

HSE guidance on the Freedom of Information Act 2000 and disclosure of information to the public (previously GAP 1)

This guidance 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.

Introduction	3
Purpose of this guidance	3
How should we approach FOI	3
What you need to remember	4
What Directorates/Divisions need to do	5
Freedom of Information status of key documents	5
The Freedom of Information Act 2000	5
To whom does FOIA apply?	6
What information does the Act apply to?.....	6
Who can apply?.....	6
What counts as a request for information?.....	7
Do we hold the information?.....	7
• private information brought into the office by staff;.....	8
• material belonging to other people or bodies;	8
• Trade Union information;	8
• HSE information but held by our contractors.....	8
How much time does FOIA allow to answer a request?.....	8
Provisions for extra time	8
What are working days?	9
Our duty to provide advice and assistance – what does it mean in practice?	9
Information that has been deleted or amended.....	9
The “public interest” test - section 2 of the Act	10
Factors in favour of the disclosure of information.....	11
Factors against the disclosure of information	12
Good decision-making: the duty to give reasons	12
Broad, repeated or vexatious requests	13
Identifying the correct process	13
More complex and sensitive requests	14
“Mixed” requests.....	14
Use of Crown Copyright	14
Third Party Copyright	15
Requests where Central Government co-ordination is necessary	15
The Clearing House	15
Responding to the request.....	16
Means of disclosure	16
FOI exemptions	17
Subject Access under the Data Protection Act 1998 (see GAP 37 for full guidance) .	18
Environmental Information Regulations 2004	18
What is environmental information?	19
HSE’s environmental information	20
Exceptions to the duty to disclose	20

Reasonableness of requests.....	21
Pesticides information	22
Appeals handling and enforcement – FOIA and EIRs	22
Appeals Procedure – Internal Review	22
Reports on incidents	22
Commission policy on publication of reports	22
Requests for other reports.....	23
Annex 1	25
FOIA Exemptions.....	25
Annex 2	30
Public Registers	30
Names and addresses of firms which are subject to one or more of the following provisions:	30
Annex 3	32
Publication of facts and analyses behind major policy decisions	32
Making internal guidance available	33
Annex 4	34
The Information Commissioner and the Information Tribunal	34
Annex 5	35
Key similarities and differences in the FOIA, the Data Protection Act and the Environmental Information Regulations	35

Introduction

Purpose of this guidance

1. The purpose of this guidance is to help HSE staff deal with information requests, manage and minimise where possible, the risks associated with the publication of health and safety information; and comply with HSE's legal obligations under the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIRs).
2. This guidance 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.
3. This document provides guidance only. It is not a statutory instrument and has no force in law. No document of this kind can be completely definitive and cases may arise where it provides little or no help.
4. It is intended to be a dynamic document and may be amended through experience. As with any information covered by FOIA and other Regulations, a decision not to disclose that is based on this guidance may be open to challenge. Any such challenge will be dealt with on a case by case basis. FOI Unit believes, however that a decision not to disclose that draws on the sensible use of this guide is more likely to be upheld
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 (as amended) 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. GAP 14 covers disclosure for the purposes of civil proceedings in England and Wales.
6. Where a request is made, either under the FOIA alone or jointly with a request under the CPRs, requests for information will necessarily have to be considered in accordance with one or both regimes.

How should we approach FOI

7. Firstly, when dealing with a FOI request, there is a presumption of openness unless there are cogent and defensible reasons against it. The defensible reasons need to fit within the meaning of one of the exemptions in FOIA (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).

8. Secondly, to make life easier for staff and save on resources, we should:
- Proactively make information available - through the Internet, disclosure on the FOI Website and publication scheme, public registers etc; and;
 - Enable easy access and release by improving the collection, storage and marking of information.

What you need to remember

9. You should remember the following basics when 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 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 FOIA and the EIRs 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, EIRs), 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 asking permission to release the information; decisions on whether to release information must be taken solely on the requirements of the FOIA, the EIRs 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 EIRs and the Commission and Executive statements, Directorates/Divisions need to:
 - proactively make available information supporting major policy decisions (HSC Discussion or Consultative Documents will contain a large part of the facts and analyses of facts that lie behind a proposal);
 - make internal guidance available by publishing it on the HSE website;
 - respond to requests following the advice in this guidance and the procedures held on the FOI site on the Intranet;
 - gather, store and mark information in a form that makes disclosure on request as simple and least resource intensive as possible;
 - use the protective markings outlined in the [HSE's Security Policies and Procedures](#) Intranet site;

Freedom of Information status of key documents

11. The HSC/E Policy on Openness says that wherever possible, we should look 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 Intranet/Internet are clearly marked with their open /FOI status, in accordance with the procedures in **GAP 3** (currently being revised by the HSE Secretariat in line with FOI) and this guidance. 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.

