

disclosing the information would outweigh any harm this would cause to the organisation or other people connected with or affected by the disclosure.

If information is to be withheld, a written refusal notice will be provided stating the reason for withholding the information and stating the procedure for appealing the decision. The applicant may then apply to the Scottish Information Commissioner for a review of the decision.

All exemptions, will be agreed by members of the NHS Borders Board Management Team before a refusal notice is given.

## **11. Internal Review**

Where an applicant is dissatisfied with the response received from NHS Borders or the manner in which the request was handled, the applicant may request an internal review.

- i. An internal review panel will be formed to review actions and decisions relating to the request.
- ii The review must be held within 20 working days of receipt of a written request for a review.
- iii The review panel will consist of the two Directors of NHS Borders, one of whom should be the Director of Performance & Planning or the Director of Public Health (as Caldicott Guardian and Chair of the Information Governance Committee) and one Non-executive Director. The review panel may request the attendance of any manager involved in responding to the request.
- iv The review panel may
  - a) Uphold the applicants complaint with or without any modifications it considers appropriate.
  - b) Substitute for any decision a different decision, or
  - c) Uphold the original decision made by NHS Borders.
- v The applicant will be notified in writing of the panels decision and informed of the right to apply to the Scottish Information Commissioner if they remain dissatisfied.

## **12. Monitoring**

The Planning & Performance Directorate will maintain a register of all requests for information other than those made for information which is available on the NHS Borders website. The register will include the action taken on each application, exemptions applied, any fees charged and the time taken to fulfil the request.

The register will identify whether the same or similar information has previously been requested and provided, or refused, the reasons for the refusal, and any reviews carried out. This will ensure consistency in dealing with similar requests, and identify repeated, duplicate or vexatious requests. It will also identify recurring requests for the same or similar information which has not been included in the Publication Scheme, and allows NHS Borders to consider whether such information should be routinely published in the Publication Scheme.

The protocol and processes will be reviewed on an annual basis and amended to take account of recommendations resulting from reviews and investigations. The protocol will be submitted to the Information Governance Committee for approval prior to implementation.

Quarterly performance reports will be presented to the Information Governance Committee identifying the following:

- Activity and details of the request made, time for responses, costs and fees charged
- number, details and outcome of internal reviews,
- number, details and outcome of investigations by the Scottish Information Commissioner,
- progress on action plans resulting from reviews and investigations.

An annual report will be made to Borders NHS Board.

### **13. References**

NHS Borders Publication Scheme  
Draft NHS Borders Records Management Policy  
The Freedom of Information (Scotland) Act  
Data Protection Act

### **14. Contacts**

Forward requests to  
[foi.enquiries@borders.scot.nhs.uk](mailto:foi.enquiries@borders.scot.nhs.uk)  
Fax: 01896 828298

Guidance on the Freedom of Information (Scotland) Act.  
Deborah Adams  
Corporate Services Manager  
Tel: 01896 825520 or ext. 5520  
Or e-mail

Data Protection Lead  
Dave Arkless  
Tel: 01896 820256 or ext 234  
Or e-mail

Caldicott Guardian  
Dr Andrew Riley  
Tel: 01896 825560  
Or e-mail

NHS Borders website  
[www.nhsborders.org.uk](http://www.nhsborders.org.uk)

Scottish Information Commissioner & Freedom of Information (Scotland) Act  
[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

