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**CHAPTER 25
SECTION 1****INTRODUCTION AND LEGAL BACKGROUND
TO THE FREEDOM OF INFORMATION ACT 2000****1. BACKGROUND**

This guide contains advice for Immigration and Nationality Directorate (IND) staff on how to deal with requests for information from members of the public in line with the statutory requirements of the Freedom of Information Act 2000 (which you will see referred to throughout this guide as "*the Act*"). Staff can find a copy of the legislation itself at the following HMSO website address:

<http://www.hmso.gov.uk/acts/acts2000/20000036.htm>

This guide has been produced by the IND Central Freedom of Information (FOI) Team to cover the main information access provisions of the Act which come into full force on 1 January 2005. It has been developed in consultation with key stakeholders across all of IND's business areas, as well as the central Home Office's Information, Record and Management Services team and Legal Advisers Branch (LAB).

The guide should be regarded as the authoritative source of reference for **all** IND staff who receive and deal with requests for information. Many Directorates within IND have also established local arrangements to deal with requests for information and the guidance here should be read alongside any instructions provided at local IND Directorate level for handling requests.

Staff should also be aware that the instructions contained here will be subject to repeated changes as case-law and guidance on the Act evolves from 2005 onwards. Staff will receive advanced notification of any substantive changes and what these will consist of.

The IND Central FOI Team have overall responsibility across IND for implementing the Act, and are also responsible for providing policy and operational advice in this area to IND Directorates. Staff can find full details and contact numbers for the team on the IND Freedom of Information page on [Horizon](#).

Those staff who do not have access to POISE machines and are on TBC will also be able to find details of the team and all the other documents placed on the internal website, by accessing the Freedom of Information Folder which can be found on the Transfer Folder.

A number of IND staff from every IND Directorate have received specialist training on the Act, and will be referred to throughout this guide as "*Freedom of Information Specialists*". Where staff have an initial query regarding the Act which their line manager is not able to answer, they should refer to their relevant Freedom of Information Specialist for assistance. A list of the staff who have received training in all the IND Directorates will be available on the internal IND Freedom of Information page and the TBC Transfer Folder. A number of IND Directorates have also established central units for dealing with requests and staff should seek guidance from these units if they have any concerns about the Act.

2. PURPOSE OF THIS GUIDE

The Freedom of Information Act 2000 establishes for the first time, for members of the public, a **legal right to know** about information held by public authorities. All public authorities will be required to operate the main information access provisions of the Act from 1 January 2005 onwards. The Home Office is classified under the Act as a public authority and therefore IND, as a part of the Home Office, is subject to all of the Act's provisions.

This guide explains the legal duty of IND staff to disclose information in line with the provisions of the Act and other relevant information access legislation. It also explains the balance between disclosing and withholding information which staff must apply, in line with the Act, when they receive requests for information. For IND staff this will mean that the decision to disclose information should always be balanced with the need to ensure that this does not effect the integrity or operation of the UK's system of immigration control.

This guide takes account of the policy, operational and legal background in relation to the Act and its potential impact on IND. If IND staff follow the advice in this guide, or seek further advice where specified, any disclosure or withholding of information made will comply with both IND and Home Office policy and the legal duties of the Department under the Act.

3. PERSONAL AND DEPARTMENTAL RESPONSIBILITY

It is important that IND employees handle all requests for information with particular care and diligence, particularly if they are unfamiliar with the Act or have any doubts about how to comply lawfully with a request for information. Section 2 of this IDI Chapter provides details of how to distinguish between routine and non-routine requests for information under the Act, and sets out procedures and the grade level of staff who should authorise responses to non-routine requests.

If a member of staff and their relevant Directorate within IND acts properly within their authorised duties, and follows this and any other relevant instructions, responsibility for a breach of the Act would normally lie with the Department and **not** the individual or their IND Directorate. Staff must always bear in mind that the Act is enforced by the Information Commissioner who has been provided with legal sanctions which can be ultimately used against any public authority which is deemed to be failing to comply with the Act. Further details of the role of the Information Commissioner can be found in Section 3 of this IDI Chapter.