The Freedom of Information Act 2000

12. On 1st January 2005 the Freedom of Information Act 2000 (FOIA) created two fundamental rights of access for any person making a request for information to a public authority such as HSC or HSE: The right;
 - To be informed by the public authority whether or not the information requested is held by the Authority; and
 - To have that **information** communicated to them.

13. It is not the intention of FOIA to hinder the efficient and legitimate functions of HSE or any government department. Therefore a number of exemptions have been designed within FOIA to enable a balance to be achieved.
14. 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.
15. Where there is doubt about the terms of the FOIA, or the decision making process in a given case proves difficult advice must be sought from the FOI Unit.
16. This guidance should be read in conjunction with the guidance held on the HSE FOI Intranet site and the [guidance issued by the Department for Constitutional Affairs \(DCA\) and the Information Commissioner](#) with which all staff making such decisions should familiarise themselves.

To whom does FOIA apply?

17. FOIA 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.
18. HSE is a nominated body for the purposes of the English Act.
19. The FOIA 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 FOIA 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 was 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. If all the information is disclosable a photocopy is a convenient way of providing the information.
22. The applicant may also ask for a summary of the information that is disclosable under FOIA.

Who can apply?

23. The right of access created by FOIA permits anyone, anywhere, to make a request. FOIA 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 FOIA in their application for information.
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 once it must be assumed to be fully open for the future i.e. it is in the public domain. Taking steps to publish the information on the HSE website to forestall further requests would be sensible.

What counts as a request for information?

26. Any request for recorded information is a request to which the FOIA procedures potentially apply. HSE has a common FOI procedure for all information requests, whether received by letter, fax, email or via the Infoline using an enquiry form.
27. Requests may be dealt with later 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:

- the request is actually asking for information;
 - it gives the applicant's contact details?
 - it is **normal business** i.e. a request for a service provided under the Health and Safety at Work Act?
 - It is already available (for example, in an HSE publication or on our web site)?
28. Depending on what your answer is to the above questions you forward it to your local FOI Officer or if not an FOI query either transfer it to the appropriate HSE section or deal with it as part of your normal work.
 29. The key to the successful management of information requests for FOI Officers is being able to discriminate between routine or straightforward requests and requests which require more careful assessment.

Do we hold the information?

30. 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 information brought into the office by staff;
 - material belonging to other people or bodies;
 - Trade Union information;
 - HSE information but held by our contractors.
31. If you are in doubt about whether you ‘hold’ such material on our premises or systems, it is essential to seek advice.
32. From time to time, you will receive requests for information that we do not hold, but may be held by another public authority. You should let the applicant know that HSE does not hold the information in question but another body may hold the information and suggest they re-apply to the other public authority. Where possible, you should provide the applicant with contact details.

How much time does FOIA allow to answer a request?

33. HSE needs to comply with Information requests under the FOIA within a 20 working days deadline following the date of receipt of the request. However, the FOIA allows 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 extra time is not specified other than as an additional “reasonable” period of time to reach a final decision. An additional 10 days could be thought to be a “reasonable time” or 20 days if very complex. You must tell the applicant within the initial 20 working day period which exemption(s) you believe apply to the information requested, and give them an estimate of the date by which the decision will have been made. This date must be met.
34. 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.
35. 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. You must remember that the overriding obligation on you is to answer requests promptly.

Provisions for extra time

36. FOIA makes only two provisions for extra time to be taken in responding to a request.

- **Fees** – You can stop the clock if, after initial consideration of the request, a fees notice is issued - [see Charging policy](#). The clock remains on hold whilst you are waiting for the fee to be paid.
- **Applying the Public Interest Test** - If you are considering refusing the information under an exemption, to which the public interest test applies, then the timescale can be extended by a 'reasonable period'. See paragraph 33 above.

What are working days?

37. '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.
38. 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.

