

REPORT

To: GENERAL PURPOSES COMMITTEE		Subject: CONSULTATION: FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 – CHARGING FEES
From: DIRECTOR OF ADMINISTRATION		
Date: 27 April 2004	Ref: JAF/IL	

1. **Purpose of Report**

1.1 The report advises of a Scottish Executive consultation on charging of fees under the Freedom of Information (Scotland) Act 2002 and proposes a response.

2. **Background**

2.1 Section 9 of the Freedom of Information (Scotland) Act provides that a local authority receiving a request for information may charge a fee for providing that information. The section gives power to the Scottish Ministers to make regulations making provision for

- the upper limit of any fee
- the way in which the fee is to be calculated
- circumstances in which no fee is to be charged.

2.2 The Scottish Executive have now produced draft Regulations and Guidance on charging fees and are consulting on those documents. Copies of those draft Regulations and that Guidance have been deposited and may be inspected in the Members' Library. Written responses require to be submitted by 31 May.

3. **Draft Regulations**

3.1 Two sets of draft Regulations have been produced – the Freedom of Information (Fees and Appropriate Limit) (Scotland) Regulations and the Freedom of Information (Fees and Appropriate Limit) (No. 2) (Scotland) Regulations. The first of those draft Regulations substantially gives effect to a framework already proposed by the Scottish Executive whereby

- the costs to be used for calculating charges are limited to the costs the local authority estimates it is likely to incur in locating and retrieving the information and giving effect to any preference expressed by the applicant as to means of communication of the information – and exclude costs incurred in ascertaining if the local authority holds the information and other costs incurred in considering the request;
- if the costs are £100 or less, the local authority is not allowed to charge and must, itself, bear the full costs;
- if the costs exceed £100 but are less than £600 the fee which can be charged is 10% of the costs excluding the first £100;
- where the costs include the cost of staff time, the chargeable cost for staff time is not to exceed £15 per hour per member of staff.

3.2 Section 12(1) of the Act provides that, if the local authority estimates that the cost of complying with a request for information would exceed such amount as may be prescribed in Regulations made by the Scottish Ministers, the local authority does not require to comply with the request. The draft Regulations prescribed that amount as £600.

3.3 The No. 2 Draft Regulations provide that, where the costs exceed £600, the local authority may nonetheless provide the information and, if it does so, may charge an amount up to £50 in respect of the first £600 of costs incurred and, in respect of the costs over £600 may charge the full costs.

4. **Guidance**

4.1 As part of the consultation, Guidance has been produced. That Guidance substantially repeats the provisions of the Regulations: it does, however, emphasise a number of factors:

- In order to prevent local authorities carrying out abortive work the Regulations provide for the costs likely to be incurred to be estimated and fees notices to be based on those estimates;
- Fees notices should explain fully how the prescribed costs have been arrived at;
- The local authority may not increase a fee beyond the estimated fee contained in the fee notice even if it transpires that the costs are higher than estimated;
- If the actual costs are lower than those estimated in the fee notice, the local authority is encouraged to issue a refund.

5. **Consideration**

5.1 Prior to the passing of the Act the Scottish Executive signalled that the costs incurred by public authorities in meeting their obligations under the Act would not be met in full. This is carried forward in the provisions of the Act and the provisions of the draft Regulations. It is, accordingly, clear that there will be a cost to the Council in complying with the provisions of the Act. The extent of that cost cannot, however, be determined in advance – it will depend on the number and complexity of requests received. On a worst case scenario the Council could receive a high volume of complex requests each one of which would represent a draw on Council funds of £500. There is, accordingly, a danger that, notwithstanding the expressed intention of the Scottish Executive, local authorities will be diverted unreasonably from their other responsibilities.

5.2 The provisions for estimating costs in advance are to be welcomed: in the absence of such provisions, there would be a requirement for local authorities to carry out the work in full before issuing a fee notice – at which stage it would be open to the applicant for information to decline to pay, thus rendering abortive the work done. The Guidance makes plain, however, that the local authority can be required to justify the estimated fee to both the applicant and the Information Commissioner.

5.3 The Guidance and Regulations provide that the local authority is not entitled to charge for any costs in determining whether information is held by the local authority or in considering whether an exemption applies.

5.4 Finally, the Guidance emphasises that prescribed costs should be based only on the marginal costs to the local authority of providing information: from this it follows that the charge must be based on the extra cost incurred by the authority in providing the full information – which, by definition, will be less than the full costs.

6. Conclusions

6.1 The Regulations give effect to a framework which was made public by the Scottish Executive in the course of consideration of the Freedom of Information Bill. At that time it was identified that complying with the Act would involve costs to local authorities, and from the Regulations and the Guidance it is clear that this is the case. It is notable, also, that the Regulations do not bring into effect the provisions of the Act whereby a local authority is not required to comply with two or more requests for information by one person or by different persons acting in concert if the total cost of complying with both (or all) of those requests exceeds the prescribed amount. Against that background it is suggested that the response to the consultation questions be as follows:

Question 1 – Do the prescribed costs as set out in the Regulations present a clear and consistent basis for charging?

Proposed response – The basis for charging is clearly set out in the Regulations: it is, however, to be noted that this has the potential to involve local authorities in significant costs.

Question 2 – Should the Regulations include a maximum level for staff costs?

Proposed response – It is not considered that the Regulations should include a maximum level for staff costs: rather it is considered that this should be left to the discretion of the local authority to apply such staff resources as may be reasonable.

Question 3 – If so, is the level proposed of £15 per hour appropriate?

Proposed response – It is considered that in many cases this level will not reflect the complexity of the task.

Question 4 – Do you consider the approach towards aggregation of costs to be reasonable both on public authorities and on those seeking information?

Question 7 – The draft Regulations do not include the provisions in the Act to aggregate costs where two or more requests are made by one person or by two or more different persons acting in concert. Should experience of operating Freedom of Information indicate that multiple requests of this nature were presenting significant difficulties, relevant provisions could be included in future Regulations. Do you consider this to be a reasonable approach to developing fees Regulations or do you feel that all the provisions to aggregate costs should be included now in the Regulations?

Proposed response to both questions – The Regulations, in dealing with aggregation of costs, do little more than repeat the provisions of Section 12(2)(c) of the Act. It is considered that the Regulations should, at the same time, bring into effect the provisions of Sections 12(2)(a) and (b) of the Act.

Question 5 – Do you consider the framework reflected in these fees Regulations to be straightforward and simple?

- (a) For applicants
- (b) For public authorities to operate

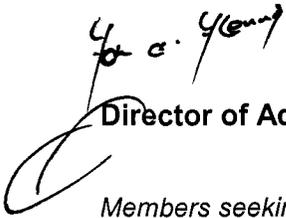
Proposed response – The framework set out in the Regulations is sufficiently clear.

Question 6 – Do you consider that the framework set out in the Regulations will not deter applicants seeking information for Scottish public authorities?

Proposed response – It is noted that the provisions of the Act and the Regulations are significantly less onerous on persons seeking information than those of other regimes: an example is the current regime in the Republic of Ireland whereby all requests for information attract a fee.

7. Recommendation

- 7.1 It is recommended that the Committee note the consultation and give consideration to a proposed response.



Director of Administration

Members seeking further information on the contents of this report are asked to contact John Fleming, Head of Central Services on Extension 2228.