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GAP 1 Freedom of Information Act 2000 and disclosure of information to the public

This GAP sets out the Health and Safety Commission's (HSC) and Health and Safety Executive's (HSE) instructions and procedures on how to deal with requests for information. A joint HSC and HSE policy statement on openness is included at the end of this GAP.

Additional guidance is available on disclosure of information for the purposes of civil proceedings (see GAP 14), and on the Data Protection Act 1998 which covers disclosure of information relating to living individuals (see GAP 37)

Introduction

Purpose of this GAP

1. This GAP sets out HSC/E's policies and procedures:

   - For proactively making available as much as possible of the information we hold; and
   - For dealing with requests from the public for disclosure of information within agreed timescales.

2. These policies and procedures build on legal requirements in the Freedom of Information Act 2000 ("FOIA") and the Environmental Information Regulations 2004 ('the EI Regulations').

What is not covered

3. Disclosure of information specifically for the purposes of civil legal proceedings is covered in GAP 14, entitled Disclosure for the Purposes of Civil Proceedings in England and Wales. This GAP is in the process of being revised to take account of the Freedom of Information Act 2000.

4. GAP 1 does not deal with disclosure to the following, except to the extent mentioned below:

   - other Government Departments;
   - local authorities;
   - other regulatory authorities (e.g. Environment Agency, Maritime and Coastguard Agency, Food Standards Agency);

- the police; or

- To employees or safety representatives by HSE.

5. In these cases, and where a disclosure request is made specifically pursuant to the Civil Procedure Rules 1998 (CPRs), disclosure will continue to be governed by section 28 of the Health and Safety at Work etc. Act 1974 (HSWA) and the CPRs, and by any other statutory provisions which may be relevant in a given case, such as the provisions of section 17 of the Anti-terrorism, Crime and Security Act 2001.

6. Where a request is made, either under the FOI Act alone or jointly with a request under the CPRs, requests for information will necessarily have to be considered in accordance with that Act.

General presumption

7. The presumption should be that all the information we hold should be released on request unless the law prevents it or it is exempt information and the public interest test demonstrably comes down against disclosure in a particular case.

8. In addition, we should look wherever possible to:

- Proactively make information available - through the Internet, public registers etc; and

- Enable easy access and release by improving the collection and storage of information.

Principles of disclosure

9. The following principles should be borne in mind in dealing with requests for disclosure of information:

- **The "public" essentially means anyone who does not have official access to government information**, and includes employers, employees, Members of Parliament (MPs), Members of the European Parliament (MEPs), the Members of Scottish Parliament (MSPs) and the National Assembly for Wales (AMs)

  GAP 40 is relevant to direct contacts with Members of Parliament), as well as lobbying organisations, commercial organisations and persons overseas.

- These instructions apply equally to requests made, in writing, by telephone, or in person.

- The FOI ACT and the EI Regulations create a presumption that information will be disclosed unless it comes within certain exempted categories of information.

- The identity of the person making the request for information or why they want the information are not generally to be taken into account in deciding whether to disclose

information. However, these issues may be relevant in deciding whether disclosure is restricted by section 28 of the HSW.

- The FOI ACT and the EI Regulations apply only when a request for information is made to HSC/E. They do not apply when HSC/E itself wishes to disclose information where no request for it has been made. Such disclosure will continue to be governed by Section 28 of the HSW Act (and any other applicable disclosure provisions in other legislation).

- Except where prevented from doing so, (e.g. by the FOIA, EI Regulations), HSE will normally release, on request, information it has received from third parties. Where HSE considers that the release of such information could cause embarrassment or adverse publicity to the party that provided HSE with the information, we will notify the party that the information is about to be released. Such a notification should not imply that we are seeking permission to release the information; decisions on whether to release information must be taken solely on the requirements of the FOIA, the EI Regulations and, where relevant, Section 28 of the HSW Act.

- In dealing with requests for information in areas where HSE acts in conjunction with another Government Department, public agency or public authority, whether under legislation or administrative arrangement, we will consult the appropriate Department, Agency or Authority before releasing the information requested.

- Where we are aware that another Government Department, Public Agency or Public Authority is the principal or part holder of information requested, we will advise the requestor of the contact details of the Public Body concerned and deal solely with the request for the information held by HSE. It remains HSC and HSE policy to release whatever information we hold where that information is necessary in the public interest to counter an immediate and significant threat to health and safety or to the environment.

What Directorates/Divisions need to do

10. In order to fulfil the requirements of the FOIA, the EI Regulations and the Commission and Executive statements, Directorates/Divisions need to:

- make available information supporting major policy decisions (HSC Discussion or Consultative Documents will contain in a large part the facts and analyses of facts that lie behind a proposal) (see Publication of Facts and Analyses Behind Major Policy Decisions);

- make internal guidance available (see Information to be made available and Making Internal Guidance Available);

- respond to requests following the guidance set out in this GAP;

- gather and store information in a form that makes disclosure on request as simple and least resource intensive as possible;

- maintain the required monitoring system.

Disclosure of information that could be withheld

11. There will be circumstances where HSE wishes to disclose information to certain parties that we would not make publicly available because the law prevents it or its release would be likely to cause harm or prejudice. For example, such information may be contained in:

    - draft reports or papers containing information covered by section 28 where expert views are required on technical or scientific aspects; or

    - draft HSC and HSE Board papers containing information which, if publicly available, would be likely to cause harm or prejudice and which is covered by one or more exemption(s) in the FOI Act or Environmental Information Regulations, but where we wish to seek the views/comments of parties outside HSE.

12. Authors may wish to consult external parties on the drafts, including 'exempt' material. The fact or expectation that some material will be closed by the author in relation to public access does not preclude making it available to such parties outside HSE as the author considers appropriate as part of the normal conduct of our business. Authors may, though, wish to make it clear to external recipients that certain material is being made available on the basis that it will be treated as confidential. In the case of draft HSC or HSE Board papers, the proposed Freedom of Information Act status and markings should be included (see GAP 3 for guidance on preparing HSE Board and HSC papers for disclosure).

The Freedom of Information Act 2000

13. On 1st January 2005 the Freedom of Information Act 2000 (FOI Act) created two important rights of access for any person making a request for information to a public authority such as HSC or HSE:

    - To be informed by the public authority whether it holds the **information** of the description specified in the request; and
    - If that is the case, to have the **information** communicated to them.

14. These rights are fundamental to the operation of the FOI Act. However it is not the intention of FOI Act to hinder the efficient and legitimate functions of Government therefore a number of exemptions and limitations designed to enable a balance to be achieved are included in the legislation.

15. Because the rights of access, and the public interests protected by the exemptions, are so important, any decision to refuse a request for disclosure has to be made with great care and based on informed and balanced decision making.

16. This GAP should be read in conjunction with the two Codes of Practice issued under the FOI Act and in conjunction with guidance issued by the Department for Constitutional Affairs (DCA**)** with which all staff making such decisions should familiarise themselves.

17. Where there is doubt about the terms of the FOI Act, or the decision making process in a given case proves difficult advice must be sought from the FOI Unit or HSE Solicitor's Office.

The structure of the Act

There are three main features of the FOI Act:

- The Publication Scheme provided for in sections 19 and 20 of the Act which has been in force for HSC and HSE, and for other public authorities since November 2002;
- The general statutory rights of access to information subject to the limitations set out in FOI Act's exemptions
- The provisions for the supervision and enforcement of FOI Act by the Information Commissioner.

To whom does it apply?

18. FOI Act applies, with few exceptions, to all public authorities in England and Wales and Northern Ireland. There is separate Scottish legislation covering nominated bodies in Scotland.

19. The FOI Act does not apply to information held by the Security Service, the Secret Intelligence Service, the Government Communications Headquarters ("GCHQ"), or the Special Forces or any unit of the armed forces providing assistance to GCHQ:

What information does the Act apply to?

20. The FOI Act applies to all information held by public authorities, recorded in any form. This is a wide definition that includes paper-based documentation, information stored on a computer, audio and video recordings, plans, maps and photographs. It does not apply to unrecorded information, which may be known to an authority or to information which an authority has held in the past but which has been destroyed in line with retention policies before a request for it is received.

21. The right is to the information itself **and not to the document or record, which contains it**. This means, for example, that where a document contains a mixture of disclosable and non-disclosable information, the disclosable information must be extracted from the document and released.

22. The applicant may also ask for a summary of the information that is disclosable under the FOI Act.

Who can apply?

23. The right of access created by the FOI Act permits anyone, anywhere, to make a request. The Act does not distinguish between members of the public, journalists, companies or other organisations. Nor does it distinguish on grounds of nationality or country of residence

24. Applicants do not need to give reasons for their requests or make reference to the FOI Act in their application.

25. This means that in principle, the same information should be provided to any person who makes the same request, and when that information has been disclosed it must be assumed to be fully open for the future. Taking steps to publish the information on the HSE web site would be sensible.

What counts as a request for information?

