

Code of Practice for Public Authorities

Freedom of Information Act (Cap. 496)

Version 1

February 2010

1.0 Appointment of FOI Officers

1.1 Each Public Authority¹, shall nominate an FOI Officer and, whenever possible, an Alternate FOI Officer, whose names and contact details shall be communicated to the FOI Coordinating Unit appointed by the Ministry for Justice and Home Affairs and copied to the Information and Data Protection Commissioner, following due consultation with the Permanent Secretary of the Ministry concerned. In the event that a Public Authority fails to appoint an FOI Officer this role shall automatically be subsumed by the Head of the Authority concerned or, in the absence of the Head of the Authority, by the most senior Official within the Authority concerned.

1.2 The FOI Officer, who will represent the Head of the Public Authority concerned in matters relating to Freedom of Information, shall be responsible for the processing of requests for documents or information in line with the Act. This will include the receipt of requests, their processing, referral to other Public Authorities (where this is necessary) and any communications with applicants as necessary in the terms of the Act. In the course of their duties, FOI Officers shall abide by the terms of this Code of Practice. Alternate FOI Officers shall assist FOI Officers in the fulfilment of these duties, further to assuming all the duties and responsibilities pertaining to the FOI Officer when the latter is unavailable.

1.3 Single FOI Officers (and, wherever possible, Alternate FOI Officers) may be nominated to represent a number of Public Authorities in cases where such Public Authorities belong to the same Division or to a particular Ministry (such as core Directorates forming part of the same Ministry). In the event this option is availed of the FOI Coordinating Unit and the Information and Data Protection Commissioner shall be duly informed.

1.4 Whenever an FOI and Alternate FOI Officer are responsible for more than one Public Authority the FOI Coordinating Unit and the Information and Data Protection Commissioner shall be notified of the Head of the Public Authority assuming responsibility for such FOI and Alternate FOI Officer.

¹ 'Public Authority' shall have the meaning assigned to it in Article 2 of the Freedom of Information Act (Cap. 496 of the Laws of Malta), namely:

- a) The Government, including any ministry or department thereof;
- b) A Government agency established in terms of the Public Administration Act or any other law;
- c) Any body established under any law, or any partnership or other body in which the Government of Malta, a Government agency or any such body as aforesaid has a controlling interest or over which it has effective control.

2.0 Establishment of an FOI Officers' Network

2.1 An FOI Officers' Network, made up of the FOI Coordinating Unit and each Public Authority's FOI and Alternate FOI Officer, shall be established, with a view to:

- a) facilitate procedures whereby requests for documents or information addressed to the wrong Authority by applicants are re-directed to the responsible Authority;
- b) facilitate the organisation of training for the Officers concerned;
- c) carry out any activities or meetings necessitating consultation or communication of information to the Officers concerned, further to sharing knowledge and experience related to the implementation of Freedom of Information commitments.

2.2 This Network shall be chaired by the FOI Coordinating Unit. The Information and Data Protection Commissioner may be requested to attend meetings of the Network by the FOI Coordinating Unit. Moreover, the Commissioner may, where considered necessary, request the FOI Coordinating Unit to convene the Network to address any issue of concern to the Information and Data Protection Commissioner's Office.

2.3 The Officers on the Network shall provide information as necessary to the Chair of the Network and communicate with the Information and Data Protection Commissioner as required.

3.0 Clarification of requests made by eligible persons

3.1 Whenever an applicant submits a request for a document or information in writing that is not in line with Article 6 or that is not clear in terms of the document required, the FOI Officer shall assist the applicant in re-formulating the request in line with the said Article or to clarify the request, as the case may be.

3.2 Assistance to the applicant may be provided by telephone or in writing, including by electronic means. The FOI Officer shall take note of any relevant additional information communicated or submitted by the applicant. Whenever the applicant has convenient access to fax or e-mail he/she may be requested to re-submit the form with all the required additional information. In this regard each Public Authority shall make the Request for Document/Information Form available on-line on its website.

3.3 Alternatively, the FOI Officer may insert a note in the form originally filled in and sent by the applicant, indicating that a clarification was obtained from the applicant (e.g. by telephone), as well as the information required by the applicant. Any such note shall be signed and dated by the FOI Officer. Prior to inserting such note the FOI Officer shall inform the applicant, who shall be given the opportunity to amend the form personally. In such case, the form would be sent to the applicant's address in order for the necessary amendment to be made. The relevant timeframes prescribed by the Act would start to apply once the application form with the pertinent clarifications is received by the Public Authority.