Staff should also be aware that the Official Secrets Act still applies to all IND personnel and provides for penalties for the unauthorised disclosure of information. This obligation of secrecy does not conflict with the Freedom of Information Act since disclosure should always be properly authorised. For further information on authorisation levels in IND when disclosing requests for non-routine information refer to Section 2 of this IDI Chapter.

If IND policies and guidance on the Freedom of Information Act are followed, then the Department will support the member of staff in any claim made against them by an individual who appeals to the Information Commissioner. The liability here will rest not with the individual member of staff but with the Department as a whole. If the

decision not to disclose information is not within the authority of the member of staff or the disclosure was made contrary to IND policies or guidance, then both the Department **and** the individual may be deemed responsible. Point 5.7 below makes clear that a decision to knowingly destroy information held by IND on receipt of a request for information will attract severe legal consequences for both the Department and any individual member or members of staff concerned.

If, after consulting this guide, a member of staff is still unsure whether to disclose information requested in a particular instance, they should **always** seek further guidance before making a decision, either from their line manager, their relevant Freedom of Information Specialist, or the IND Central FOI Team.

4. FURTHER SOURCES OF INFORMATION

This guide explains in some detail the provisions contained in the Act as they are most likely to impact on IND's work. It is not, however, a complete statement of the Act and only covers those areas around disclosing and withholding information which are likely to be most relevant to IND staff during the course of their official duties.

A number of other useful publications are available on the internet and in hard copy format which provide detailed or specialised guidance for government officials dealing with requests under the Act. Staff should refer to the internal IND Freedom of Information website for further details of these or the TBC Transfer folder.

5. KEY ELEMENTS OF THE FREEDOM OF INFORMATION ACT 2000

5.1. Legal background to implementation

The Freedom of Information Act received Royal Assent on 30 November 2000. The requirements set out by the legislation have been implemented in stages to allow public authorities the necessary time to prepare for the Act.

A Home Office Publication Scheme was established in 2002 in line with section 19 of the Act and provides a map for members of the public to find information both quickly and easily which is held by the Department. Details of the scheme can be found on [Horizon](#).

IND has also established a Publications Editorial Board which provides guidance on publishing information for IND Directorates and also champions the need for publication of material wherever appropriate, across IND, in the spirit of greater openness. It is likely that as the Act evolves and particular requests are made to IND for information which has not been previously published, IND Directorates may choose to publish this information on a regular basis as part of the Publication Scheme. IND Directorates should email IND's Central FOI Team if they have any suggestions for publishing information as part of this scheme. The email should state clearly in that this relates to the publication scheme and should be sent to the following Poise address on the Home Office global address list:
Freedom Of Information Team (IND).

The main provisions of the Act are the statutory rights of access it creates to the information held by public authorities, and this will come into force for Government

Departments, such as the Home Office, on 1 January 2005. The Information Commissioner through the Information Commissioners Office will be responsible for regulating the provisions of the Act. Members of the public, outside organisations, MPs or legal representatives will be able to appeal to the Information Commissioners Office where they believe that IND has not released the requested information in line with the Act.

While the Act is designed to enable individuals to access a wide range of information, it also has a number of provisions which permit public authorities to limit the disclosure of information. These are referred to as “*substantive exemptions*” and in total there are 23 of these from the rights of access under the Act. They mark out the limits of the right of access to information under the Act, providing a public authority can demonstrate in most cases that disclosure may harm the public interest in line with the specified exemptions. Further details on substantive exemptions and applying these can be found in Section 5 of this IDI Chapter.

5.2. Information access provisions

Section 1 of the Act creates two key information access rights which provide for:

- i) the right for an applicant to be told whether IND holds the information requested;
- ii) and if that is the case, the right for an applicant to have that information communicated to them by IND.