## Appendix 1

### **Examples of information which may be requested**

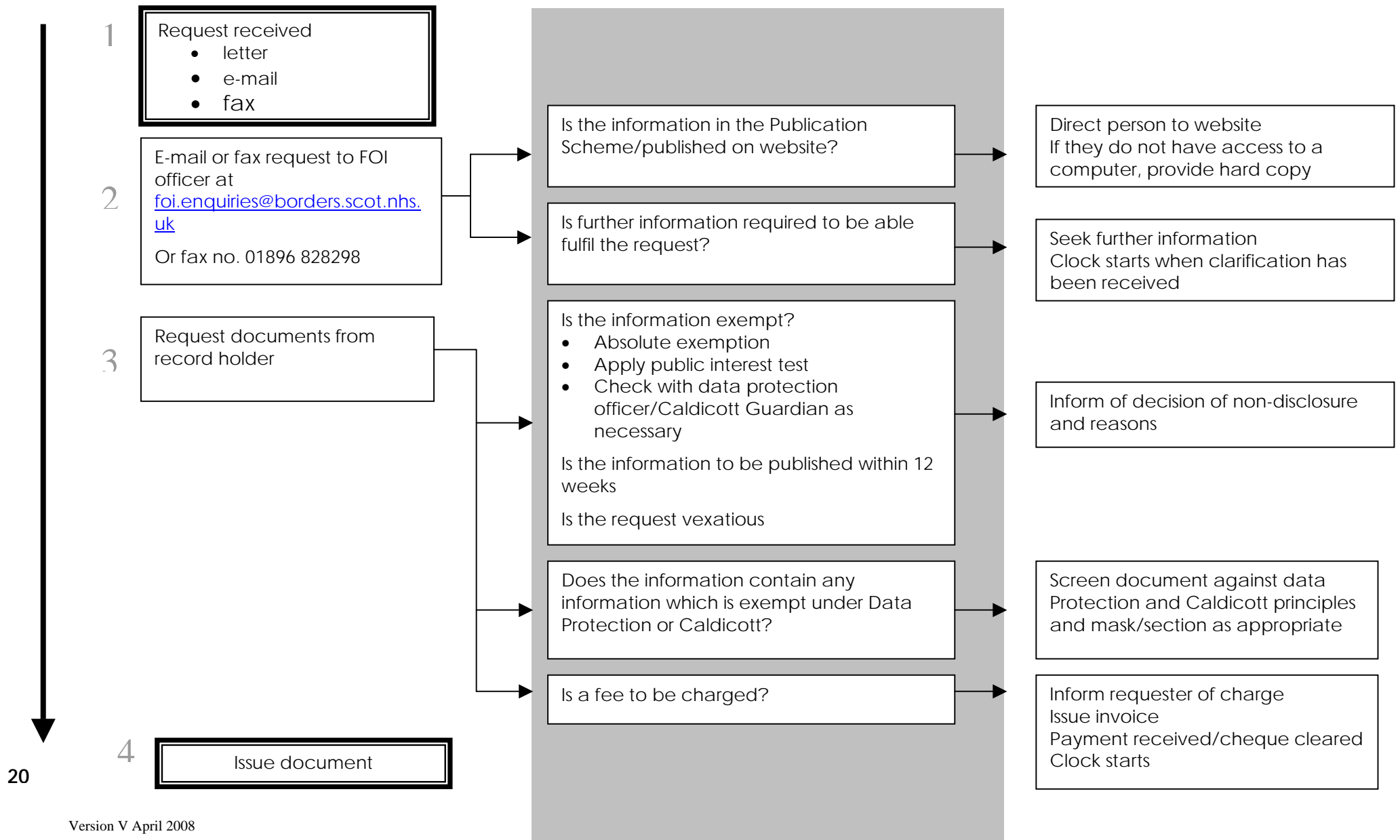
Policies and protocols  
Strategies  
Business plans  
Service development plans  
Minutes of meetings  
Option appraisals  
Briefing papers  
Activity, e.g. numbers of patients attending certain clinics or undergoing certain procedures

### **Background information which may be requested in support of the above documents**

Letters and faxes  
e-mails  
Committee roles and remits  
Memos  
File notes  
Notes taken at all meetings, including informal minutes



**Process for responding to requests**



**NHS Borders**



**Request for Information under Freedom of Information (Scotland) Act 2002**

**Proforma for recording verbal requests**

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**Details of person making request**

Name

Address

Telephone number

e-mail address

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**Details of information requested.**

Please give as much detail of the information required as possible. For example: documents - name of document; minutes of meetings - name of committee and date of minutes; specific issue or project – name of topic or project and type of information required. Continue on a separate sheet if required.

Specific issue or project

Name of document(s)

Name of committee(s)

Date/month of meeting

Signature of person making the request .....