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

39. 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.
40. The [Section 45 Code of Practice](#) issued by the DCA provides detailed guidance on the provision of advice and assistance to applicants and you should consult it as and when necessary. Also the Information Commissioner's Office has published on their web site an awareness guide on advice and assistance.
41. 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 do not need to comply with the request until you receive this.
42. 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 or phone the applicant.
43. It is important that you keep a detailed record, on Freetrack if possible, of any letters, e-mails and telephone conversations you may have with applicants in the course of providing advice and assistance. This is in case of an internal review appeal or subsequent appeal to the Information Commissioner.

Information that has been deleted or amended

44. The right of access to information under the FOIA 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
 - the information was deleted or amended *after* the request was received.

- **Deleting information from the system before the request was received.**

If you instruct a computer to delete a particular item it may not result in the item being destroyed immediately. At least for a period, you might still be able to retrieve the information albeit with substantial cost and disruption to the system. However, where you intended that data should be permanently deleted, and this was not achieved only because the technology will not permit it, you may regard such data as having been permanently deleted. This information is now “not held” by HSE and you do not have to retrieve it or provide a response to a request.

This approach is not justified where you have only temporarily deleted the information and is stored in such a way that it could easily be recovered, for example from the Deleted Items folder in Outlook or in a temporary file. HSE considers this information to be “held” by HSE and you may have to provide it if a request is received.

- **Amending information before a request was received**

It is possible that you will hold multiple versions of a piece of text, although this is not recommended. If you are in any doubt about which version or versions should be disclosed, you should consult the FOI Unit.

- **Deleting or amending information after the request was received**

You must not delete or amend information held by HSE **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 FOIA for which the person convicted will be held personally responsible.

If you delete requested information in line with HSE’s records management practices from any computer, hard copy records management system or electronic filing system, after a request is received, the information is “not held” by HSE. This will only apply if you can show that when you made the deletion:

- you had no knowledge of the request; and
- you were following standard records management policy and retention schedules when you deleted the information.

The “public interest” test - section 2 of the Act

45. The Public interest test lies at the heart of the FOIA. In effect something “in the public interest” is simply something that serves the interests of the public. When applying the

test, you are deciding whether in any particular case it serves the interests of the public better to withhold or to disclose information.

46. The Courts have often considered the question of where the public interests lies in newspaper cases. The courts have often distinguished between things that are in the public interest from things that merely interest the public – there is an important distinction.
47. There will sometimes be a private interest in withholding information where it may give rise to embarrassment because of incompetence or carelessness for example. The Information Commissioner would not accept that as a reason for non-disclosure and believes that the public interest favours accountability and good administration. But there will be many occasions when public and private interests coincide. For instance: a private interest in that the unauthorised disclosure of information held by a solicitor may damage the client, and a public interest, in that it is in the interests of society as a whole that there is access to justice and a fair trial.
48. It may be argued that information is too complicated for the applicant to understand or that disclosure might misinform the public because it is incomplete (for example because the information consists of a policy recommendation that was not followed). Neither of these are good grounds for refusal of a request. If you fear that the information to be disclosed may be misleading, the solution is to give some explanation or put the information into a proper context rather than withhold it.

Factors in favour of the disclosure of information

49. There is a presumption running through the Act that openness in itself, is to be regarded as something in the public interest. The following list of public interest factors is published by the Information Commissioner, as encouraging the disclosure of information:
 - Furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by government;
 - Promoting accountability and transparency by public authorities for decisions taken by them. Placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decision making and administration;
 - Promoting accountability and transparency in the spending of public money. The public interest is likely to be served, for instance in the context of private sector delivery of public services, if the disclosure of information ensures greater competition and better value for public money. Disclosure of information as to gifts, hospitality and expenses may also assure the public of the personal probity of civil servants;
 - Allowing individuals and companies to understand decisions made by public authorities affecting their lives and in some cases, assisting individuals to challenge those decisions, even if that makes life uncomfortable;
 - Bringing to light information affecting public health and safety. The prompt disclosure of information by scientific and other experts may contribute not only to the prevention of accidents or ill health but may also increase public confidence.

50. This list is not exhaustive and in HSE there may be plenty of other factors to take into account depending on the type of information requested, for example, assists in the access to justice and other fundamental rights.