26. Any request for recorded information is a request to which Freedom of Information Act procedures potentially apply. HSE has decided to deal with all information requests, whether received by letter, fax email or verbally, under a common FOI procedure.

27. Requests may later be dealt with under a different regime, for example, the Data Protection Act for personal information, but in the first instance, all are assessed under FOI principles.

You need to consider:

- Whether it is actually requesting information.
- Does it give the applicant's contact details?
- It is not normal business i.e. a request for a service provided under the Health and Safety at Work Act?
- Not already available? (for example in an HSE publication or on our web site)

28. If the above criteria are fulfilled, forward the request to your local FOI Officer.

29. If one or more of the above criteria are not met, either transfer it to the appropriate HSE section or deal as appropriate.

FOI exemptions

30. There are 23 exemptions under the Act, 8 of which are 'absolute' and the remainder 'qualified.'

- Where an "absolute" exemption applies there is no obligation to consider the request for information any further, although in the case of some 'absolute exemptions they may refer you to an alternative access regime e.g. the Data Protection Act.

- 'Qualified' exemptions are subject to an assessment of the balance of the public interest in all circumstances of the case, both for and against disclosure.

31. Because the exemptions take many different and varied forms and because the interests they protect are usually broadly defined, there is considerable potential for overlap between the exemptions.

32. In some instances the FOI Act provides for the mutual exclusivity of certain of the exemptions. So, for example, the section 24(1) (national security) exemption does not apply to information already exempt under section 23(1) (information supplied, by or relating to a security body). Sections 30 (investigations and proceedings conducted by public authorities) and 31 (law enforcement), and 35 (formulation of government policy) and 36 (prejudice to effective conduct of public affairs) are also mutually exclusive.

33. However, generally speaking, there is no reason why overlapping exemptions should not be applied simultaneously. Where an exemption directs you to a separate access regime, as in the case of environmental information and personal information it is the rules of those access regimes which need to be followed.

34. Certain of the exemptions are concerned with the effect, or likely effect, of the disclosure in question. So, for example, they may provide that certain information is exempt if its disclosure "would, or would be likely to, prejudice" certain matters.

35. The FOI Act contains the following exemptions:

- Information accessible to the applicant by other means (section 21): This is an absolute exemption. Information may be exempt by virtue of this provision even though it is available only on payment. Examples of this type of information covered by this exemption include books and pamphlets (including priced publications) published by HSC or HSE, information available full text on the HSE website and copies of Acts of Parliament and statutory instruments;

- Information intended for future publication (section 22): This section exempts information which is intended to be published, where it is reasonable that the information should not be disclosed until the intended date of publication. Examples of the type of information covered by this exemption might include information relating to HSC/HSE research projects, which it would be inappropriate to publish until the project had been completed, or statistical information which is usually published to a specific timetable (annually, quarterly etc) such as the HSC/HSE annual reports, offences and penalties report;

- Information supplied by, or relating to bodies dealing with security matters (section 23): This provision confers absolute exemption on all information directly or indirectly supplied by, or relating to certain bodies dealing with security matters. A certificate signed by a Minister of the Crown is conclusive proof that the information is of the type in question, subject to a right of appeal to the Information Tribunal. The obligation to confirm or deny whether or not HSC or HSE holds such information does not arise if to comply would itself disclose exempt information;

- National security (section 24): This section exempts information not covered by section 23, however, a certificate is **not** necessary in order to rely on this exemption.

- The obligation to confirm or deny whether the requested information is held does not arise where such an exemption is required in order to safeguard national security. A certification process is provided which is similar to that in section 23;

- Defence (section 26): This section exempts information the disclosure of which would, or would be likely to, prejudice the defence of the British Islands or any colony or the capability, effectiveness or security of the armed forces. If any such information is held the Ministry of Defence should be consulted before a decision on disclosure is reached;

- International relations (section 27): This section exempts information the disclosure of which would, or would be likely to, prejudice relations between the United Kingdom and any other State or international organisation, or international court, the interests of the United Kingdom abroad, or the promotion or protection by the United Kingdom of those interests. So, for example, this exemption might become relevant in respect of maintaining the confidentiality of communications between the European Commission and a Member State Another example, might be information or communications between HSE and the Channel Tunnel Intergovernmental Commission and Safety Authority;

- Relations within the United Kingdom (section 28): This section exempts information, which would, or would be likely to prejudice relations between any two administrations in the United Kingdom for example early communications on policy between the Welsh Assembly and Whitehall where differences exist but which are subsequently resolved.
- The economy (section 29): This section exempts information the disclosure of which, would, or would be likely to, prejudice the economic interests of the United Kingdom or the financial interests of any administration in the United Kingdom, (which would include, for example, budgetary interests);

- Investigations and proceedings conducted by public authorities (section 30). This is an important qualified exemption for covering any information held at any time by a public authority for the purposes of a criminal investigation or criminal proceedings conducted by it. If information has ever been held for these purposes it becomes and remains exempt information but it subject to the public interest test. In balancing public interest considerations HSE will need to consider in particular:
    - the potential effects of a disclosure and
    - the nature and seriousness of the matter being pursued.

  Also exempt is information relating to the obtaining of information from confidential sources (informers) if it was obtained for functions relating to, criminal investigations, criminal proceedings and civil proceedings;

- Law enforcement (section 31): This exemption is also of importance to HSE, covering information the disclosure of which would, or would be likely to, prejudice certain specified law enforcement matters; it essentially protects the conduct of investigations and proceedings, which may lead to prosecutions, or prejudice civil proceedings brought by an authority. This would include, for example, the conduct of appeals against improvement and prohibition notices in the Employment Tribunal under section 24 HSWA, any civil proceedings HSE is a party to, and any judicial review proceedings brought against HSC or HSE. Subsection (2) sets out the purposes referred to in subsections (1)(g), (h), (i), and (j). Section 31 is an exemption turning on the likely effects of a response to a request for information. It

requires a prejudice test to be applied. It is also a qualified exemption – before information may be withheld in reliance on it, the public interest balance must be considered. The Act makes express provision for mutual exclusivity with section 30. This is important because there would otherwise be a large area of potential overlap between the two sections. This mutual exclusivity provision directs attention in the first place to section 30. Only if information falls outside section 30 does section 31 come into consideration;

- Court records, etc (section 32): This is an absolute exemption. Where it applies there is no discretion to disclose information. It exempts information which is held by a public authority solely by virtue of the fact that it is contained in:

    - documents filed with, or placed in the custody of, a court for the purposes of proceedings,
    - served upon, or by, the public authority for the purposes of such proceedings,
    - which a court has created for the purpose of such proceedings (for example, bench memoranda, claim forms, pleadings, indictments, skeleton arguments, opening notes);

- Parliamentary privilege (section 34): This section exempts information if this is required for the purpose of avoiding an infringement of the privileges of either House of Parliament. This may be a consideration where a request for disclosure anticipates an announcement or publication about to be made or laid before Parliament. Care is also needed where information has been given to a Parliamentary Committee in a memorandum or evidence, but the Committee has not yet published its report. In general there should be no difficulty about disclosing the substance of the memorandum if this is properly in the public domain, but it may be a breach of privilege to publish the report or evidence given in full before the Committee has published it;

- Formulation of government policy, etc (section 35): This is a qualified exemption and where it applies the public interest in disclosure must be balanced against the public interest in withholding the information. The same test applies to the duty to communicate information and to the duty to confirm or deny. This is a broad exemption covering information “if it relates” to the formulation or development of government policy, ministerial communications, Law Officers’ advice or the operation of a Ministerial private office. Once a decision as to government policy has been taken, any statistical information used to provide an informed background to that decision cannot be exempt under s35 although it could be exempt under section 36. This exemption is intended to be used, to provide an informed background to decision taking;

- Prejudice to effective conduct of public affairs (section 36): This section relates to information held by government departments which is **not** exempt by virtue of section 35 and to information held by other public authorities. It provides that information is exempt if, in the reasonable opinion of a “qualified person”, its disclosure would, or would be likely to prejudice the maintenance of the convention of collective ministerial responsibility, would, or would be likely to, prejudice the work of the Executive Committee of the Northern Ireland Assembly or the National Assembly for Wales, would, or would be likely to, inhibit the free and frank

provision of advice or exchange of views, or would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs. The obligation to confirm or deny that requested information is held does not arise if, in the reasonable opinion of a "qualified person", to do so would, or would be likely to, have any of the adverse effects referred to above. In HSC the qualified person is the Chair of the Commission, for HSE it is the Director General;

- Communications with Her Majesty etc. and honours (section 37): This section exempts all information relating to the award of any honour or dignity by the Crown or to any communications with the Royal Family of Household. It is a qualified exemption;

- Health and safety (section 38) exempts information the disclosure of which would, or would be likely to, endanger the physical or mental health or safety of any individual. A public authority is exempt from the duty to confirm or deny holding the information if this would be likely in itself to cause harm stated above. The test is one whether disclosure would be "likely to endanger" so deals with risk of harm rather than harm itself. Relevant considerations will obviously be the risk and severity of any potential harm to any individual, and the strength of the public interest in disclosure;