These two rights in no way discriminate between who can make a request and how a request can be dealt with by IND. Essentially anyone in the world, regardless of their nationality or profession is able to make a request. Staff should not treat requests differently on account of the nature of the person making that request or how they intend to use that information. These rights also apply to information held by IND before 1 January 2005, as well as after this date. A request for information does not even have to refer to the Freedom of Information Act for it to be treated under the provisions of the Act itself. Instead, it is the duty of staff to recognise whether a request falls to be dealt with under the Act, and handle it accordingly. Further details of what constitutes a request under the Act can be found at Section 2 of this IDI Chapter.

5.3. Definition of information

The Act applies to all recorded information IND holds at the time of the request, and in any format. It could, for example, be held:

- on paper; or
- on a computer; or
- audio tape; or
- video; or
- manuscript; or
- post-it note.

Where IND Directorates have large amounts of information stored electronically there may be some doubt as to what stage such information may be classified as being no

longer held, and so not subject to disclosure under the Act. The starting point for staff here is that all electronic information held on personal drives, shared drives or any other electronic medium will be regarded as being held by IND for the purposes of the Act and so would be potentially disclosable if requested.

Where emails or other electronic documents have been sent to the Deleted Items folder on Microsoft Outlook or the Recycle Bin, and are then deleted again it would not be subject to disclosure under the Act. This means that any information which has been deleted once but is still located in either the Deleted Items folder or the Recycle Bin would still be disclosable under the Act as this has only been deleted once. Further details on searching electronic files when a request is received can be found in Section 2 of this IDI Chapter.

5.4. **Information stored on behalf of someone else**

IND may also hold information on behalf of someone else: for example Trade Union information; private material brought into the office by staff; or material belonging to other people or bodies. In such circumstances these forms of information do not have to be provided in response to a request for information. It is also important to remember that personal comments made by staff (often stored on email) will not usually need to be disclosed if they do not relate to the information requested. Whether information is held on behalf of someone else is a difficult question and will depend on the precise circumstances involved. If you are dealing with a request and you think that the relevant information may only be held on behalf of someone else then it is important to seek advice from your relevant Freedom of Information Specialist or the IND Central FOI Team.

5.5. **Archived information**

The right of access also applies to any information which is in storage, for example if it is in a filing system outside of a Directorate's building, or in an out-sourced records unit.

If any information requested has been transferred and held by The National Archives staff should respond to the applicant using the standard letter template at **Annex A**.

If staff are unsure as to whether or not any records requested have been archived or out-sourced, they should contact the General Registry Unit in IND for further information.

5.6. **Means of disclosure**

Once a decision has been taken to release information, a key consideration for staff will be the format in which to release it to an applicant. IND will hold information in many different formats that will be potentially disclosable under the Act. Applicants may request information that is included in minutes of meetings, e-mails, maps, audio recordings, video recordings etc.

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 under the Act is only to information and not documents.

Staff must, when considering whether to release information requested in a specific format, consider whether it is reasonable to provide the information in the format requested. The applicant could request a copy of the information in a permanent form (or any other form acceptable to them), or ask for a summary or digest of the information, or to come and inspect a record containing the information.

When considering whether to release the information in any of the formats requested by the applicant, staff should consider:

- a. **Whether the format is easily replicable** – e.g. can the information requested be easily copied e.g. is easy access available to audio copying equipment if a tape recording is requested?
- b. **The cost of providing the information in the format requested** – if providing the information in the format requested by the applicant takes the cost of processing the request over the £600 cost limit. Section 4 of this IDI Chapter has further details on this. Staff should also give active consideration as to whether the information can be released in another format which would not incur such a cost. For example, sending information electronically to an applicant who provides only their email address may be impracticable or exceed the £600 cost limit where much of the information is stored on manual files and would require staff to transfer this to an electronic format. In such circumstances staff should write back to the applicant asking for a postal address which will make disclosure of information from manual files easier.

Where staff may have to apply any of the substantive exemptions explained in Section 5 of this IDI Chapter, they should refer to this for further details of how to withhold material in these circumstances.