Factors against the disclosure of information

51. The main factors counting against the disclosure of information are those set out in the exemptions themselves. For example, there is an obvious public interest in national defence, maintaining good international relations and law enforcement, something in which HSE is particularly interested. If disclosure of information would adversely affect these matters, then it is relevant to consider the exemptions to weigh the possible adverse effect of disclosure against the positive benefit of openness. An example would be where section 31 exempts information whose disclosure would, or would be likely to prejudice the apprehension or prosecution of offenders. In HSE this could mean the potential influence of a case currently being taken under HSW Act. In these circumstances you should withhold information.
52. There may be additional factors to take into account once you have decided one of the FOI exemptions is relevant. Consideration of the Data Protection Act and of the Human Rights Act 1998, for example, may lead to the conclusion that information should not be disclosed because it might prejudice the right to a fair trial. An HSE example to demonstrate this right was:
- refusing a FOI request for information on companies, who had or were appealing an HSE prosecution, as if their appeal was successful then disclosure of any of the information could be unfair to a defendant, who may subsequently have their conviction overturned.
53. 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, for example, receiving a request for information about an accident 10 years previously could be treated differently in comparison to a recent event.

Good decision-making: the duty to give reasons

54. Decision Makers must read all correspondence thoroughly because if there is a subsequent appeal, how the case was handled would be investigated by the HSE Appeals Officer.
55. Decision Makers therefore, need to weigh up the public interest considerations carefully, whether in favour of protecting information from disclosure or alternatively in favour of disclosure.
56. You cannot simply say that the public interest is 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 both the file and Freetrack to leave a clear audit trail if the case is later appealed.

57. Where you take a decision to withhold the information you must give reasons for that decision, for example, in a request for names of people who had died as a result of gas incidents, HSE's response stated that such information would be withheld under the exemption in section 44(1)(b) because it would cause distress to surviving family members, so contravening their rights under the European Convention on Human Rights Article 8(1) in that it does not respect private and family life. The public interest, in this instance, was therefore not in favour of disclosure.
58. It is 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. See specific guidance for FOI Officers and decision makers on the FOI Site under [the Act at Work](#) on the Intranet.

To Neither Confirm Nor Deny (NCND)

59. You will also need to take a decision first, when considering exemptions, whether or not to confirm to the applicant that the requested information is in fact held by HSE. There are circumstances in which to confirm (or indeed deny) that information is held would not be appropriate. So, for example, you would neither confirm nor deny to the applicant if information was requested to confirm the existence, size and strength of fissionable material at a particular reactor site. Where HSE reaches the conclusion that it has no obligation under the FOIA to say whether it holds the information the normal manner of doing so is to say that HSE [will neither confirm nor deny](#) whether it holds the information. Fuller guidance on this issue is held on the FOI site on the Intranet.

Broad, repeated or vexatious requests

60. A number of requests under the Act can be very broad requests for information. They may not describe the information sufficiently precisely to allow you to identify and find the information. If the request is too broad or general in nature (e.g. seeks all information on asbestos 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). See HSE's [Charging policy](#). Remember we have a duty to provide assistance to applicants, and this might include helping them to refine a request that is too general ([see Paragraph 39](#). above)
61. [Repeated and vexatious](#) requests are a different matter and comprehensive guidance is available on the FOI site. You should always contact the FOI Unit if you consider that a request might be vexatious.

Identifying the correct process

62. You may find sometimes it is 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 guidance will help, but you will also have to rely on your own judgement to spot the cases that need more careful handling. This will come with experience.

More complex and sensitive requests

63. FOIA means that Departments have had to deal with more complex requests for information. These are requests for information that 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 such as the Police, British Energy or ordinary factory occupiers;
- from the media on issues which have a high public profile e.g. requests from the BBC on the Bristol NHS Stress case or the proposed LNG terminal at Milford Haven;
- which may relate to financial interests e.g. about the cost of our contracts; and
- which may be part of an orchestrated campaign, or
- it may be unclear as to whether or not the information sought is exempt.

64. 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

65. A mixed request is a case in which an applicant requests information that 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 5](#).

Use of Crown Copyright

66. You should be aware that copyright protection could apply to information that is disclosed under the Act. 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. The Office of Public Sector Information (previously HMSO) have issued guidance on this subject in relation to Crown Copyright, which is available on OPSI's website <http://www.opsi.gov.uk/>, or by contacting OPSI at:

Office of Public Sector Information
Licencing Division,
St Clements House,
2-16 Colegate,
Norwich NR3 1BQ

Phone enquiries

Tel: 01603 723011 Fax: 01603 723000

Third Party Copyright

67. If HSE is complying with our statutory duty under sections 1 and 11 of the Freedom of Information Act to release information to an applicant, we are not breaching the Copyright, Designs and Patents Act 1988. The FOIA 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.
68. 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.