- Environmental Information (section 39): This is an absolute exemption and directs you to the regime for disclosure under the Environmental Information Regulations 2004; **Need to add the S.I. number once the Regulations are made.**

- Personal Information (section 40): If the applicant of the request is the data subject, then the exemption is absolute and request dealt with under the Data Protection Act 1998 which gives the right of access;

- Information provided in confidence (section 41): This exemption qualifies the right of access under the Act where disclosure of information would be a breach of confidence Actionable at common law. The section exempts information obtained from any other person if its disclosure would constitute such a breach of confidence. This exemption is an absolute exemption. A duty of confidence may be created by contract, or may arise from the circumstances. The common law of confidence itself however provides that, in certain circumstances a duty of confidence does not arise (or rather can be overridden) in the public interest;

- Legal professional privilege (section 42): This section exempts, as a class, information to which legal professional privilege applies. Legal professional privilege applies to confidential communications between lawyers and their clients for the purpose of giving or receiving legal advice, and to any communication whose dominant purpose was the prosecution of defence of legal proceedings but the exemption is not absolute so far as HSE's privilege is concerned. If you receive a request for information, which is contained in any legal advice or a request for a copy of any legal advice, whether obtained from within HSE Solicitor's Office, external counsel, solicitor agents you must refer the request to the FOI Unit who will liaise with HSE Solicitor's Office. Similarly if you receive a request for information contained in or a copy of any Law Officers advice, or relating to any request to the Law Officers for advice you must refer that request to the FOI Unit,

who will liaise with HSE Solicitor's Office. You should neither confirm nor deny to the applicant that we hold any such advice or information;

- Commercial interests (section 43) exempts information if it constitutes a trade secret or if disclosure would, or would be likely to, prejudice the commercial interests of any person – including HSC's, HSE's or HSL's. This is a qualified prejudiced-based exemption. So the test for the exemption is whether or not our commercial interests, or those of any other person would or may be prejudiced by disclosure. In order to assess whether or not disclosure could prejudice commercial interests it is necessary to identify the interests themselves and how disclosure might prejudice them, and whose interests they are. HSE's commercial interests might, for example, be prejudiced where a disclosure would be likely to damage its business reputation or the confidence that our stakeholders may have in us, or have a detrimental impact on our ability to carry out our statutory functions. A simple assertion by a person that there would be prejudice to their interests is not sufficient to engage the exemption. It will need to be supported by reasons and ideally, pragmatic evidence. Where there is any possibility that disclosure would prejudice the interests of either a stakeholder or a third party, we must consider an approach to that third party with a view to establishing their willingness or ability to waive or mitigate that prejudice or set down reasons for not doing so. The decision whether to disclose however must be taken by HSE;

- Prohibitions on disclosure (section 44): This is an absolute exemption. The section exempts all information where disclosure is prohibited by or under an enactment (e.g. the Human Rights Act 1998), is incompatible with any European Community obligation, or would constitute or be punishable as a contempt of court.

The "public interest" test - section 2 of the Act

36. The FOI Act seeks to balance the right to know with the delivery of effective government. So, in the case of a qualified exemption, section 2 requires a public authority to consider whether, in all the circumstances of the case, the public interest in withholding the requested information outweighs the public interest in disclosure.

37. Decision Makers therefore, need to weigh up the public interest considerations in favour of protecting information from disclosure and the public interest considerations in favour of disclosure, judging where the public interest lies. If the public interest in withholding the information outweighs the public interest in disclosure, it should be withheld. If it does not the information should be disclosed.

38. The terms of the exemptions found in Part II of FOI Act provides a broad indication of the kind of public interest considerations in favour of refusing a request. Some requests (e.g. section 36) give rather more specific indications of the relevant public interest factors, which may be involved.

39. It is not, however, sufficient simply to assert a public interest in non-disclosure: its relevance to the circumstances of an individual request, and an assessment of the balance which has been carried out must be properly analysed, supported and recorded on the file.

40. As the balance of the public interest is liable to change over time so the public interest will need to be reviewed afresh in response to renewed requests for information.

How much time does the Act allow to answer a request?

41. Information requests under the FOI Act need to be complied with not later than 20 working days following the date of receipt of the request. However, the FOI Act recognises that a public authority may need additional time in which to make a proper assessment of where the public interest lies since this may give rise to difficult issues of judgment. The FOI Act, therefore, allows a public authority to take additional "reasonable" period of time to reach a final decision where such a qualified exemption is engaged. In these cases, however, the applicant must be told within the 20-day period which exemption(s) it believes apply to the information requested, and give an estimate of the date by which the decision will have been made. This date must be met.

Good decision-making: the duty to give reasons

42. Where HSC or HSE declines to provide information in reliance on one of the exemptions, either because an absolute exemption applies, or because the balance of the public interest is against disclosure they will not, of course, be obliged under the FOI Act to disclose it.

43. Where a decision is taken to withhold the information reasons must be given for that decision. At this point a decision will also need to be taken on whether or not to confirm to the applicant that the information, which has been requested is in fact held by HSE. There are circumstances in which even to confirm (or indeed deny) that information is held is not appropriate. So, for example, information requested to confirm the existence, size and strength of fissionable material at a particular reactor site would not be confirmed or denied. Where HSE reaches the conclusion that it has no obligation under the FOI Act to say whether it holds the information the normal manner of doing so is to say that it will neither confirm nor deny whether it holds the information.

44. Where information is withheld the response to the applicant must meet certain statutory requirements:

- specifying which exemption or exemptions are used;
- giving reasons (if that would not otherwise be apparent) why the exemption applies; and
- in the case of a qualified exemption, stating the reasons for claiming that the balance of the public interest comes down in favour of not complying with the request.

45. It will, therefore, be important to ensure that both the decision making process, and the recording of such decisions is sound. Poor decision-making and file handling will put at risk the prospect of successfully defending a decision against appeal.

Do we hold the information?

46. In some cases it may not be clear whether information which is physically present on our premises or systems is properly to be regarded as "held" by us. Examples include:

    - private material brought into the office by officials;
    - material belonging to other people or bodies;
    - Trade Union material;
    - HSE information held by contractors.

47. If you are in doubt about whether we 'hold' material which is on our premises or systems, it is essential to seek advice.

48. From time to time, you will receive requests for information which we do not hold, but which may be held by another public authority. You should let the applicant know that your authority does not hold the information in question but the information may be held by someone else and suggest they re-apply to the other public authority. Where possible, you should provide the applicant with contact details.

Information that has been deleted or amended

49. The right of access to information under the FOI Act applies to information we hold at the time that the request is received. If it appears that requested information has been deleted or amended, it is important to identify:
    - whether the information was deleted or amended *before* the request was received; or
    - whether the information was deleted or amended *after* the request was received.

- **Information that was deleted from the system before the request was received**
  Instructing a computer to delete a particular item may not result in the item being destroyed immediately. At least for a period, the information might still be retrievable albeit with substantial cost and disruption to the system. However, where it is the intention that data should be permanently deleted, and this is not achieved only because the technology will not permit it, authorities may regard such data as having been permanently deleted. This information is no longer considered to be "held" by the authority and does not have to be retrieved or provided in response to a request.

  This approach is not justified where the information has only been temporarily deleted and is stored in such a way that it could easily be recovered, for example from the Deleted Items folder in Outlook. This information is still considered to be "held" by the Department and may have to be provided if a request is received.

- **Information amended before a request was received**
  It is possible that you will hold multiple versions of a piece of text. If you are in any doubt about which version or versions should be disclosed, you should consult the FOI Unit.

- **Information that is deleted or amended after the request was received**
  Information held by an authority **must not be deleted or amended in order to avoid complying with a FOI request.** Altering, defacing, blocking, erasing, destroying or concealing information in order to avoid providing it in response to an FOI request may constitute a criminal offence under section 77 of the FOI Act for which the person convicted will be held personally responsible.

  If requested information is deleted from any computer, hard copy records management system or electronic filing system in line with HSE's records management practices after a request is received, the information is not considered to be held by the public authority. This will only apply if it can be shown that the person who made the deletion had no knowledge of the request and that they were following standard records management policy and schedules when they deleted the information.

Repeated or vexatious requests

50. A number of requests under the Act are very broad requests for information and they may not describe the information that is sought sufficiently precisely to enable you to identify and locate the information. If the request is too broad or general in nature (eg. seeks all information on a topic over many years) you have a duty to provide advice and assistance to the applicant in order to focus the request. But the breadth of a request is not in itself an automatic reason to refuse it (although cost considerations might well be relevant here).

51. Repeated and vexatious requests are a different matter:

    - **Repeated requests** If a public authority has previously complied with a request for information that was made by a person, does not need to comply with a repeated request from the same person (i.e. an identical or substantially similar request) unless a reasonable period of time has elapsed between compliance with the first request and receipt of the second.