3.4 Alternatively, if the applicant so prefers and it is practical to do so, the FOI Officer shall hold a meeting with the applicant.

3.5 Assistance to the applicant may include:

- guidance to make a request in line with Article 6 of the Act;
- requests for details on the type of information the applicant is looking for;
- or,
- an outline of the different types of documents that may meet the terms of the request.

3.6 Whenever such information is requested of applicants, FOI Officers shall not seek to determine the aims or motivation of the applicant. The scope of any requests for information by the FOI Officers should solely be to identify the document or information required by the applicant.

3.7 Whenever assisting with requests FOI Officers shall not require applicants to be in possession of administrative information such as file numbers or names.

3.8 In the event that an applicant, after being given due assistance by the FOI Officer, still cannot clarify the terms of his request, the applicant shall be formally informed that the Public Authority is not in a position to process the request as notwithstanding assistance provided by the said Authority to clarify the scope of the request, the applicant could not provide the necessary clarifications. The applicant would also be informed of the internal complaints procedure of the Public Authority and his/her right to request investigation and review by the Information and Data Protection Commissioner in accordance with Article 23 of the Act.

4.0 Transfer of Requests between Public Authorities

4.1 Whenever an FOI Officer receives a request relating to documents or information that may be held by another Public Authority he/she shall contact the FOI Officer of that Authority. Should it be confirmed that the document or information in question is held by that Authority, the request shall be duly transferred.

4.2 The FOI Officer receiving the request shall bring the request to the attention of the Public Authority responsible as soon as possible and in any case not later than 5 working days after the day on which the request was received. The 20 working day timeframe for notifying the applicant as to whether his/her request will be met or not, is not suspended during the time when the request is being transferred from one Public Authority to another. It is therefore important that the transfer takes place as soon as possible. Whenever the Officer is in doubt as to the Public Authority holding the document or information referred to in the request, the Officer may bring the request to the attention of the members of the FOI Officers' Network. The FOI Officer shall therefore transmit the request to a contact person within the FOI Coordinating Unit. The FOI Officer shall also indicate to the FOI Coordinating Unit which Public Authorities are likely to have the document or information requested, whenever this is known. The contact person within the FOI Coordinating Unit shall immediately transmit the request to the FOI Officers of the Public Authorities concerned.

4.3 Whenever an FOI Officer receives a request from another FOI Officer or through the FOI Coordinating Unit, on whether a particular document or information is held by his Public Authority or not, the receiving FOI Officer shall indicate to the requesting Officer, within a maximum of 5 working days, whether the document or information in question is held by his/her Authority. Should it transpire that the Public Authority of the receiving FOI Officer does not hold the document or information in question; the requesting Officer shall still remain responsible for identifying the Public Authority to whom the request should be forwarded.

4.4 Whenever more than one Public Authority holds the document or information in question, the FOI Coordinating Unit may decide which Public Authority would respond to the applicant's request.

4.5 The applicant shall be formally informed by the FOI Officer who received the request, of the transfer of the request, and that the request would be pursued by the Public Authority to which the request was transferred. Such information shall be communicated to the applicant within not more than 10 working days of the receipt of the request from the applicant.

5.0 Consultation with Third Parties

5.1 Whenever a request is made for a document or information that is held by the Public Authority of the FOI Officer receiving the request, but relates to third parties, and such document or information does not appear to fall within the scope of the Act's exemptions (including but not limited to Article 5(3)(a) and 20(2)(a)), the FOI Officer shall inform the persons in question on the possible disclosure of the document or information. The scope of this consultation shall be to confirm whether the document or information in question falls within the scope of the exemptions foreseen by the Act or not, or any restriction on disclosure foreseen by any other law.

5.2 In the event that the third parties in question are represented by an association, consultations may be held with the association. Where the number of parties in question exceeds 10 persons or institutions, and they are not represented by an association, the FOI Officer may consult a representative sample reaching or nearing 20%.

5.3 The persons in question shall be given 10 working days to submit their views as to whether the said exemptions apply or not. If no feedback is received within 10 working days the FOI officer shall consider that the persons in question are giving their tacit consent to the disclosure of the document or information. The FOI Officer, following due consultation with the Head of Department, may provide for an extension of the consultation period, even if notification of the Public Authority's decision would not be communicated to the applicant within the 20 working days foreseen by Article 10 of the Act. The applicant would be duly informed of the extension of the 20-day timeframe, the reason thereof, the internal complaints procedure of the Public Authority and the right to address a complaint to the Information and Data Protection Commissioner in accordance with Article 23 of the Act.