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**Details of person receiving request**

Name

Department

Base

Date request received

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**Fax or e-mail this proforma to:**

e-mail address: [foi.enquiries@borders.scot.nhs.uk](mailto:foi.enquiries@borders.scot.nhs.uk)

Fax: 01896 828298 for the attention of Deborah Adams, Corporate Services Manager

## **EXEMPT INFORMATION**

### **As Defined in the Freedom of Information (Scotland) Act 2002**

#### **A. Information otherwise accessible**

- 1 Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- 2 For the purposes of subsection (1), information-
  - a may be reasonably obtainable even if payment is required for access to it;
  - b is to be taken to be reasonably obtainable if-
    - i the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or
    - ii the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by, members of the public on request, whether free of charge or on payment.
- 3 For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

#### **B. Prohibitions on disclosure**

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- a is prohibited by or under an enactment;
- b is incompatible with a Community obligation; or
- c would constitute, or be punishable as, a contempt of court.

#### **C. Information intended for future publication**

- 1 Information is exempt information if-
  - a it is held with a view to its being published by-
    - i a Scottish public authority; or
    - ii any other person,at a date not later than twelve weeks after that on which the request for the information is made;
  - b when that request is made the information is already being held with that view; and
  - c it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).
- 2 Information obtained in the course of, or derived from, a programme of research is exempt information if-

- a the programme is continuing with a view to a report of the research (whether or not including a statement of that information) being published by-
  - i a Scottish public authority; or
  - ii any other person; and
- b disclosure of the information before the date of publication would, or would be likely to, prejudice substantially-
  - i the programme;
  - ii the interests of any individual participating in the programme;
  - iii the interests of the authority which holds the information; or
  - iv the interests of the authority mentioned in sub-paragraph (i) of paragraph (a) (if it is a different authority from that which holds the information).

**D. Relations within the United Kingdom**

- 1 Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.
- 2 In subsection (1), "administration in the United Kingdom" means-
  - a the Government of the United Kingdom;
  - b the Scottish Administration;
  - c the Executive Committee of the Northern Ireland Assembly; or
  - d the National Assembly for Wales.

**E. Formulation of Scottish Administration policy etc.**

- 1 Information held by the Scottish Administration is exempt information if it relates to-
  - a the formulation or development of government policy;
  - b Ministerial communications;
  - c the provision of advice by any of the Law Officers or any request for the provision of such advice; or
  - d the operation of any Ministerial private office.
- 2 Once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of-
  - a paragraph (a) of subsection (1), as relating to the formulation or development of the policy in question; or
  - b paragraph (b) of that subsection, as relating to Ministerial communications.
- 3 In determining any question under section 2(1)(b) as respects information which is exempt information by virtue of subsection (1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
- 4 In this section-

"government policy" means-

- a the policy of the Scottish Administration; and
- b in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

"the Law Officers" means the Lord Advocate, the Solicitor General for Scotland, the Advocate General for Scotland, the Attorney General, the Solicitor General and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet); and

"Ministerial private office" means any part of the Scottish Administration which provides personal administrative support to a Minister.

- 5 In the definitions of "Ministerial communications" and "Ministerial private office" in subsection (4), "Minister" means a member of the Scottish Executive or a junior Scottish Minister.

#### **F. Prejudice to effective conduct of public affairs**

Information is exempt information if its disclosure under this Act-

- a would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;
- b would, or would be likely to, inhibit substantially-
  - i the free and frank provision of advice; or
  - ii the free and frank exchange of views for the purposes of deliberation; or
- c would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

#### **G. National security and defence**

- 1 Information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.
- 2 A certificate signed by a member of the Scottish Executive certifying that such exemption is, or at any time was, required for the purpose of safeguarding national security is conclusive of that fact.
- 3 Without prejudice to the generality of subsection (2), a certificate under that subsection may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.
- 4 Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
  - a the defence of the British Islands or of any colony; or
  - b the capability, effectiveness or security of any relevant forces.
- 5 In subsection (4)-
  - a in paragraph (a), "British Islands" and "colony" are to be construed in accordance with Schedule 1 to the Interpretation Act 1978 (c.30); and

- b in paragraph (b), "relevant forces" means-
  - i the armed forces of the Crown; and
  - ii any forces co-operating with those forces, or any part of the armed forces of the Crown or of any such co-operating forces.