    - A **vexatious** request is determined by the information requested, **not** the person making the request. An individual cannot be classified as a vexatious requestor. An individual can make as many requests for information as he/she wishes, and cannot be labelled as vexatious – each of their requests must be determined on a case-by-case basis – but the provisions on aggregating the costs of these requests may be relevant. Vexatiousness needs to be assessed in all the circumstances of an individual case, but if a request is not a genuine endeavour to access information for its own sake, but is aimed at disrupting the work of an authority, or harassing individuals in it, then it may well be vexatious. You should always contact the FOI Unit if you consider that a request might be vexatious.

Our duty to provide advice and assistance – what does it mean in practice?

52. We are under a duty to provide advice and assistance, so far as it would be reasonable to expect us to do so, to people who have made or who propose to make requests for information.

53. The Section 45 Code of Practice provides detailed guidance on the provision of advice and assistance to applicants and gives examples of where the duty may arise and how public authorities might comply with it. The Code of Practice should be consulted as and when necessary. The Information Commissioner's Office has produced an awareness guide on advice and assistance which can be found on their web site.

54. The provision of advice and assistance does not normally affect the 20 working days deadline. However, if you are providing advice and assistance because you need further information in order to identify the information requested, you are not obliged to comply with the request until you receive this.

55. If you have to request more information from applicants as to the precise nature of the information they are requesting, then you should consider the most appropriate way of obtaining it. It may be quicker to e-mail the applicant.

56. It is important that you keep a detailed record of any letters, e-mails and telephone conversations you may have with applicants in the course of providing advice and assistance.

What are working days?

57. 'Working Days' are all days except Saturdays and Sundays, Christmas Day and Good Friday, and Bank Holidays anywhere in the UK as set out in the Banking and Financial Services Act 1971.

58. It should be noted that Civil Service 'privilege days' do count as working days. If your office is closed for a privilege day this should be built into the timetable for response.

Provisions for extra time

59. The Act makes a limited number of provisions for extra time to be taken in responding to a request.

- **Fees** - The timescale is put on hold if, after initial consideration of the request, a fee is requested - see chapter on Cost and Fees. The timescale remains on hold whilst you are waiting for the fee to be paid.

- **Applying the Public Interest Test** - If the information being sought has to be considered under an exemption to which the public interest test applies (please see the exemptions section in the following chapter and in the 'Introduction to Exemptions') then the timescale is extended by a 'reasonable period'. Although there is no statutory time limit on how long the 'reasonable period' may be, if you are considering the public interest test you must, under section 17(2), give an estimate of

the date by which you expect to reach such a decision. You must ensure however that you do not unnecessarily delay responding to a request when considering the public interest test. There will be many cases when you are able to make a consideration of the public interest test and answer the response within 20 working days. In such circumstances you should ensure that you do so. It must be remembered that the overriding obligation on you is to answer requests promptly.

If the timescale for response needs to go over the 20 working day deadline, you are expected to give an estimate which is realistic and reasonable in the circumstances of the particular case, taking account, for example, of the need to consult third parties where this is necessary. You are expected to comply with this estimate unless there are good reasons not to do so You should ensure that your response to the applicant is prompt, and that you do not unnecessarily delay responding by using the 'reasonable time' period for no good reason.

If you exceed the estimated time you gave to the applicant, you should explain to the applicant the reason for the delay. If you find, while considering the public interest, that the estimate given is proving unrealistic, you should ensure that you keep the applicant informed.

Your public authority should keep a record of instances where estimates are exceeded, and where this happens more than occasionally, take steps to identify the problem and rectify it.

Assessing requests for information

60. The key to the successful management of information requests is being able to discriminate between routine or straightforward requests and requests which require more careful processing.

Identifying the correct process

61. It can sometimes be difficult to assess at first glance the complexity of a request for information or to judge the level at which it needs to be signed off. The procedures in this GAP will help, but you will also have to rely on your own judgement to spot the cases that need more careful handling.

Routine requests

62. These are the straightforward requests for information that we dealt with as a matter of course before the FOI Act came into force. Examples include asking for copies of Fully Open internal documents produced by HSE; asking us for contact details; and details of services that we provide to the public. These kinds of requests will continue to be dealt with as normal under FOI, there is no need to refer these kinds of requests to more senior staff. The 20 working days deadline for response must still be adhered to.

63. Much of our routine correspondence will also fall within this category.

More complex and sensitive requests

64. The Freedom of Information Act means that Departments will have to deal with more complex requests for information. These will be requests for information which go beyond the day-to-day correspondence that we normally deal with. Requests may be complex for a variety of reasons. For example:

- requests may involve consultation with other public bodies or with third parties;
- it may be unclear as to whether or not the information sought is exempt;
- requests on issues which have a high public profile;
- requests which may relate to financial interests; and
- requests which may be part of an orchestrated campaign.

65. In any case of this nature, it will be important that the FOI Unit is involved. Some particularly important kinds of complex requests are considered further below.

"Mixed" requests

66. A mixed request is a case in which an applicant requests information which needs to be considered under more than one access to information regime. The most important access regimes apart from FOI are subject access under the Data Protection Act 1998 and access to environmental information under the Environmental Information Regulations 2004. The key similarities and differences between these three regimes are set out in Annex 9.

Requests where Central Government co-ordination is necessary

67. Some of the most complex and sensitive requests will need to be referred to the Central Clearing House through the FOI Unit for guidance and advice. This will be because they raise difficult issues which go to the heart of the careful balance which needs to be struck between people's right to know and the Government's ability to govern effectively.

The Clearing House

68. The Clearing House will Act as the central point of expertise, guidance and advice for all FOI requests which raise sensitive issues and have Whitehall-wide implications.

69. The Clearing House will:

- ensure a consistent government-wide position on round-robin and potentially precedent setting cases;
- provide guidance on all sensitive cases with a potentially high profile;
- align responses, where necessary, with government policy and guidance;
- revise government guidance in the light of emerging case law and new policy; and
- be a source of expert advice and guidance to Departments on the FOI Act, Data Protection, and the Environmental Information Regulations.

70. The Clearing House will not answer requests on behalf of Departments. It will provide advice on difficult cases, but the responsibility for answering the requests will still lie with the Department which holds the information requested.

71. Which requests should be referred to the Clearing House?

72. It is not possible to provide a conclusive or exhaustive list of requests which should be referred to the Clearing House. However, the list below should serve as a guide of the broad range of matters which the FOI Unit must see and, if they deems appropriate, refer to the Clearing House.

- requests which obviously involve cross Whitehall issues;
- Round Robin requests, such as those relating to Departmental financial information;
- requests raising difficult issues about the application of sensitive exemptions, for example those relating to the policy-making process (advice to Ministers, Ministerial letters), cabinet correspondence or papers, national security or international relations, commercial confidentiality or legal advice;
- requests for which Ministerial certificates may have to be considered; and
- particularly difficult mixed requests.

73. If you are unsure about the need to refer any particular request to the Clearing House, the FOI Unit will be able to advise you.

Responding to the request

Means of disclosure

74. Once a decision has been taken to release information, the key consideration for an authority is the form in which it is to be released. Public authorities will hold information that is covered by the right of access under the Act in many different forms. Applicants may request information that is included in minutes of meetings, e-mails, maps, audio recordings, video recordings and information held in any format by your department.

75. Sometimes applicants will request information in a particular form, perhaps asking for a copy of the minutes of a particular meeting. It is important to remember that the right of access is to information, not documents. But if it is reasonable to comply with an applicant's request as to the form in which information is disclosed, you are obliged to comply with that request.

76. If the applicant requests a copy of the information in a permanent form, (or any other form acceptable to them), for a summary or digest of the information, or to come and inspect a record containing the information, you must, when considering whether you can release the information, also consider whether it is reasonable to provide the information in the format requested.

77. When considering whether you can release the information in the format requested by the applicant you should consider:
    a. **Whether the format is easily replicable** – eg. can you easily copy the maps requested, do you have audio copying equipment?

b. **The cost of providing the information in the format requested** – would providing the information in the format requested by the applicant take the cost of processing the request over the fees threshold. If this occurs, you should write to the applicant, stating that a fee is payable for releasing the information in the format requested. You should also give Active consideration to whether the information can be released in another format which would not incur a cost. If this is possible, you should alert the applicant to this fact in the same letter.

Subject Access under the Data Protection Act 1998 (see GAP 37 for full guidance)

78. The Data Protection Act protects people's right to private life in two ways:

- it sets out eight data protection principles that people must comply with when they deal with and disclose personal data;
- it gives individuals a number of specific legal rights, in particular the right of access to their personal data.

79. Requests under the Data Protection Act are known as "subject access requests".

80. The main features of the processing of subject access requests are:

- from January 2005 it applies to all personal data that is held by public authorities;
- the public authority must reply within 40 calendar days;
- the request does not have to cite the Data Protection Act; and
- there are a number of exemptions from the right of access.

81. If a request for information is **to any extent** a "subject access request" then it must to that extent be dealt with in accordance with the Data Protection Act. It is important that you are able to recognise a subject access request and that it is dealt with quickly and in line with existing procedures.