Requests where Central Government co-ordination is necessary

69. You may need to refer some of the most complex and sensitive requests through the FOI Unit to the Central Clearing House 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

70. The Clearing House will act as the central point of expertise, guidance and advice for all FOI requests that raise sensitive issues and/or have Whitehall-wide implications. The BBC request for information about the proposed Liquid Natural gas terminal at Milford Haven was one such request.
71. 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 FOIA, Data Protection, and the Environmental Information Regulations.
72. The Clearing House will not answer requests on behalf of HSE. It will provide advice on difficult cases, but the responsibility for answering the requests will still lie with HSE.

Which requests should be referred to the Clearing House?

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

- requests which obviously involve cross Whitehall issues, for example, those which relate to COMAH sites and would be of interest to DTI and the Environment Agency;
 - 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;
 - high profile issues whether current or historical (e.g. issues of Ministerial and/or media interest and where release or refusal is likely to attract media coverage);
 - Gateway reviews;
 - internal audit reports;
 - NAO investigations;
 - complex and/or high profile procurement projects; and
 - shared information held relating to the Efficiency Programme;
 - information less than 30 years old is held by the National Archives and there may be a dispute between the Department and TNA;
 - metadata (such as - software code, document properties (e.g. list of people editing documents / when last edited / etc), document wordcounts);
 - file lists where the guidance does not apply.
74. 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

75. Once a decision has been taken to release information you need to decide how you will release the information. HSE will hold information that is covered by the right of access under FOIA 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 Directorate.
76. 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 have to comply with that request.
77. If the applicant requests a copy of the information in a permanent form, (or any other form acceptable to them), or 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 that format.
78. When deciding whether you can release the information in the requested format you should consider:

- a. **Whether the format is easily replicable** – e.g. 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.
- c. **Supplying the information in a low cost format** - You should also give active consideration to whether the information can be released in another format that would not incur a cost. If this is possible, you should tell the applicant in the same letter.

FOI exemptions

79. 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.
80. 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.
81. In some instances the FOIA 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.
82. However, generally speaking, there is no reason why overlapping exemptions should not be applied simultaneously e.g. s.40 (personal data) and s.41 (information provided in confidence) or s.41 and s.43 (commercial interests).
83. Where an exemption directs you to a separate access or disclosure regime e.g. section 39, the Environmental Information Regulations 2004 or section 40, the Data Protection Act 1998, it is the rules and procedures of those access regimes that need to be followed subsequently. Section 44 of the FOIA gives an absolute exemption if our disclosing requested information would be a breach of the law. If, for example, we would be prohibited from releasing information under the Official Secrets Act or the Criminal Procedure and Investigations Act 1996, we cannot release it under FOIA.

84. Certain of the exemptions are concerned with the effect, or likely effect, of the disclosure of the information 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. The exemptions are discussed in more detail in [Annex 1](#) and on [the DCA website](#).

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

85. 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 own personal data.
86. Requests under the Data Protection Act are known as “subject access requests”.
87. The main features of the processing of subject access requests are:
- from January 2005 it applied to all personal data, including unstructured files held by HSE;
 - HSE 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.
88. 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.
89. 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 FOIA and the Data Protection Act may be found in [Annex 5](#), [GAP 37](#) and the exemptions guidance produced by the [DCA](#).

Environmental Information Regulations 2004

90. New Environmental Information Regulations also came into force on 1 January 2005 at the same time as the FOIA. Like the FOIA, 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.
91. The main features of the EIRs are:
- Requests may be made orally or in writing;

- The public authority must reply within 20 working days;
 - There is a limited range of exceptions, all of which are subject to a public interest test;
 - You cannot refuse to meet a request on the grounds of cost.
92. The Environmental Information Regulations 2004 (EIRs) implement Council Directive 2003/4/EC on public access to environmental information. They require public authorities who have responsibilities in respect of the environment and hold environmental information to release the information on request, subject to some excepted 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). Full guidance is available on the Department for Environment, Food and Rural Affairs (DEFRA) Website
<http://www.defra.gov.uk/corporate/opengov/eir/guidance/index.htm>
93. 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.)
94. 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 it is impracticable, because of complexity and volume of the information requested, to respond in 20 days.
95. Under EIR HSE is not obliged to consult in respect of information that may be wholly or jointly owned by third parties e.g., where the cost of consultation is disproportionate or there has been earlier consultation on the status and sensitivity of the information.