## **H. International relations**

- 1 Information is exempt information if-
  - a its disclosure under this Act would, or would be likely to, prejudice substantially-
    - i relations between the United Kingdom and any other State;
    - ii relations between the United Kingdom and any international organisation or international court;
    - iii the interests of the United Kingdom abroad; or
    - iv the promotion or protection by the United Kingdom of its interests abroad;
  - or
  - b it is confidential information obtained from-
    - i a State other than the United Kingdom; or
    - ii an international organisation or international court.
- 2 For the purposes of subsection (1), information obtained from a State, organisation or court is confidential at any time while-
  - a the terms on which that information was obtained require it to be held in confidence; or
  - b the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
- 3 In subsection (1)-
 

"international court" means an international court which-

  - a is not an international organisation; and
  - b is established-
    - i by a resolution of an international organisation of which the United Kingdom is a member; or
    - ii by an international agreement to which the United Kingdom is a party;

"international organisation" means-

  - a an international organisation whose members include any two or more States; or
  - b an organ of such an international organisation;

"State" includes-

  - a the government of any State; and
  - b any organ of such a government,

and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.

## **I. Commercial interests and the economy**

- 1 Information is exempt information if-
  - a it constitutes a trade secret; or
  - b its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).
- 2 Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
  - a the economic interests of the whole or part of the United Kingdom; or
  - b the financial interests of an administration in the United Kingdom.
- 3 In subsection (2), "administration in the United Kingdom" has the same meaning as in section 28(2).

## **J Investigations by Scottish public authorities and proceedings arising out of such investigations**

- 1 Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
  - a an investigation which the authority has a duty to conduct to ascertain whether a person-
    - i should be prosecuted for an offence; or
    - ii prosecuted for an offence is guilty of it;
  - b an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or
  - c criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.
- 2 Information is exempt information if-
  - a held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14) but not for the time being concluded; or
  - b held at any time by a Scottish public authority for the purposes of any other investigation being carried out-
    - i by virtue of a duty to ascertain; or
    - ii for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.
- 3 Information held by a Scottish public authority is exempt information if-
  - a it was obtained or recorded by the authority for the purposes of investigations (other than such investigations as are mentioned in subsection (1)) which are, by virtue either of Her Majesty's prerogative or of powers conferred by or under

any enactment, conducted by the authority for any purpose specified in section 35(2); and

- b it relates to the obtaining of information from confidential sources.
- 4 Information is exempt information if obtained or recorded by a Scottish public authority for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of such investigations as are mentioned in subsection (1) or (3).

## **K. Law enforcement**

- 1 Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
- a the prevention or detection of crime;
  - b the apprehension or prosecution of offenders;
  - c the administration of justice;
  - d the assessment or collection of any tax or duty (or of any imposition of a similar nature);
  - e the operation of the immigration controls;
  - f the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained;
  - g the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
  - h any civil proceedings-
    - i brought; and
    - ii arising out of an investigation conducted, for any such purpose, by or on behalf of any such authority, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment.
- 2 The purposes are-
- a to ascertain whether a person has failed to comply with the law;
  - b to ascertain whether a person is responsible for conduct which is improper;
  - c to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
  - d to ascertain a person's fitness or competence in relation to-
    - i the management of bodies corporate; or
    - ii any profession or other activity which the person is, or seeks to become, authorised to carry on;
  - e to ascertain the cause of an accident;
  - f to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration;
  - g to protect the property of a charity from loss or mismanagement;
  - h to recover the property of a charity;

- i to secure the health, safety and welfare of persons at work; and
- j to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work.

**L. Confidentiality**

- 1 Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
- 2 Information is exempt information if-
  - a it was obtained by a Scottish public authority from another person (including another such authority); and
  - b its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

**M. Court records, etc.**

- 1 Information is exempt information if it is contained in-
  - a document-
    - i lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter;
    - ii served on, or by, a Scottish public authority for the purposes of such proceedings; or
    - iii created by a court or a member of its administrative staff for the purposes of, or in the course of, such proceedings; or
  - b a document-
    - i lodged with, or otherwise placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration; or
    - ii created by such a person for such purposes, and a Scottish public authority holds the information solely because it is contained in such a document.
- 2 In this section-

"court" includes a tribunal or body exercising the judicial power of the State; and

"inquiry" means an inquiry or hearing held under a provision contained in, or made under, an enactment.
- 3 This section does not apply to information held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14).