5.4 During consultations the FOI Officer may also consult the third parties concerned on whether any further explanatory material or advice should be given to the applicant together with the document or information in question. Such advice may include references to copyright restrictions.

5.5 When processing a request relating to documents or information held by the Public Authority receiving the request, but prepared or otherwise involving another Public Authority or Authorities, but no other third parties, the FOI Officer shall consult the FOI Officer of the Authority or Authorities in question. The response by these Authorities concerning their views as to whether the document should be disclosed or withheld would be submitted within a maximum of 10 working days. If no feedback is received during such timeframe the FOI Officer shall consider that the Authority or Authorities in question are giving their tacit consent to the disclosure of the document or information.

6.0 Inclusion of Disclosure of Information clauses in Contracts entered into by Public Authorities

6.1 Heads of Public Authorities shall consider their obligations in terms of the Act when entering into contracts with private companies. Contractors shall be made aware that information relating to contracts may be disclosed under the Freedom of Information Act unless it falls within the scope of the Act's exemptions or any other law regulating disclosure.

6.2 Contracts may feature provisions relating to those clauses the disclosure of which would require prior consultation with the contractor in question in accordance with the procedure laid down in 5.0, without prejudice to the Public Authority's obligations as set out in the Act.

7.0 Complaints about the handling of requests for documents or information

7.1 Although applicants are entitled to address complaints or seek review of any decision by a Public Authority by making recourse to the Information and Data Protection Commissioner, each Public Authority must offer avenues for applicants to complain to, and seek a review by, the Public Authority itself, by adopting an Internal Complaints Procedure.

7.2 Each Public Authority should therefore establish a simple procedure whereby applicants can seek review of any decision taken, or complain about any delays in relation to the release of documentation or any other matter relating to the implementation of the provisions of the Act. This procedure shall be referred to and duly explained in all formal replies submitted by each Public Authority in relation to the Act, and shall, in particular, be included in each Reply Form along with information relating to the right of the applicant to address a complaint or seek review by the Information and Data Protection Commissioner.

7.3 The internal complaints procedure must not be cumbersome on the applicant. In particular, it should not:

- a) entail more than 10 working days to address the complaint and provide a reply;
- b) require the submission of information by the applicant which is not envisaged by the Act;
- c) entail additional charges for the applicant.

7.4 Moreover, the procedure would enable the applicant to:

- a) file a complaint in writing (including by electronic means);
- b) give reasons for his or her disagreement with the Public Authority's decision to withhold the information requested; and,
- c) report failure to meet the stipulated deadlines in the Act, as well as the failure to send notifications.

7.5 In those instances where the Public Authority has communicated its readiness to provide the requested document or information, its internal complaints procedure shall provide for the addressing of relevant complaints foreseen by the Act, such as the document or information not being provided in the preferred format. Furthermore, whenever fees are charged in accordance with the Fees charged by Public Authorities for access to documents Regulations, the internal complaints procedure shall provide for:

- a) reporting of disagreement by the applicant on the implementation of the said Regulations by the Authority in question;

- b) the possibility for the applicant to give reasons why he/she considers that the fee should not be applied in relation to his/her request pursuant to Article 9(5) (b) of the Act; however without prejudice to the Public Authority's discretion in this regard as stipulated in the Act.

7.6 Each Public Authority shall communicate its pertinent procedure, compliant with the above minimum standards, through its FOI Officer, to the Information and Data Protection Commissioner and the FOI Coordinating Unit prior to the entry into force of the Act. Any subsequent changes to the procedure would have to be communicated to the Information and Data Protection Commissioner and the FOI Coordinating Unit at least 30 working days prior to coming into effect.

7.7 The Information and Data Protection Commissioner may make recommendations relating to the procedure adopted by each Public Authority. Where the Information and Data Protection Commissioner considers that the internal complaints procedure adopted by a Public Authority is too cumbersome, and that the Public Authority in question is therefore not in conformity with this Code, the Commissioner may make a practice recommendation pursuant to Article 22 of the Act, specifying the steps which ought to be taken to bring about conformity.

7.8 Whenever the Public Authority's decision in the context of the internal complaints procedure is not favourable to the applicant, the applicant shall be reminded of his/her right to address a complaint or seek a review of the decision by the Information and Data Protection Commissioner in accordance with Article 23 of the Act.