82. The personal data of other people (that is, people other than the person making the request) is exempt under section 40 of the Freedom of Information Act. Guidance on the interaction between the FOI Act and the Data Protection Act may be found in the exemptions guidance produced by the Department for Constitutional Affairs.

Environmental Information Regulations 2004

83. New Environmental Information Regulations came into force on 1 January 2005 at the same time as the FOI Act came into full force. Like the Freedom of Information Act, they give access rights to any person, anywhere in the world, but deal specifically with information about activities that may have an impact on the environment.

84. The main features of the Environmental Information Regulations are:

- Requests may be made orally or in writing.
- The public authority must reply within 20 working days.

- There is a limited range of exemptions, all of which are subject to a public interest test.
- There is no upper limit for the cost of meeting a request beyond which the request may be refused

85. The Environmental Information Regulations 2004 (EIRs) implement Council Directive 2003/4/EC on public access to environmental information. They require public authorities which have responsibilities in respect of the environment and hold environmental information to release the information on request, subject to some exempted classes. The 2004 Regulations are fully retrospective (i.e. they apply to information acquired before 1st January 2005, the date the Regulations came into force). Guidance on the implementation of the Environmental Information Regulations is available on the Department for Environment, Food and Rural Affairs (DEFRA) Website.

86. The EIRs overrule all other statutory provisions on disclosure where those other provisions conflict with the Regulations. In HSE's case this means that the statutory restrictions on disclosure in section 28 of the HSW may not apply to requests made for environmental information as defined in the Regulations. (But see section 28 of the Health and Safety at Work etc Act 1974 which explains how, in certain defined circumstances, section 28 can result in some categories of information being required to be exempt from disclosure under the EIRs.)

87. The EIRs require a response to a request to be given as soon as possible and, no later than 20 working days after the date of receipt of the request. This can be extended to 40 days if the complexity is such that to reply in 20 days is impracticable.

What is environmental information?

88. The Regulations define environmental information as information relating to:

a) the state of any water, air, flora, fauna, soil, natural site or other land;
b) any activities or measures (including Activities that give rise to noise or other nuisance) which adversely affect or are likely to adversely affect anything in (a); or
c) any activities or other measures (including environmental management programmes) which are designed to protect anything in (a).

89. The EIRs do not require HSE to release information about human health and safety except where it has been, or could be, affected through environmental media (e.g. air, water or soil). For example, information that workers at a manufacturing plant were directly harmed in the manufacture of a substance is not releasable under the EIRs as environmental media are not involved. However, if fish were harmed, or could have been harmed, because a substance got into a watercourse, or humans were harmed, or could have been harmed, because a substance got into the food chain, such information would have to be released on request as environmental media are involved.

HSE's environmental information

90. HSE is within scope of the EIRs as we have environmental responsibilities and hold environmental information, or have it held on our behalf by another organisation (e.g. Iron Mountain).

91. We may obtain environmental information in carrying out any of our functions or in any area of our responsibilities and such information is subject to the requirements of the EIRs. For example, information we obtain on noise, Legionnaires' disease, ionising or non-ionising radiations may be disclosable to the extent that it relates to the environment. In addition, HSE has statutory environmental responsibilities in the following areas, and may have environmental information that must be disclosed under the EIRs, subject to the exempted categories of information:

- major accident hazard sites (as defined in the Control of Major Accident Hazards (COMAH) Regulations 1999)
- pesticides
- new substances
- genetically modified organisms
- onshore and cross country pipelines
- polychlorinated biphenyls (PCBs) and polychlorinated terphenyls (PCTs)
- import and export of certain dangerous chemicals (under EC Regulation 2455/92)

Exceptions to the duty to disclose

- Under the EIRs, a public authority may refuse to disclose requested information if:
- in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information;
- it does not hold the information when the request is received;
- the request for information is manifestly unreasonable;
- the request for information is formulated in too general a manner and we have complied with our duty to provide advice and assistance to the applicant as far as is reasonable;
- the request relates to material which is still in the course of completion;
- the request involves the disclosure of internal communications (including communications between government departments).

92. A public authority may refuse to disclose requested information when disclosure would adversely affect:

a) international relations, defence, national security or public safety;

b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature
c) intellectual property rights;
d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
f) the interests of the person who provided that information where that person –
    i. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
    ii. did not supply it in circumstances such that that or any other public authority is entitled apart from these regulations to disclose it; and
    iii. has not consented to its disclosure; or
g) the protection of the environment to which the information relates.

93. We may also respond to a request by neither confirming or denying whether such information exists and is held by us, whether or not we hold such information, if the confirmation or denial would involved the disclosure of information that would adversely affect any of the interests mentioned above.

94. However, where information about emissions is requested, we cannot refuse to disclose it for any of the reasons from **a** to **g** above.

95. Where disclosable information is contained in other information that is not disclosable, we cannot withhold the requested information unless it reasonably cannot be separated from the other material. For example where so much material is non-disclosable that what remains is meaningless or otherwise unhelpful to the applicant.

Reasonableness of requests

96. The EIRs provide that requests can be refused where they are manifestly unreasonable or formulated in too general a manner. Before considering refusing a request on these grounds your Directorate/Divisional FOI Officer should be consulted.

97. HSE will deal with any appeals against EIR decisions under the Freedom of Information Act appeals procedure.

Appeals handling and enforcement – FOI Act and EIRs

Appeals Procedure – Internal Review

98. All FOI Act appeals must be made through HSE's FOI Unit and submitted in writing (fax and email are acceptable). The FOI Unit will Act as secretariat and appellant contact point for all appeals.

99. Appeals appropriate for internal review are likely to relate to:

- decisions not to disclose information

- any fees we may charge

100. We may get complaints about other aspects of our compliance with the FOIA, such as non-disclosure because we do not hold information, or failing to supply information within 20 working days. However, these issues are not appropriate for internal review and should be addressed to the Information Commissioner.

101. On receipt of a letter of appeal, the FOI Unit will issue an acknowledgement letter to the appellant. The letter will highlight our target timescale for dealing with appeals of 20 working days.

102. The FOI Unit will record the appeal on the tracking system, request all papers relating to the original request, and inform the D/D that an appeal has been received.

103. The FOI Unit will notify HSE Solicitors' Office that an appeal has been made and allocate the appeal to a nominated Appeals Officer (SCS) outside of the line management of the original Decision Maker. The nominated Appeals Officer will have taken no part in the original decision making process.

104. The FOI Unit will ask the D/D that dealt with the request to make a submission to the Appeals Officer.

105. The Appeals Officer will review all aspects of the original decision with support and advice from the FOI Unit and Solicitors' Office. They will aim to respond to the Appellant within 20 days. If this is not possible the Appellant will be advised when to expect a decision – that date not to exceed 40 days from receipt of the appeal. When a decision is reached, the Appeals Officer will notify the FOI Unit who will convey the decision to the appellant.

106. The Appeals Officer’s decision may be to:

- uphold the original decision to withhold information (in which case, advise the appellant of further appeals procedures)
- issue all (or parts of) information that has been withheld
- uphold a decision to charge fees
- decide that no fee should be charged
- reduce the fee to be charged
- refund all (or part) of a fee already paid

107. The FOI Unit will detail all stages of the appeal on the tracking system.

108. If previously withheld information is to be supplied, or a refund made as a result of the appeal, the FOI Unit will liaise with the relevant D/D to do this. The D/D will confirm to the FOI Unit when the required Actions have been carried out and the case will be closed on the tracking system.

Enforcement by the Information Commissioner

109. Following an Internal Review any person ("the complainant") may apply to the Information Commissioner for a decision, as to whether HSC or HSE has dealt with the request correctly in accordance with the provisions of FOIA. The Information Commissioner may refuse to entertain the complaint or may require HSC or HSE to take steps to comply with FOIA. This is done by way of a "decision notice". Both the complainant and HSC/HSE have a right of appeal against a decision to the Information Tribunal and thence (on a point of law) to the High Court.

110. The Information Commissioner has powers to obtain information from HSC and HSE in order to reach a decision as to whether or not HSC or HSE has dealt with the request properly. He can also serve "Information Notices" and Enforcement Notices". Failure to comply with such a notice is treated as a contempt of court. The Information Commissioner also has powers of entry and inspection, similar to those of HSE and the Police.

111. All appeals under FOI or appeals to the information Commissioner must be directed to HSE's FOI Unit who will liaise with HSE's Solicitor's Office. They should be submitted in writing (fax and email are acceptable). The FOI Unit will Act as secretariat and appellant contact point.

112. In the case of complaints about other aspects of compliance with the FOIA, which are not appropriate for internal review, such as non-disclosure because the information is not held, or failing to supply information within 20 working days, these will be addressed in the first instance to the Information Commissioner.

