

REPORT

To: GENERAL PURPOSES COMMITTEE		Subject: FREEDOM OF INFORMATION: ELECTED MEMBERS
From: DIRECTOR OF ADMINISTRATION		
Date: 6 January 2005	Ref: JAF/IL	

1. **Purpose of Report**

1.1 The report advises the Committee of draft Guidance, issued by the Scottish Information Commissioner at the request of COSLA, on how Freedom of Information will affect Councillors and seeks homologation of a response to COSLA's consultation thereon.

2. **Background**

2.1 At the request of COSLA, the Scottish Information Commissioner has issued draft Guidance on how the Freedom of Information (Scotland) Act 2002 will affect Councillors. That draft Guidance (a copy of which is attached as Appendix 1 to this report) covers both the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004.

2.2 The draft Guidance considers two main issues on the relationship between Freedom of Information and Councillors. The first issue is whether information held by Councillors is covered by the legislation and the second is the extent to which information held by local authorities on behalf of Councillors is covered. In summary the Guidance advances the proposition that, while information held by a Councillor in relation to her or his party political or constituency activities will not be accessible under the Act, other information held by a Councillor is likely to be covered by the Act.

3. **Consultation**

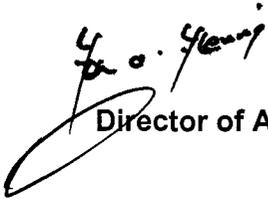
3.1 The draft guidance appears to be predicated on the basis that individual Councillors can, in many circumstances, act on behalf of the Council in creating and holding information. This does not appear to accord with the statutory provision whereby Councils can exercise their functions by virtue of

- the Council in plenary session;
- a duly authorised Committee;
- a duly authorised Sub-Committee;
- delegated powers to an officer;
- in some circumstances by an agency through another authority.

3.2 On receipt of the draft Guidance COSLA embarked on a consultation process and, in view of the timescale, a response has been submitted. A copy of that response, which deals both with the statutory position and with the practicalities of the Guidance, is attached as Appendix 2 to this report.

4. **Recommendation**

- 4.1 It is recommended that the Committee note the draft Guidance issued by the Scottish Information Commissioner and homologate the submission of the response in terms of Appendix 2 to this report.

A handwritten signature in black ink, appearing to read 'John Fleming', is written over a large, stylized circular scribble.

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.

COUNCILLORS AND FREEDOM OF INFORMATION

Introduction

COSLA has asked the Scottish Information Commissioner (SIC) to provide them with some guidance on how freedom of information will affect councillors. In this note, freedom of information is taken to mean the rights to access information under both the Freedom of Information (Scotland) Act 2002 (the Act) and the (draft) Environmental Information (Scotland) Regulations (the EIRs).

There are two main issues which need to be considered when discussing the relationship between freedom of information and councillors. The first issue is whether councillors are covered by the legislation. The second is to what extent local authorities hold information on behalf of councillors.

Are councillors covered by the legislation?

Schedule 1 of the Act sets out the bodies which are public authorities under the Act. Part 3 of Schedule 1 covers "local government". The following bodies are specifically mentioned in Part 3: assessors, councils, joint boards, licensing boards and the Strathclyde Passenger Transport Authority.

The problem comes, however, in deciding whether a councillor is acting as part of one of these bodies (for ease of reference I will refer to "councils" in the rest of the document). There does not appear to be any set rules on when a councillor is and is not acting on behalf of a council.

However, it is helpful to look at guidance which has been issued to councillors in respect of other legislation. For example, guidance issued by the UK Information Commissioner (UKIC), who is responsible for regulating the Data Protection Act 1998, recognises that a councillor can act as a member of a council (e.g. as a member of a housing committee who has access to tenancy files); on their own behalf (e.g. dealing with complaints made by local residents) and on behalf of a political party (e.g. as an office holder or official candidate). The guidance appears to suggest that that only when the councillor is acting as a member of the council are they part of the council.¹

The SIC agrees with this line and is of the opinion that information held by a councillor in relation to his/her party political or constituency activities will not be accessible under the Act or the EIRs. Any other information held by a councillor is likely to be covered by the Act and the EIRs. This includes recorded information about formal council meetings (including minutes, agendas and reports) and informal meetings which the councillor has with council staff or with external bodies on council business. It will also include information which the councillor holds as, e.g., the leader of the council.

