

**THE SCOTTISH LEGAL AID BOARD**  
**RESPONSE TO SCOTTISH EXECUTIVE**

**“FREEDOM OF INFORMATION (SCOTLAND ACT 2002 – ONE YEAR ON  
A consultation on the operation of the Act after one year in force”**

**INTRODUCTION**

The Scottish Legal Aid Board (“the Board”) welcomes the opportunity to respond to the Consultation Paper on the operation of the Freedom of Information Act after one year in force. The Board’s response is limited to issues affecting the Board. Accordingly, the Board has not completed all parts of the pro-forma response, but has the following observations to make which it hopes will be of assistance to the Executive.

**TOPIC 1 – COVERAGE OF THE ACT**

**The Board has no comment to make on this topic.**

**TOPIC 2 - DISCHARGE OF DUTIES**

Q9: How well do the Section 60 and 61 Codes of Practice meet your requirements?

**In general the Codes of Practice meet our requirements well.**

10a: Does the Section 60 Code provide sufficiently clear guidance to authorities on their responsibilities under FOI(S)A?

**Guidance is reasonably clear and has presented no compliance difficulties.**

Q10b: Does the Section 61 Code provide clear and useful guidance on records management, and the transfer of records to archives?

**The Guidance is reasonably clear. We do not believe that the transfer of records to the archives is an issue for the Board.**

Q11: Are there any other areas on which it would be helpful to provide guidance in either the Section 60 or Section 61 code?

**No.**

**TOPIC 3 - FEES/CHARGING**

Q12: Do you think the current fees regulations are generally correct? Are they effective??

**As our answers to the questions following will reveal, the Board believes that there are short comings in the fees regulations. Beyond the answers to the specific questions below, the Board finds it particularly difficult to understand why only 10% of the cost incurred can be recovered for the element of cost between £100 and £600, particularly in the case of commercial or media interests.**

Q13: A cap is placed on costs in that an authority does not have to comply at all with a request for information if the projected costs of doing so are above an amount specified by

Scottish Ministers. This is referred to in the fees regulations as the "prescribed amount" and is currently £600. In your view is this the correct amount?

**The Board would not support a raising of the threshold.**

**It is may be useful, first, to contextualise the prescribed amount in terms of the resources consumed in satisfying such a requests:**

- **the bulk of cost the Board incurs is related to staff;**
- **At a typical senior administrative rate (say £10 per hour), £600 equates to 60 hours of work;**
- **the Board can recover less than 10% of this cost;**

**At the current level of requests, with the current thresholds, the Board has generally been able to accommodate the impact of the legislation.**

**The Board believes that an increase in the threshold would inevitably make this difficult to sustain because such an increase would mean that:**

- **more requests would fall within the threshold,**
- **a relaxation of the threshold would be likely to precipitate more requests; and**
- **these additional requests would inevitably be of the resource intensive type.**

Q14: Are the elements allowed for in estimating the "projected costs" appropriate?

**Yes**

Q15: Staff time costs which can be charged for is subject to the maximum rate of £15 per hour. In your view is this the correct amount? Is this the correct approach?

**No, although there should be some compulsion to ensure that the staff costs incurred are minimised in terms of quantity and grade of staff, organisations should be able to charge for staff time at the actual cost incurred. If this rate exceeds £15 per hour, that amount should be recoverable. In any event, any maximum rate should be subject to routine revalorisation.**

Q16: The regulations did not introduce the provisions in the Act to aggregate costs where 2 or more requests are made by one person or by 2 or more different parties acting in concert. Is there evidence in light of experience, of a requirement to incorporate these provisions in future revised fees regulations?

**The Board has received multiple requests by one person; and the Board believes that the fees regulation should provide for aggregation of costs in such circumstances. Although the Board has not, to date, received requests from multiple persons acting in concert, it believes that this is a real possibility and would welcome the ability to aggregate costs in such circumstances.**

Q17: Do you have any other comments on the content of the current fees guidance (Annex 3 to the Section 60 Code of Practice)

**No.**

Q18: Do you have any evidence of the resource implications/general impact of FOI(S)A on your organisation?