Reports on incidents

Commission policy on publication of reports

113. There is a continuing demand for HSE to make publicly available reports on incidents we investigate. The release of information in such reports is governed by HSW Act Section 28, which allows for information to be released for a number of reasons. Apart from those called for under Section 14(2) of the HSW Act, and on other major incidents, investigation reports are normally not intended for proactive publication, although information from them may be released on request. Nevertheless, there are circumstances in which the public interest is served by publication of an authoritative HSE report, and sometimes an interim report, on a non-major incident investigation. The Commission's policy statement sets out the circumstances in which reports will be made proactively available on public interest grounds.

114. Section 14(2) investigations apart, these criteria are in general terms and it will be for the operational Directorate/Division concerned to decide in the light of this policy and the circumstances of the incident whether proactively to make a report publicly available. Operational Directorates/Divisions may decide to use a 'decision tree' approach to enable inspectors to identify at an early stage which non-major incident investigations will result in a published report.

115. The existing practice of publishing on a regular basis reports on the following matters will continue:

- incidents at nuclear installations
- pesticides
- certain hazardous transport accidents
- railway incidents.

116. The disclosure of reports for the purposes of legal proceedings is not affected by this policy (see GAP 14 on Disclosure for the purpose of civil proceedings in England and Wales).

117. When preparing a report for publication, authors should consider the following:

- personal privacy
- commercial confidentiality
- intellectual property rights
- national and public security

118. Attention should also be paid to:

- ensuring that publication does not prejudice law enforcement or legal proceedings (including, in particular, an individual's right to a fair trial); and
- the restrictions and allowances on disclosure of information in section 28 of the HSW Act.

119. The decision to publish a report should be made and publicly announced as soon as possible after an incident.

Requests for other reports

120. It is likely that there will be requests for information about other HSE inspection and investigation reports. These should be dealt with under the FOI procedure and, where environmental information is involved, under the EI Regulations. Requests for personal information continue to be dealt with under the Data Protection Act.

121. There is no right to have a copy of the inspection or investigation report itself under the FOI Act or the EI Regulations. However, subject to any FOI exemptions or EIR exceptions, and the Data Protection Act provisions for personal information, any information held by HSE will be disclosable.

122. In most cases it would be reasonable to provide information on the factual aspects of a report - e.g. the premises inspected, the date of inspection, what was found, any

breaches of health and safety legislation, any Action required and the date by which it is required.

123. The voluntary release of reports for the purposes of legal proceedings is covered in **GAP 14**. In some cases, the report, or parts, may constitute the personal data of the individual making the request. In such cases the procedures set out in **GAP 37** will apply. Where this is not the case you must ensure that information is not disclosed where the law prevents this.

124. It is for Directorates/Divisions to decide how to disclose information on inspection reports. For example, Nuclear Safety Directorate has decided to make available quarterly inspection reports on nuclear power stations and other nuclear installations. Such a method may not be suitable for inspectorates dealing with a large number of sites where inspections are much less frequent. In such cases it may be better to deal with requests on an ad hoc basis.

Freedom of Information status of key documents

125. The HS/E Policy on Openness Government that we should look wherever possible to make information publicly available, especially through the Internet. It is important, therefore, that key documents (e.g., internal guidance and procedures, Board and Commission papers) that will be placed on the Internet are clearly marked with their open government status, in accordance with the procedures in **GAP 3** and this GAP. Directorates and Divisions should also arrange that authors proactively mark other key documents where it can be anticipated that there may be requests for their release.

Pesticides information

126. Whilst most of HSE's Activities are governed by the HSW Act and the relevant statutory provisions, in the case of pesticides HSE has enforcement responsibilities under Part III of the Food and Environment Protection Act 1985 (FEPA) and the Control of Pesticides Regulations 1986 (COPR).

127. When considering requests for information on pesticides you should therefore consider the requirements of this legislation as well as the FOI ACT and the Environmental Information Regulations 2004. Section 28 of the HSW Act does not apply to the release of pesticides information obtained using powers in FEPA and COPR.

Annex 1

HSC/E policy statement on Open Government

The Health and Safety Commission (HSC) is committed to being open about what we do. This is a statement of our policy on openness.

HSC has a duty under the Health and Safety at Work etc Act 1974 (HSW Act) to ensure that employers, employees and the public are kept informed about health and safety at work matters. In practice, the Health and Safety Executive (HSE) carries out this duty on HSC's behalf, and HSE shares this policy on openness.

Our Aims

Our aims are to:

- share what we know;
- find out what information held by us people need, and try to provide it;
- inform, consult and engage with others on important proposals;
- consider information and views received about health and safety; and
- be open about how and why we make decisions.

We believe these aims will help us

- develop closer partnerships with everyone concerned with health and safety at work;
- be accountable;
- be trusted as a confident and independent enforcement and regulatory body; and
- succeed in delivering better health and safety.

In accordance with the Freedom of Information Act 2000, we will make all information we hold available, unless prevented by provisions under the Act. Situations where it is unlikely that we will be able to disclose information include when:

- the law prevents it; or
- we consider that harm or prejudice of a type identified by one or more of the exemptions found in Part II of the FOI Act (such as prejudice to enforcement or prosecution, harm to people's health and safety, breach of confidence, prejudice caused by the disclosure of information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained) would be caused by its release".

These aims and principles apply to all of HSC/E's activities and the points below explain some of the ways in which this will be achieved.

Providing Information

Publication Scheme

As required by the Freedom of Information Act 2000, HSC/E operates a Publication Scheme that explains:

- what information we make available, and how to obtain it;
- what information we do hold is available from our offices or website;
- what information we provide free; and
- what we charge for, and how much we charge.

Once information is listed and available under the Scheme it is exempt from the FOI Act requirements to supply information on request. In these circumstances inquirers will be advised how or where to get the information they want.

Sharing Knowledge

Reports on Incidents

HSE investigates many incidents, accidents and dangerous occurrences at work, and publishes reports:

> (a) when HSC has directed HSE to investigate and make a 'special' report under the HSW Act;
>
> (b) where it is clearly in the public interest that a report should be published, for example:
>
> > (i) where an accident gives rise to general public or local alarm leading to a need for explanation;
> >
> > (ii) where we need to satisfy the public that the matter has been thoroughly investigated and all avenues for further Action identified; and
> >
> > (iii) where lessons for improving health and safety have been learnt and should be widely circulated.

Research

We carry out scientific research into health and safety issues and publish the results. The criteria for carrying out research are published on the HSE website.

Informing and Consulting on Important Proposals

When developing proposals for Regulations and Approved Codes of Practice, we ask the public for its views. We have a commitment to:

- consult early;
- write documents in simple language;
- give people time to respond; and
- report back on results.

Receiving Views and Information

We want to receive views from as wide a range of people as possible.
Their views will be taken into account when decisions are made.

Making Decisions

We make information available about our decisions through:

Open Meetings and Papers, Minutes, etc of Meetings

The agendas, papers and minutes of our meetings are available on the Internet and from HSE's Information Centre. We hold some of our meetings in public to give a better understanding of our work.

Advisory Committees

HSC's Advisory Committees conduct their business openly and responsibly, and consult the public on policy issues. Agendas, papers and minutes are available on the Internet and some meetings are held in public.

Response to Consultations

We publish the analysis of responses to consultations and the decisions we make. This includes individual responses, unless respondents explicitly ask for their name not to be revealed.

In developing and improving this positive culture of openness, we will continue to consult and work in co-operation with the public.

What does being more open mean?

In simple terms it means:

- asking how we can release information

rather than

- thinking how we can withhold information.

The presumption should be that all the information we hold should be released on request unless the law prevents it.

In addition, we should look wherever possible to make information publicly available through the Publication Scheme, public registers etc;

We will improve the collection and storage of information to enable easy access and release of information; and use our publication scheme to tell people what information is available from HSE and how to obtain it.

How do we achieve greater openness?

HSE and people we have contact with, particularly employers, are ready to move to a situation where much of the information HSE holds will and should be given out. Existing restrictions on information release (e.g. s28 of HSWA) have been replaced by a very limited number of exceptions to the right of access to official records and information in the Freedom of Information legislation.

In developing our positive culture of openness, the Board recognises that:

- it will take some time to develop fully
- dealing with requests for information will take resources away from 'frontline' Activities.
- staff will need training and development in this area and will need the support of their managers in giving sufficient time to do this work
- as an organisation we need to develop the confidence to deal with the questioning which will inevitably result from a greater level of openness and to be honest when we get things wrong; and
- we must apply the same principles of openness to our Activities within HSE.

The way ahead

The Board wish to see HSE become, in its attitudes, operations, policies and processes, a leading example across Government of an open and accountable organisation. With your help and support we are confident that this is within our grasp.

Annex 2

Changes to section 28 of the Health and Safety at Work etc Act 1974

Section 28 of the Health and Safety at Work Act has been amended to bring restrictions on giving information into line with FOI Act.

HSWA section 28 deals with how we manage information that we have obtained using HSE's statutory powers. Until 1 January 2005, there were only limited circumstances in which this information could be disclosed.

The section 28 restrictions have now been removed and requests for this type of information can now be considered under the FOI Act.