7.9 The Officer assessing requests made in terms of the Internal Complaints Procedure shall, insofar as possible, be distinct from the FOI Officer or the Alternate FOI Officer, and may be the Head of the Public Authority in question.

8.0 Keeping of documents and records by Public Authorities

8.1 It is recommended that even where documents are stored in a paper-based Registry system, electronic copies should, insofar as practicable, also be stored with a view to ensure more expeditious retrieval.

8.2 The electronically stored documents should be easily and, if possible, directly accessible, to the FOI Officer and the Alternate FOI Officer of the Public Authority concerned.

8.3 Electronic storage shall be required in relation to the following category of documents:

- i) Documents containing policies, principles, rules or guidelines in accordance with which decisions or recommendations are made in respect of members of the public;
- ii) Documents relating to decisions or recommendations made in respect of individual members of the public; and,
- iii) Documents relating to the introduction of new procedures or practices affecting members of the public.

8.4 Insofar as they don't relate to individual members of the public, documents falling under the above categories shall, whenever possible, be uploaded on the Public Authority's website or another related website as necessary.

8.5 Public Authorities shall also keep records of requests for documents or information received and replies provided in terms of the Freedom of Information Act. Public Authorities shall also keep record of decisions by the Information and Data Protection Commissioner that are relevant to their area of interest.

8.6 The Information and Data Protection Commissioner shall communicate to the FOI Coordinating Unit information relating to decisions on Freedom of Information cases. Wherever necessary, the FOI Coordinating Unit would be bringing such decisions to the attention of the FOI Officers' Network.

8.7 The Information and Data Protection Commissioner shall also make further recommendations as necessary to Public Authorities on the keeping of documents and records 6 months following the submission of the first annual report (as per Article 21(5)) to the Minister on the workings of the Act. The recommendations would also be brought to the attention of the FOI Coordinating Unit; alternatively the Information and Data Protection Commissioner may communicate with the Public Authorities through the FOI Coordinating Unit.

8.8 The FOI Officers of all Public Authorities shall submit to the Information and Data Protection Commissioner and the FOI Coordinating Unit any additional information required to enable the formulation of appropriate recommendations.

8.9 The recommendations shall have the aim of ensuring that Public Authorities are in a position to meet applicants' requests as expeditiously as possible, and therefore they shall take into consideration the type of documentation most in demand during the first year of operation of the Act.

9.0 Submission of documents or information to applicants

9.1 Whenever a Public Authority communicates a decision to an applicant that access to a document or information will be granted in terms of Article 10 or 11 of the Act, at the same time informing the applicant of the fees applicable to the request, the Public Authority shall make available the document or information to the applicant within a maximum of 10 working days of the relevant payment being made.

9.2 Whenever a Public Authority communicates a decision to an applicant that access to a document or information will be granted in terms of Article 10 or 11 of the Act, at the same time informing the applicant that no fee will be charged, the Public Authority shall make available the document or information to the applicant within a maximum of 10 working days from the notification of the said decision.

9.3 Whenever a Public Authority decides to grant access to a document or information in the context of the Internal Complaints Procedure, the document or information shall be made available to the applicant within a maximum of 10 working days from the notification of the said decision.

10.0 Dealing with Vexatious Requests

10.1 Whereas Public Authorities remain bound to provide the documents or information required by applicants in accordance with the provisions of the Act, it should be ensured that vexatious requests are not allowed to hinder the proper functioning of the Act or the effectiveness of Public Authorities in implementing it.

10.2 Determining whether a request is vexatious implies recourse to its context and history. As a first step, it is to be determined whether a request is likely to cause unjustified distress, disruption or irritation to staff (e.g. use of hostile or abusive language; unreasonable fixation on an individual member of staff; mingling of accusations and complaints; repeated vaguely worded requests that are not clarified by the applicant).

10.3 Secondly, it would have to be considered whether:

- a) the request appears obsessive; and/or,
- b) whether complying with the request would impose a significant burden on the Public Authority, disrupting its operations (including the handling of other requests in terms of the Act).

10.4 In this regard, a Public Authority may refuse to comply with repeated requests by the same person for the same information, particularly when such requests are made within short periods when the information in question could not have changed in any substantial manner. A notification of refusal shall be sent to the applicant, wherever possible substantiating the reason for the refusal, e.g. 'The request was refused as a reply to the same request was already provided by the Department only last month.'