What is environmental information?

96. Regulation 2(1) of the EIR 2004 define “environmental information” as information relating to:
- “any information in written, visual, aural, electronic or any other material form on
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural gas sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environments of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or

likely to affect the elements and factors referred to in (a) or (b) as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) or (c)..."

HSE's environmental information

- 97. 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. the document storage company, Iron Mountain).
- 98. 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 Regulations 1999 as amended by the Control of Major Accident Hazards (Amendment) Regulations 2005)
 - 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, HSE 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).
99. HSE 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 HSE or any other public authority;
 - ii. did not supply it in circumstances such that HSE 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.
100. 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 involve the disclosure of information that would adversely affect any of the interests mentioned above.
101. However, where information about emissions is requested, HSE cannot refuse to disclose it for any of the reasons from **d** to **g** above.
102. Where disclosable information is contained in other information that is not disclosable, HSE cannot withhold the requested information unless it reasonably cannot be separated from the other material. For example where so much information is non-disclosable that what remains is meaningless or otherwise unhelpful to the applicant.

Reasonableness of requests

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

Pesticides information

104. 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).
105. When considering requests for information on pesticides you should therefore consider the requirements of this legislation as well as the FOIA 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.

Appeals handling and enforcement – FOIA and EIRs

Appeals Procedure – Internal Review

106. All FOIA 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.
107. HSE will also deal with any appeals against EIR decisions under the same [appeals procedure](#), available on the FOI Intranet site.
108. Decision makers should ensure that FOI Officers are kept informed and that papers are kept in chronological, numbered order to pass to the Appeals Officer.

Reports on incidents

Commission policy on publication of reports

109. 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 factual 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.
110. 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.

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

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

112. The disclosure of reports for the purposes of legal proceedings is not affected by this policy. Working assumptions in this area are currently being developed.

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

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

114. 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.

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

Requests for other reports

116. 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 procedures and, where environmental information is involved, under EIRs. Requests for personal information continue to be dealt with under the Data Protection Act.

117. There is no right to have a copy of the inspection or investigation report itself under the FOIA or EIRs. 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.

118. 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.

119. The voluntary release of reports for the purposes of legal proceedings was previously covered in **GAP 14**. This guidance is currently being reviewed and has been temporarily withdrawn. 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.
120. 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 a case by case basis as they arise.

Annex 1

FOIA Exemptions

The FOIA 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 such as minutes of an IAC meeting 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 is 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, whistle blowers) 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. HSE as a public authority has the right to think in private. 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 section 35 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. This exemption should be used rarely and not without consulting the Legal Advisers Office;

- 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 (SI 2004 No.3391);
- Personal Information (section 40): If the applicant is the data subject, then the exemption is absolute and the request is 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 Legal Adviser’s Office, external counsel, solicitor agents you must refer the request to the FOI Unit who will liaise with HSE Legal Adviser’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 Legal Adviser’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.

Annex 2

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 and London and Bootle 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. FOD receives information from other inspectorates and distributes it to Local Offices. OSD maintain their own registers which are available at their offices in London and Aberdeen.

The registers contain the following information:

Names and addresses of firms which are subject to one or more of the following provisions:

- Explosives Act 1875 (new regulations on Manufacture and Storage of Explosives pending)
- Nuclear Installations Act 1965
- Fire Certificates (Special Premises) Regulations 1976
- Asbestos (Licensing) Regulations 1983 as amended
- Control of Major Accident Hazards Regulations 1999 and Control of Major Accident Hazards (Amendment) Regulations 2005
- 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 as amended by the Amendment Regulations 2005

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

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 3

Publication of facts and analyses behind major policy decisions

HSC/E is committed to publish the facts and analyses of facts that 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**). The attached disclaimer should be used in all Consultative Documents:

FOIA disclaimer:

"Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances; this will mean that your personal data will not be disclosed to third parties."

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 that informed the proposal or decision they should also be made available publicly.

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**, currently under review.

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 that 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 FOIA 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 currently being revised in line with FOI). 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 FOI 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 FOI 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 4

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

Annex 5

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

Access Regime	Subject matter	Time Limit	Cost	Exemptions	Is citation of the Act 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 FOIA.	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 exceptions, all of which involve Public Interest Test	No	One set of regulations for England & Wales and Northern Ireland, similar regulations for Scotland