Subject to the exemptions in the FOI Act (or EIR exemptions), we can release information

- proactively - because it is in the public interest for us to put that information into the public domain, or
- in response to a request under the FOI Act or the Environmental Information Regulations 2004

We are not required to disclose information when the public interest for making the information available is outweighed by a greater public interest in protecting it. However, applying the public interest requires us to exercise our skill and judgement and document our reasoning and decision making.

Other disclosure regimes

If another disclosure regime, such as the Official Secrets Act, or the Criminal Procedure and Investigations Act 1996 (see GAP 14) prohibit the release of requested information, these rules must be applied. Section 44 of the FOI Act gives an absolute exemption if our disclosing requested information would be a breach of the law.

Annex 3

Fees and charging

HSC and HSE are committed to openness and aim to release as much information as possible both routinely and in response to requests under Freedom of Information (FOI) legislation.

However, there should be a balance between their policies on openness and the regulatory and enforcement responsibilities imposed by the HSWA 1974. Consequently HSE's charging policy has been developed in awareness that the resource diverted to respond to FOI requests does not impair HSE's mission to protect the safety and health at work.

The FOI allows public authorities to charge for the cost of answering requests in certain cases. There are two types of fees that we can charge:

- A fee to cover the **prescribed costs** of the request – the cost of finding, sorting, editing or redacting[1] the material when it exceeds £600, as defined in the Fees regulations[2].
- A fee to cover the cost of **disbursements**, such as printing, photocopying, postage or information provided in other formats, to be charged in all cases where costs exceed £35

These are described in more detail below.

Prescribed costs

Section 13 of the Freedom of Information Act states that fees can be charged for requests that exceed the appropriate limit. The Secretary of State has decided that the appropriate limit should be:

- £600 for central government;

If requests would cost less than this to answer, information will be supplied free of charge

To be consistent, all public authorities use the **same hourly rate** of £25 per hour for estimating costs, regardless of the seniority of the staff involved.

The prescribed costs of answering a request are defined as:

- determining whether the information requested is held;
- locating and retrieving it;
- extracting the information to be disclosed from other information, including the first time an individual working in the authority reads information for this purpose

[1] If a document contains a section or sections that are considered exempt, the authority might choose to block out these sections before sending on the information, rather than reprinting or reformatting the document. This is known as 'redaction'.
[2] Fees Regulations 2005

(although any subsequent readings, or if the information is passed to others to read, should not be included); and
- communicating information. This doesn't include the cost of disbursements (described below), but can include the time taken to write a response to the request, edit or redact information.

The following items will not be included in the prescribed costs:

- The costs involved in considering whether material should be classed as exempt under the Act or whether exempt information should be disclosed under the public interest test. This includes both staff time and the cost of any legal advice that the authority may choose to seek. It also covers situations where the authority can neither confirm nor deny that it holds requested information.
- The costs involved in considering whether a request is vexatious or a repeated request.
- Consulting third parties prior to sending out the information.
- Overheads, including IT running costs, superannuation costs, building-related costs (heating, lighting etc).
- The time taken to calculate the fees notice, including time taken when aggregating requests.
- The time taken to check that a request for information meets the requirements of the FOI Act (as described in section 8 of the Act).
- Advice and assistance provided under section 16 of the Act

If a request is particularly wide-ranging, and therefore likely to be expensive to answer, HSE will discuss this with the applicant and see if the question could be refined to a more manageable level. This could include reducing the scope of the request so that it comes within the appropriate limit, or doing such work as is possible without breaching the appropriate limit.

Where the request is still estimated to exceed £600 (3 days work equivalent) HSE will:

- Answer, and charge the full prescribed cost of the request up to £799 (4 days work equivalent)
- Give careful consideration to requests which will cost £800 or more to provide the requested information (over 4 days work equivalent). In such cases it is unlikely that the diversion of resource from HSE's regulatory and enforcement function will be considered to be justified .In such cases HSE staff will discuss with the applicant ways in which the request could be refined to manageable level.
- This limit of £800 will not apply to information requested under the Environmental Information Regulations where the legislation states that no information can be refused on the grounds of cost.

Disbursements

In addition to any charge for the prescribed costs of a request, HSE will also charge for the cost of disbursements – that is, the cost of physically producing information and sending it out.

HSE will take account of the applicant's preferred format for receiving information, so far as this is reasonably practicable. This includes summarising or translating the information, or allowing the applicant reasonable opportunity to inspect a record containing the information. Costs incurred through producing material in an alternative format will be included as disbursement costs. However, if these costs are high, HSE will contact the applicant to discuss whether a free or cheaper alternative might meet their needs equally well.

To summarise, disbursements can include the cost of:

- photocopying or printing material
- postage
- producing material in an alternative format at the request of the applicant, such as putting it onto CD-Rom, video, or audio cassette
- providing extracts of databases
- translating information into a different language at the request of the applicant.
- allowing the applicant reasonable opportunity to inspect a record containing the information[3]

The cost of disbursements does not include any of the costs that are listed above as being included in the prescribed costs or excluded from the prescribed costs.

It also does not cover the cost of putting the material in a different format where this is required by law – for example, the cost of producing material in Braille (as required by the Disability Discrimination Act 1995), or translating information into Welsh (as required by the Welsh Language Act 1993).

HSE will charge for disbursements at:

- Three pence per sheet of printing or photocopying
- Full postage costs. Documents will be sent by second class mail unless specified otherwise
- Actual costs incurred when providing information in other formats as follows:
    - CDs at 40p each
    - Floppy discs at 20p each
- Any disbursements involving staff time[4] will be charged at a flat rate cost of £25 per hour.

[3] In the majority of cases, this could be done at no or minimal cost to HSE – it should usually be possible to set aside space for the applicant to inspect the records with minimal disruption to the work of other staff. In such cases, we would expect no charge to be made unless there is a need to have a member of staff sit with the applicant at all times, with the staff member away from their usual job and unable to carry out their usual work.

HSE can charge for disbursements in all cases, regardless of whether we are also charging for the prescribed costs of a request. However, in cases where the disbursement cost is low i.e. less than £35 any fee will be waived.

Fees notices

Where charges are indicated, a fees notice will be issued in advance of the request being answered, giving an estimate of the costs involved. An applicant will have three months to pay. If payment is not forthcoming, HSE does not have to answer the request (section 9(2) of the FOI Act).

Freedom of Information requests have to be answered promptly, and in any event not later than the twentieth working day following date of receipt. However, where fees apply the date between the issue of the fees notice and the date when the fee is paid are disregarded in calculating the 20 day deadline

If the Actual cost of answering the request is greater than the estimated cost, HSE will bear the additional cost.

If the Actual cost of answering the request proves to be less than the estimated cost charged, HSE will refund the excess money to the applicant. If the Actual cost proves to be less than £600 then HSE will refund all the money to the applicant, less disbursements over £35.

Aggregating requests for fees purposes

Requests can be aggregated in specified cases for the purposes of calculating fees where two or more requests for information are made to a public authority–

(a) by one person, or
(b) by different persons who appear to be Acting in concert or in pursuance of a campaign
(c) on the same or a related subject
(d) received before the 60th working day following the date of receipt of the first of the requests.

However HSE will exercise caution when considering whether requests should be aggregated, making decisions about aggregating requests on a case by case basis.

Mixed requests

A mixed request is a case in which an applicant requests information under more than one access regime. The most important access regimes apart from FOI are subject access rights under the Data Protection Act 1998 and access to environmental information under the Environmental Information Regulations 2004.

The three regimes have slightly different charging processes:

[4] Such as staff supervising personal inspection of documents or time spent providing extracts of databases

- HSE does not charge for “subject access” requests made under the Data Protection Act.
- The charging regime under the Environmental Information Regulations states that authorities cannot refuse to answer requests on grounds of cost.

When calculating fees, HSE will separate out the constituent parts of the request and charge according to each regime.

Annex 4

Public Registers

It remains part of the HSC/E's policy on access to health and safety information that registers of certain types of information should be publicly available. Information on successful prosecutions (excluding those pending appeal) and Enforcement Notices has been placed on HSE's Website, and other registers (e.g.,GMO notifications) will progressively be added. But for the time being some are still held in Local Offices, where they may be inspected free of charge.

The Commission's policy on Freedom of Information requires certain types of information to be made available in public registers. These will progressively be placed on the HSE Website, but until this is the case, some registers will need to be available for inspection at HSE Local Offices. FOD co-ordinates the operation of these registers on behalf of the whole of HSE (other than HID Offshore Division (OD)), receiving information from other inspectorates and distributing it to Local Offices. OD maintain their own registers which are available at their offices in London and Aberdeen.