5.7. Deleted or amended information

There are two key points which staff should always bear in mind when deleting or amending any information:

- Requests for information under the Act relate only to information that is held at the time the request is received.
- The Act creates a criminal offence (in section 77) of altering, defacing, blocking, erasing, destroying or concealing any record held with the intention of preventing disclosure of information following a received request for that information.

Where a request is received and information has been altered or deleted prior to the receipt of the request, there is no obligation on IND to provide the deleted information as that information is not counted as being held by IND under the Act.

Where a request is received and applies to information which the applicant is entitled to either under the Act or section 7 of the Data Protection Act 1998 (known as a subject access request) any alteration to or deletion of the record, the information held or any personal data risks attracting criminal liability for both the Department and any individual concerned. If convicted the Courts can impose a fine.

Whenever staff are aware that a request falls to be dealt with under the Freedom of Information Act or the Data Protection Act, they should seek further advice from their line manager, relevant Freedom of Information Specialist or the IND Central FOI Team before any alteration, amendment or deletion is made to any of the information requested. No alteration, amendment or deletion should ever be made with the intention of preventing the disclosure of information or personal data in response to a Freedom of Information Act or Data Protection Act request – this would be a criminal offence.

5.8. Time for responding to requests

The Act makes clear that responses to requests for information should be made promptly and **no later than 20 working days** following the day after IND or the wider Home Office first received the request. Working days are defined as all days except Saturdays, Sundays and Bank Holidays. Civil Service privilege days count as working days.

For example, an applicant writes in directly to IND requesting information on the number of non-asylum removals made in 2002. IND or the wider Home Office receives the requests and opens it. The day on which this request is opened either electronically or has been date stamped by the post room manually counts as day 0. The 20 working days then apply from the day after day 0.

The request is always considered as being received when it is delivered and first opened in either IND or the wider Home Office. The clock does not start when it is assigned to the appropriate member of staff or IND Directorate to answer. It is important, therefore, that if staff receive a request for information which is not for their relevant IND Directorate to deal with, that it is allocated swiftly to the appropriate Directorate who leads on the subject of the request, either in IND or in the central Home Office.

In some cases where requests may be made for information such as responding to Minister and MP Cases, staff should continue to meet the deadlines set if these are more pressing than the 20 working days target. These requests will still need to be answered under the information access provisions of the Act.

If a request for information has been received in IND or the wider Home Office but the relevant answering Directorate is not able to meet the 20 working day target, then an initial response should be sent immediately to the applicant acknowledging their letter and explaining that it is being dealt with. The response should make clear the reason for the delay and when the case is expected to be answered. A standard letter template, which Directorates should adapt for use in such circumstances, is attached at **Annex A**.

Where a case has been transferred to IND from another Government Department or public authority and it is for IND to deal with, the 20 days target will only begin when it is officially transferred and first received in either IND or the wider Home Office.

On some occasions, staff may receive email requests for information directly from applicants. All IND Directorates should ensure that they have arrangements in place locally to ensure that the email inboxes of staff can be accessed to check for new

requests. This will ensure that in cases where a member of staff may be away from the office on a period of annual or sick leave, that a request can be dealt with swiftly and does not remain unchecked as the 20 working day target reduces. The use of the Out of Office reply function on Microsoft Outlook may not reach all applicants who have made external email requests. One best practice mechanism for ensuring that emails can be regularly checked when staff may be away is to use the Delegates option on Microsoft Outlook. This allows any member of staff to provide colleagues with read access rights to any emails which come into their inbox. This should always be done with the active consent of all staff members involved, and where line managers provide this permission to any staff, they should ensure that confidential personnel matters relating to any staff are not discussed via email.