**N. Personal information**

- 1 Information is exempt information if it constitutes-
  - a personal data of which the applicant is the data subject;

- b personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
  - c personal census information; or
  - d a deceased person's health record.
- 2 The first condition is-
- a in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
    - i any of the data protection principles; or
    - ii section 10 of that Act (right to prevent processing likely to cause damage or distress); and
  - b in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.
- 3 The second condition is that, by virtue of any provision of Part IV of that Act, the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- 4 In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to that Act are to be disregarded.
- 5 In this section-
- "the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;
- "data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;
- "health record" has the meaning assigned to that term by section 1(1) of the Access to Health Records Act 1990 (c.23); and
- "personal census information" means any census information-
- a as defined in section 8(7) of the Census Act 1920 (c.41); or
  - b acquired or derived by virtue of sections 1 to 9 of the Census (Great Britain) Act 1910 (c.27), which relates to an identifiable person or household.
- 6 In section 8(7) of the Census Act 1920 (penalties), in the definition of "personal census information", at the end there is added "but does not include information which, by virtue of section 58(2)(b) of the Freedom of Information (Scotland) Act 2002 (asp 13) (falling away of exemptions with time), is not exempt information within the meaning of that Act".

**O. Health, safety and the environment**

- 1 Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.
- 2 Information is exempt information if a Scottish public authority-
  - a is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
  - b would be so obliged but for any exemption contained in the regulations.
- 3 Subsection (2)(a) is without prejudice to the generality of section 25(1).

**P. Audit functions**

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially the exercise of a Scottish public authority's functions in relation to-

- a the audit of the accounts of other Scottish public authorities; or
- b the examination of the economy, efficiency and effectiveness with which such authorities use their resources in discharging their functions.

**Q. Communications with Her Majesty etc. and honours**

Information is exempt information if it relates to-

- a communications with Her Majesty, with other members of the Royal Family or with the Royal Household; or
- b the exercise by Her Majesty or Her prerogative of honour.

## Appendix 5

### Roles and Responsibilities

<i>Roles</i>	<i>Responsibilities</i>
Non-executive Directors of NHS Borders	Taking part in the internal review process as required
Chief Executive	Responsibility for the Implementation and compliance with the Freedom of information (Scotland) Act 2002 is delegated to the Director of Performance & Planning as lead director
Director of Performance & Planning	Responsibility for the Implementation and compliance with the Freedom of information (Scotland) Act 2002 Monitoring performance and compliance Approving decisions not to provide information based on exemptions, excessive cost of compliance, information not existing Leading the internal review process
Directors of NHS Borders	Approving decisions not to provide information based on exemptions, excessive cost of compliance, information not existing Taking part in or leading the internal review process as required
Managers	Ensuring all departments have a copy of this protocol and that their staff know what steps to take if they receive a request for information from a member of the public. Managers should comply with requests for information from the Corporate Services Manager or the Planning & Performance Directorate. This includes <ul style="list-style-type: none"> <li>• Locating the relevant information and forwarding copies to the Corporate Services Manager.</li> <li>• Identifying issues within the information which may contravene the Data Protection Act or may qualify as exemptions.</li> <li>• Liaising with the Corporate Services Manager with regard to any problems which may cause a delay in the response.</li> </ul> Managers should ensure they, and their staff operate effective records management systems
Staff	All staff should be familiar with this protocol and know what steps to take if they receive a request for information. All staff are responsible for passing requests for information to the Corporate Services Manager. All staff are responsible for processing information in accordance with the Act, and the policies, procedures and guidance as laid down by NHS Borders. Individuals should ensure that all information they are responsible for, including electronic information, can be accessed by at least one other person. All staff should make every effort to assist the public in making requests under the Act.