The registers contain the following information:

Names and adresses of firms which are subject to on or more of the following provisions:

- Explosives Act 1875
- Nuclear Installations Act 1965
- Fire Certificates (Special Premises) Regulations 1976
- Asbestos (Licensing) Regulations 1983
- Control of Major Accident Hazards Regulations 1999
- Ionising Radiations Regulations 1985 (including notifications deemed to have been made under Regulation 39(1) of these Regulations)
- Dangerous Substances in Harbour Areas Regulations 1987
- Genetically Modified Organisms (Contained Use) Regulations 2000

Information from notifications requiring consent under the Genetically Modified Organisms (Contained Use) Regulations 2000

In Scotland only: prohibition notices, applications for consent and convictions under the Genetically Modified Organisms (Deliberate Release) Regulations 1992. (The equivalent registers for England and Wales are kept at offices of the Environment Agency)

Names and addresses of firms to which licences, certificates and orders have been issued by HSE under various statutory provisions

Names and addresses of firms and individuals convicted of breaches of health and safety legislation - this information is available on the HSE Website.

Names and addresses of firms on whom HSE has issued improvement or prohibition notices - this information is available on the HSE website.

FOD will ensure that the details of convictions received from the HSC/HSE's agent, Gas and Oil Measurement Branch of the Energy Division of the Department of Trade and Industry, are included in the Local Office registers. However, HID Offshore Division will maintain its own registers of notifications and of convictions at its offices in London and Aberdeen.

Inspection of registers at Local Offices (or at HID OD offices) is free of charge. If an applicant requires copies, HSE's standard photocopying fee and any postage incurred should be levied.

The list of statutory provisions above covers only existing legislation. Branches drafting legislation should consider whether registers under such legislation should be added to the list, and should consider this question in HSE Board and Commission papers.

Annex 5

Relationship of FOI to the protective marking system

Assigning a protective marking to a document does not necessarily mean that information cannot be disclosed under FOI Act or the EI Regulations. A protective marking is merely an indication that an exemption may apply. Information is protected from disclosure only if it falls within the exempted categories of information under FOI Act or the EI Regulations.

NB Information may be exempt under the FOI Act but fall under the terms of different legislation e.g. DPA or Official Secrets Act.

In some cases the protective marking may no longer be relevant; in others the marking may cover only part of the information in a document. On the other hand, the absence of a protective mark does not mean that the information can be automatically disclosed in all cases where doubt exists it will be necessary to check with document owners before disclosing. For further information on the protective marking system, see Security Policies and Procedures, Document and Information Security Protective Markings on the Intranet.

Annex 6

Publication of facts and analyses behind major policy decisions

HSC/E is committed to publish the facts and analyses of facts which are considered relevant in framing major policy proposals and decisions. Information, which comes within the exempted categories of information under the FOIA, does not have to be made available, but it is HSC/E policy to do so unless there is a statutory bar or some significant harm would result. This commitment should normally be carried out by the lead policy Branch.

In HSC/E most major policy proposals are subject to formal public consultation, and the Consultative Documents contain in a large part the facts and analyses of facts that lie behind the proposal. The HSC has decided that the responses to Consultative Documents should also be made publicly available except where a respondent has asked for all or part of a response to be kept confidential (instructions on making the responses to consultative documents available are contained in **GAP 9**). HSE should also make available any relevant Regulatory Impact Appraisals (RIAs). In most cases this will probably satisfy the commitment in the Code. If there are also, for example, research reports or other material which informed the proposal or decision they should also be made publicly available.

It is HSC/E policy to release HSC/E Agendas, Papers and Minutes unless doing so would cause significant harm and they are covered by an appropriate FOI exemption. HSC/E Agendas, Papers and Minutes are published on the HSE Website. Arrangements for making HSC/E papers etc available are set out in **GAP 3**.

Where major decisions are taken without going through the formal public consultation process it will be for Directorates/Divisions to decide what material should be made available. It should only be in rare cases that no material could be made available.

Making internal guidance available

HSE is committed to make publicly available explanatory material and internal guidance on our dealings with the public where that material will help better understanding of our actions in dealing with the public. Any material the release of which would cause significant harm and which comes within the exempted categories of information does not have to be made available. The "public" includes the businesses which we inspect.

HSE already publishes a large amount of guidance, for example, on explaining health and safety legislation or particular hazards or risks. This volume of published guidance seems likely in all but a few cases to satisfy the commitment in FOI Act to publish explanatory material.

All internal guidance (which includes circulars, codes and sector minutes) should be considered for publication except guidance which deals solely with HSE's internal workings (e.g. personnel matters, internal financial procedures). Thus, for example, internal guidance for inspectors on a particular hazard would be covered as well as guidance on how to enforce the legislation designed to protect workers and the public from the hazard.

Guidance should be prepared for release with any parts in the exempted categories blanked out in the same way as exempted parts of **HSE Board or HSC papers** (see GAP 3). It has been HSE's policy since 1995 to make internal guidance publicly available in line with the openness policy. By now, all guidance should be marked with its OG status.

New internal instructions should be prepared in such a way that they can immediately be placed on the Intranet without further vetting. The author is responsible for ensuring these documents are clearly marked with their OG status and any exempted sections marked up in the same way as exempted sections of **HSE Board or HSC papers**.

D/Ds must keep any public sets of internal instructions up to date.

Annex 7

The Information Commissioner and the Information Tribunal

The Information Commissioner's Office is the independent statutory body which polices the operation of the Freedom of Information Act, as well as the Data Protection Act [see http://www.informationcommissioner.gov.uk].

Under the Freedom of Information Act 2000 the role of the Information Commissioner is as follows:

- The Commissioner may issue general guidance on good practice, or "practice recommendations" directed at particular authorities.
- If the Commissioner has received a request for a decision or considers certain information is relevant to determine whether a public authority has complied with Part I of the Act or the Codes of Practice he may serve an information notice on any public authority requiring it to supply that information to him.

- Where the Information Commissioner considers a complaint, he will issue a decision notice setting out his view on whether the Act has been complied with. Where a breach of the Act is identified, the notice will specify the steps which must be taken by the authority in order to comply with that requirement and the timescale for compliance.

- If the Commissioner is satisfied that a public authority has failed to comply with any of the requirements of Part I of the Act, he may serve on the authority an enforcement notice requiring the authority to take particular steps within a specified time to comply with those requirements.

- Failure to comply with an Information, Decision or Enforcement Notice may be dealt with as though the public authority had committed contempt of court.

The Information Tribunal will hear appeals against notices issued by the Commissioner. [http://www.dca.gov.uk/foi/infcom.htm]

- A complainant or a public authority may appeal to the **Information Tribunal** against a decision notice. A public authority may also appeal to the Information Tribunal against an information notice or an enforcement notice served on it. On hearing the appeal the Information Tribunal may uphold the notice in its entirety, substitute an alternative notice or dismiss the notice.

- The decision of the Information Tribunal may in turn be appealed on a point of law to the High Court of Justice (England and Wales), Court of Session (Scotland) or High Court of Justice in Northern Ireland (Northern Ireland).

- Appeals from these notices can be heard by the Information Tribunal (a tribunal which is specifically for matters concerning enforcement notices or decision notices issued by the Information Commissioner).

Annex 8

Copyright issues

Use of Crown Copyright

Public authorities should be aware that information which is disclosed under the Act may be subject to copyright protection. If an applicant wishes to use any information in a way that would infringe copyright, for example by making multiple copies, or issuing copies to the public, he or she would require a licence from the copyright holder. HMSO have issued guidance on this subject in relation to Crown Copyright, which is available on HMSO's website [link here], or by contacting HMSO at

HMSO Licencing Division
St Clements House
2-16 Colegate
Norwich NR3 1BQ
Tel: 01613 621000
Fax: 01603 723000

Third Party Copyright

Public authorities complying with their statutory duty under sections 1 and 11 of the Freedom of Information Act to release information to an applicant are not breaching the Copyright, Designs and Patents Act 1988. The FOI Act specifically authorises release of the information to an applicant, even if it is in such a form as would otherwise breach the copyright interests of a third party.

However, the Copyright Designs and Patents Act 1988 will continue to protect the rights of the copyright holder once the information is received by the applicant.

Annex 9

Key similarities and differences in the FoI Act, the Data Protection Act and the Environmental Information Regulations

Access Regime	Subject matter	Time Limit	Cost	Exemptions	Is citation of Act the needed in the request	Coverage
Freedom of Information	All information not accessible under the Data Protection and Environmental Information Regulations	20 working days from receipt of request	No fee for information requests which cost less than £600 (central government),– but can charge for disbursements, ie. photocopying, posting	23 exemptions, two different types: i.) Qualified - subject to a public interest test ii.) Absolute exemption	No	UK Government departments plus public authorities in England & Wales and Northern Ireland Scotland has separate Act
Data Protection	Applicant's own personal data	40 calendar days	HSE makes no charge for these requests	Limited range of exemptions, not subject to the public interest test. Some vary considerably from those in the FOI Act.	No	UK Application
Environmental Information Regulations	Environmental Information	20 working days	Fees may be charged and no upper limit for the cost of meeting a request beyond which the request may be refused.	Limited range of exemptions, all of which involve Public Interest Test	No	One set of regulations for England & Wales and Northern Ireland, similar regulations for Scotland