¹ The guidance relates to the notifications requirements of councillors and can be viewed at <http://ico-cms.amaze.co.uk/DocumentUploads/general%20advice%20for%20the%20elected%20members%20of%20local%20authorities.pdf>. SIC has discussed the relationship of freedom of information and councillors has with the UKIC, but his office do not yet have a policy on the relationship.

It may also include information which a councillor holds as a result of his/her membership of an external body, although this is likely to depend on the terms of his/her appointment to the body.

It is of course possible that information will not have to be disclosed because it falls into one of the exemptions contained in the Act or the EIRs.²

Requests for information relating to a councillor's work as member of a council could be made either to the council or to the councillor. As the 20 working day period for responding to requests begins when the council or the councillor receives this information, it is important that councils provide assistance and training to councillors on how to deal with information requests, both in terms of the legislation and in terms of councils' internal practices. It is important that training extends to the EIRs, given that verbal requests are valid under the EIRs.

What about information held by a council which belongs to a councillor?

The Act allows an information request to be made for any information which is held by a council. However, there is a definition of "held" in the Act, which means that if a council holds information on behalf of another person, then that information is not considered to be held by the council and does not have to be released in line with an information request.

The EIRs are very different. If information is in the possession of a council and has been produced or received by that council or is held by another person on behalf of the council, then the information is considered to be "held" and should be released under the EIRs. Unlike the Act, the EIRs do not exempt information which a council holds on behalf of another person.

Many councils are likely to hold information on behalf of a councillor. For example, a council may allow a councillor to use its IT system for writing and storing correspondence with and on behalf of constituents. Some councils provide councillors with administrative support, including for political meetings. What happens if requests are made for information held by the council in these circumstances?

As mentioned above, councillors do not need to respond to requests for information made to them where the information request relates to their party political or

² Although the publication of committee agendas, reports etc is covered by the Local Government (Access to Information) Act 1985 (the 1985 Act), any refusal to disclose information must still be considered in line with the exemptions contained in the Act or the EIRs. Both the Act and the EIRs exempt information if other legislation prohibits the disclosure of that information (s26(a) of the Act and reg.10(5)(d) of the EIRs). The 1985 Act only prohibits the disclosure of information in very limited circumstances, ie (1) where the information has been given to the council by a government department and that department has expressly forbidden the disclosure of the information and (2) information the disclosure of which is prohibited by statute or by the order of a court. If the information falls into either of these groups, it does not have to be disclosed in response to a request under the Act or the EIRs, because of the specific exemptions in the Act and the EIRs for information whose disclosure is prohibited by other legislation. However, there are other circumstances (see Sch 7A of the 1985 Act) in which councils are *permitted* to withhold information from the public. The fact that councils are given a discretion here means that the disclosure of the information is not *prohibited* by other legislation and the exemption in s26(a) of the Act and reg.10(5)(d) of the EIRs cannot be relied on. However, even if these exemptions cannot be used, it is possible that councils will be able to rely on one of the other exemptions in the Act or in the EIRs.

constituency activities. The SIC is satisfied that where a request is made to a council for this type of information under the Act, then the council only holds the information because it is holding it on behalf of the councillor. As a result, neither the councillor nor the council needs to disclose the information under the Act.

However, the EIRs are different from the Act. They do not exempt information which is held on behalf of another person. Instead, information which is in a council's possession and has been produced or received by that council is considered to be held by the council and should be released under the EIRs. This means that environmental information which a council holds on behalf of a councillor would have to be disclosed. However, there may be other exceptions under the EIRs which allow the information to be withheld, e.g. because it is personal data (reg.11).³

Status of guidance

This has been prepared by the SIC at the request of COSLA. It contains the Commissioner's current view. This view may change over time as cases are referred to the Commissioner for decision and most requests will have to be considered on a case by case basis. It is not legal advice and should not be considered as such.