**The main body of evidence regarding the resource implications of freedom of information are the statistics covering the Board's handling of applications:**

|                                                            |            |
|------------------------------------------------------------|------------|
| <b>Total number of applications received</b>               | <b>116</b> |
| <b>Responses provided:</b>                                 |            |
| <b>Information provided free of charge</b>                 | <b>53</b>  |
| <b>Information provided after payment of fee</b>           | <b>2</b>   |
| <b>The Board does hold not the requested information</b>   | <b>9</b>   |
| <b>Refusal notice(s) issued:</b>                           | <b>44</b>  |
| <b>Projected cost over £600 – information not supplied</b> | <b>6</b>   |
| <b>Total number dealt with</b>                             | <b>114</b> |
| <b>Number currently outstanding</b>                        | <b>2</b>   |

Q19: Is the operation of the FOI(S)A fee charging regime working effectively with the charging regime for the Environmental Information Regulations ( EIRs)?

**The Board has, to date, no experience of the charging regime for the Environmental Information Regulations.**

Q20: How many times have you issued a fees notice?

**Four times (out of 116 requests, 1st Jan 2005 to 16th Feb 2006).**

Q21: How many times have fees notices which you have issued not been paid?

**Two times.**

Q22: Are there any other issues on fees/charging which you wish to raise?

**No.**

#### **TOPIC 4 - TIMESCALES**

Q23: Can you provide us with evidence of any significant difficulties arising from the 20-day response time requirements?

**Although the Board has a good record of meeting the 20-day response time requirement, this can be at the expense of delivering timeously on its routine operational work. The existence of the statutory response time requirement in regard to FoI means that resources are inevitably focussed on its achievement, rather than on meeting non-statutory performance targets.**

**The Board also observes that the time limit is less generous and inconsistent in its measurement, with that of Subject Access requests under the Data Protection Act. The Board would welcome harmonisation of the time limits at 40 calendar days.**

**Finally, the Board believes that there could be greater flexibility in the application of time limits:**

- **Where an applicant indicates their willingness to work to an extended timescale, this should have precedence over the 20-day limit; and**

- **The Board also believes that the time limit should take account of prevailing circumstances, and allow an extension of time, where the Board can show just cause. This would be consistent with the time limits given to the applicants: where they can have the six-month limit for seeking review of a decision extended at the Commissioners discretion; and in the case of the Commissioner, who has four months to deal with requests for decisions, or “such other period as is reasonable in the circumstances”.**

Q24: Are there any other time limits provided for in the Act which are giving rise to concern?

**No.**

#### **TOPIC 5 - PROHIBITIONS TO DISCLOSURE OF INFORMATION**

Q25: Do you have any examples of occasions where statutory provisions in other legislation are **in practice** preventing the release of information through FOI(S)A by Scottish public authorities?

**Yes. Section 34 of the Legal Aid (Scotland) Act 1986 prevents Board employees from disclosing, to a third party, information furnished by or on behalf of an applicant, without the consent of the applicant. To do so constitutes a criminal offence.**

**The Board recognises that this is a proper statutory control over information furnished regarding legal aid applications.**

**The Board is, however, aware that this provision can frustrate the actions of the Scottish Information Commissioner in seeking to determine, on receipt of an application for review of the Board’s decision to withhold the information, whether such information was properly withheld.**

**The Board recommends that the Scottish Information Commissioner be granted appropriate statutory power to allow the Board to waive S34 in such circumstances. Such provision should both provide protection to the Board employees from prosecution; and transfer obligations to the Commissioner to ensure that the information remains properly safeguarded, and, for example, not subject to release by the Commissioner through his receipt of a Freedom of Information request.**

#### **TOPIC 6 - FOI(S)A SECTION 31 GUIDANCE- ISSUES RELATED TO NATIONAL SECURITY**

**The Board has no comment to make on this topic.**

#### **CONCLUSION**

The Board is more than happy to liaise and assist further regarding any of the issues raised within this response and regarding any other issues that may be identified by the Executive and/or others.