10.5 Whenever a refusal is issued, the applicant shall be informed of the Public Authority's internal complaints procedure and his right to seek investigation and review by the Information and Data Protection Commissioner in accordance with Article 23 of the Act.

11.0 Administration of Fees

11.1 When charging processing fees in accordance with the Fees charged by Public Authorities for access to documents Regulations time spent searching for a document or information that turns out to have been misplaced or could not otherwise be readily located as a result of negligence or any other operational inadequacy shall not count towards the calculation of the processing fee.

12.0 Application of Article 14(f)- Requests that result in a substantial and unreasonable diversion of the resources of Public Authorities from other operations

12.1 Whereas Public Authorities are bound to provide documents or information to applicants, subject to the relevant exemptions, due consideration must be given to the impact of requests made in terms of the Act on the operations of the Public Authority.

12.2 Public Authorities may consider a request to entail a substantial and unreasonable diversion from other operations if its total cost to the Public Authority reaches or exceeds EUR 100.00, calculated with reference to the following rates:

- i) EUR 5.00 per man-hour of processing;
- ii) The rates applicable to additional fees in Schedules 2 and 3 of the 'Fees charged by Public Authorities for access to Documents Regulations, 2010.'

12.3 Public Authorities are not precluded from still acceding to the request for information in specific cases where, even though the limit is exceeded, they consider it appropriate to do so

13.0 Application of Article 35(2)- Other reasons for withholding official information

13.1 Article 35(2) enables Public Authorities to withhold documents falling within the scope of Part VI of the Act whenever 'the public interest that is served by non-disclosure outweighs the public interest in disclosure.'

13.2 In considering whether the public interest is best served by non-disclosure Public Authorities shall therefore assess whether any of the following scenarios apply in relation to the respective Articles of Part VI of the Act.

Article 36- Internal Working Documents

13.3 In considering whether Article 35(2) applies in relation to Internal Working Documents, the public interest in non-disclosure encompasses the following situations:

- a) The disclosure of the document would give rise to undue alarm or concerns; or,
- b) The disclosure of the document could give rise to misunderstandings or misconceptions with regard to Government Policy or intentions; or,
- c) The document, if disclosed, may result in dissemination of information that is not factually accurate or out of date; or,
- d) The document is a work in progress which is likely to undergo significant change before it is finalized; or
- e) The disclosure of the document would reveal internal discussions, deliberations, exchange of views, proposals, advice or recommendations on the part of officials or holders of political office concerning Government policy.

13.4 It is possible that the public interest in disclosure may outweigh these considerations, particularly with regard to matters which are of widespread public concern, but it may be assumed that this will happen in unusual situations and under normal circumstances documents need not be disclosed where the above considerations apply.

13.5 It should be noted that the above considerations do not apply in the case of documents containing purely factual information. Such documents are therefore subject to disclosure.

13.6 The same applies to reports or studies drawn up by scientific or technical experts that involve the application of scientific or technical expertise, even if such documents contain advice on scientific or technical matters. Such documents are also subject to disclosure. Scientific or technical advice that is

subject to disclosure can be distinguished from policy advice under (e) above through the following characteristics:

- a) it involves the application of specialized expertise and does not take account of broader policy considerations;
- b) there is a reasonable expectation that a fresh study of the same issue by another similarly qualified individual would produce similar conclusions;
- c) it is undertaken by staff below senior management level (advice drawn up by senior managers should always be considered policy advice falling under (e) above, and hence not normally subject to disclosure).

Article 37- Documents affecting financial or property interests of Public Authorities

13.7 Any document revealing administrative or other malpractices within the Public Authority shall not be considered to have a substantial effect on the financial or property interests of the Government or of another Public Authority, insofar as it contains no information having such effect, in which case only such information shall be withheld.

Article 38- Documents concerning certain operations of Public Authorities

13.8 Any document revealing information that may in any way aid or otherwise affect candidates during tests or examinations shall be withheld in terms of Article 38(a) and (b). Any document that may prejudice the conduct or outcome of audits shall also be withheld under the same articles.

13.9 In considering whether the public interest in non-disclosure outweighs that in disclosure in relation to Article 38(c) and (d), it shall be assessed whether:

- a) the scenarios referred to in relation to Article 36 apply; or
- b) whether any third party would stand to unduly benefit from the disclosure of the document; or,
- c) whether the disclosure of the document would hinder the effective enforcement of any applicable legislation by the Public Authority concerned.