³ This issue was raised with the Scottish Executive Environment Group on 16 November 2004. They have been asked to consider aligning the EIRs with the Act.

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APPENDIX 2

With reference to your e-mail of 17 December to Leaders and Chief Executives, I note the terms of the draft guidance which the Scottish Information Commissioner has made available to Cosla on the subject of Councillors and Freedom of Information. I understand that the Commissioner is in the course of consulting Cosla on the terms of this draft advice with a view to receiving representations and thereafter finalising the terms of that advice for issue to Councils.

My purpose in writing is to express extreme concern and reservations about the terms of the draft advice as it stands. In the first place it is predicated on the basis that individual Councillors can in many circumstances act on behalf of the Council in creating and holding information. As a general contention I think that this is wrong in principle and in practice. The fact of the matter is that by statute Councils can exercise their functions by virtue of:-

- the Council in plenary session;
- by a duly authorised committee;
- by a duly authorised sub-committee;
- by delegated powers to an officer;
- in some circumstances by an agency through another authority.

It is trite law to say that the Council cannot exercise a statutory function through a single elected member: and indeed you will recall from much of the debate in recent years around alternative political management systems such as executive or cabinet arrangements, one of the issues constantly flagged up was a requirement to either adjust the legislation to make specific provision for a decision to be made by a single elected member who might be the "Minister" for a particular portfolio: or more commonly to provide a mechanism whereby the cabinet itself required to be constituted as a committee of the Council.

Fundamental to these arrangements is the accepted notion that, irrespective of the strength of influence or authority of an individual elected member, that a single member cannot, in a formal sense, bind the Council to a particular course of action to the extent of exercising a function in the Council's name.

It is on that basis that I suggest that the draft advice from the Commissioner misunderstands the nature and function of an individual elected member. While it is accepted that a councillor will have a number of jurisdictions and capacities, including a committee member and policy maker, in none of these capacities will he or she exercise a direct executive function in name of the Council.

The second overall objection is one of practicalities. In reality if the final advice from the Commissioner follows the draft, it appears to me to be suggested that, if a request is received under the FOI(S) Act seeking information held by the Council, then the Council, as well as requiring to trawl its normal departmental sources to retrieve that information, is likely to require also to trawl similarly amongst its elected members to see whether they might hold information of this description: and thereafter for a decision to be made as to whether that information is held on behalf of the Council or, as the Commissioner's draft advice describes it, as a constituency issue or as a party political matter. Although the draft advice appears to suggest that an approach may be made by an enquirer to an individual councillor, it appears to me that the more correct view is to suggest that a request to the Council, if the advice is followed, may require the Council then to trawl the information records of - in my case - seventy individual elected members.

An example might assist. If an enquiry is received as to what representations may have been made concerning a particular planning application, then that information can be accessed from the committee and background papers held by the appropriate Council department which will show the application papers and representations and objections made to the Council or brought to the Council's attention. If, however, a particular representation is made direct to an elected member

which he chooses not to share with the officers for consideration by the Planning Committee then that will be a representation made (in terms of the Commissioner's draft advice) to the Council but which the Council will not be aware of unless it seeks amongst its elected members as to whether such information has been received by them direct.

It appears to me that in such an arrangement the FOI regime will, fairly rapidly, be brought into some disrepute: and will, at minimum, be made particularly clumsy and impractical.

I appreciate that the Commissioner's draft advice appears to be based on similar advice for Data Protection purposes adopted by the Information Commissioner. That may, in part, be based on different constitutional arrangements for local authorities in England and Wales. It may be that the legal arrangements involving this status of elected members to act in an executive capacity are different in England, which may have influenced the nature of that advice. In any event my strong suggestion is that Cosla should encourage the Scottish Commissioner to reconsider the terms of the draft advice on these considerations.

John O'Hagan
Director of Administration