5.9. **Extra time for responding**

The Act does make a limited number of provisions for extra time to be taken in responding to a request in specific circumstances:

The applicant's initial request is unclear or may exceed the £600 cost limit-

If it is necessary to contact the applicant asking for further information, the 20 working day response period does not start until the applicant has satisfactorily provided sufficient further information to enable us to process their request further. Usually this will happen if after initial consideration by staff, it is not clear exactly what information an applicant wants, or if their initial request may fall to be rejected as it exceeds the £600 cost limit. Staff should consult Section 4 of this IDI Chapter for further details of how to deal with these types of requests.

Applying the Public Interest Balancing Test- The 20 working day timescale can be extended by a reasonable period if the information being sought by the applicant has to be considered under a substantive qualified exemption and additional time may be required to assess the public interest balancing test. Staff should consult Section 5 of this IDI Chapter for further details on how to extend the time period in when considering the application of qualified exemptions.

6. **DISCLOSURE UNDER OTHER INFORMATION ACCESS REGIMES**

6.1. **Code of Practice on Access to Government Information**

The full implementation of the Freedom of Information Act's access provisions on 1 January 2005 will mean that the voluntary Code of Practice on Access to Government Information (COPAGI), which has been in force prior to 2005, no longer has any binding effect on Government Departments. As the provisions of the Freedom of Information Act 2000 are also retrospective in their effect, staff should **completely disregard** COPAGI from 1 January 2005 onwards when receiving any new requests for access to information held by IND. Even if requests received after 1 January 2005 relate to information which was held by IND prior to 1 January 2005 or refer to the Code, these should still be dealt with by applying the Freedom of Information Act 2000 provisions. Similarly, any requests for information which cite the Code prior to 1 January 2005 and which have not been answered by IND before this date, should be answered with reference to the Freedom of Information Act 2000.

6.2. Disclosure of personal data and environmental information

The implementation of the information access provisions of the Act do not in any way undermine or replace the statutory obligations which IND is required to comply with when considering requests in respect of certain other categories of information. The following statutory regimes govern access to particular categories of information:

The Data Protection Act 1988 (“DPA”);
The Environmental Information Regulations 2004 (“EIR”);

To prevent public authorities from having to deal with possible legislative conflicts when assessing the disclosure of certain forms of information, the Act makes specific provision for handling requests where they ask for information in areas covered by the DPA and EIR. It also makes provision for areas where disclosure may be covered by a common law prohibition such as breach of confidence or where disclosure may be prevented by a category of statutory prohibition.

6.3. Data Protection Act (DPA) 1988

The DPA sets out how bodies, such as the Home Office and IND, who process data about individuals (referred to in the DPA as “personal data”) should deal with this data. These are known as the data protection principles. The DPA also provides a legal right for an individual to access data about them and to be told what processing goes on and for what purposes.

There is dedicated guidance for IND staff on the DPA in the IDI Chapter 24 *‘Disclosing personal information’* which staff should consult to find out more about the DPA and how it applies to IND.

If an individual makes a request and refers to the Freedom of Information Act but in fact the request is really for personal data about the applicant then the request should be dealt with as a DPA subject access request (under section 40(1) of the Freedom of Information Act).

Section 40 of the Freedom of Information Act also deals with the situation where a request for information potentially requires disclosure of information about a living individual other than the applicant (i.e. the information relates to a “third party”). Where that is the case it is important that the data protection principles are respected so that a request under the Freedom of Information Act does not lead to disclosure of personal data about a third party unless that is defensible in DPA terms.

Whenever an information request potentially requires disclosure of personal data about a person other than the applicant, staff should consult the guidance on disclosure to third parties in the revised IDI Chapter 24 *“Disclosing Personal Information”*.

6.4. Environmental Information Regulations 2004

The Environmental Information Regulations establish a specified access regime which allows people to request environmental information from public authorities and those bodies carrying out a public function. New regulations in this area are due to

come in to force on the 1st January 2005 entitled the Environmental Information Regulations 2004. Section 39 of the Act exempts environmental information from being dealt with under the Freedom of Information Act and provides it should be dealt with under the Environmental Information Regulations 2004. Any requests received in IND which are believed to fall under the EIR regime should be referred to the IND Central FOI Team.