

# **MEMORANDUM OF UNDERSTANDING**

**between**

**THE SCOTTISH INFORMATION COMMISSIONER**

**and**

**THE CROWN OFFICE & PROCURATOR FISCAL SERVICE**

**and**

**THE CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND**

**IN RELATION TO THE INVESTIGATION OF CRIMINAL OFFENCES**

## **1. Introduction**

- 1.1 Section 65 of the Freedom of Information (Scotland) Act 2002 (FOISA) and regulation 19 of the Environmental Information (Scotland) Regulations 2004 (EIRs) contain specific criminal offences (referred to as "the relevant offences" within this Memorandum of Understanding (MOU)) in relation to withholding or destroying information after a request for that information has been made to a Scottish public authority (see Appendix A).
- 1.2 In terms of section 65A of FOISA and regulation 19A of the EIRs, proceedings in respect of the relevant offences may be commenced within six months beginning with the date on which evidence that the prosecutor believes is sufficient to justify the proceedings came to the prosecutor's knowledge. However, no proceedings may be commenced more than three years after the commission of the offence, or, in the case of a continuous contravention, after the last date on which the offence was committed. Both section 65A and regulation 19A are subject to section 136(3) of the Criminal Procedure (Scotland) Act 1995, which makes it clear that proceedings shall be deemed to be commenced on the date on which a warrant to apprehend or to cite the accused is granted, if the warrant is executed without undue delay.
- 1.3 The timely and effective investigation of the relevant offences is vital to maintain public confidence in the general right of access to information afforded under FOISA and EIRs.

## **2. Purpose**

- 2.1 The purpose of this MOU is to agree a framework for the investigation and reporting of the relevant offences between the Scottish Information

Commissioner (the SIC), the Crown Office & Procurator Fiscal Service (COPFS) and the Chief Constable of the Police Service of Scotland (Police Scotland). The MOU will also ensure that there is a clear understanding of the various roles and responsibilities of each organisation during the investigation and reporting of any of these offences.

### **3. Legal Framework**

3.1 The SIC and Police Scotland are both responsible for investigating and, where appropriate, reporting allegations of the relevant offences to COPFS for consideration of prosecution.

3.2 It is agreed that:

3.2.1 the investigation of the relevant offences will be conducted on a joint basis by the SIC and Police Scotland; and

3.2.2 at the conclusion of the investigation, Police Scotland will report the matter to the appropriate Procurator Fiscal, (and take due regard to their obligations under disclosure), where there is *prima facie* evidence to substantiate the allegation that a relevant offence has been committed.

### **4. Allegations of Criminality**

4.1 An allegation of the commission of a relevant offence is likely to come to the attention of Police Scotland or the SIC in the following ways:

4.1.1 an allegation made directly to Police Scotland by a named person;

4.1.2 an allegation made directly to the SIC;

4.1.3 some evidence or allegation of criminality uncovered during an investigation undertaken by the SIC under section 47 of FOISA (which applies to both FOISA and the EIRs); or

4.1.4 during an investigation carried out by the SIC for the purposes of determining whether a Scottish public authority is complying with the provisions of FOISA or EIRs, or a Code of Practice issued thereunder.

4.2 Where an allegation is made to Police Scotland, the allegation must be shared with the SIC at the earliest opportunity and prior to the commencement of any formal investigation by Police Scotland.

4.3 Where an allegation is made to the SIC, or evidence of criminality is uncovered during an investigation undertaken by the SIC in terms of 4.1.3 or 4.1.4 above, the allegation must, unless the SIC reasonably believes that there is no evidence to suggest that an offence may have taken place, be

shared with Police Scotland at the earliest opportunity and prior to the commencement of any formal investigation by the SIC.

4.4 A formal criminal investigation into a relevant alleged offence will normally only commence when:

4.4.1 the allegation relates to a valid request for information (under section 1(1) of FOISA and regulation 5 of EIRs) to which the applicant is entitled, wholly or in part; and

4.4.2 the allegation is accompanied by evidence to indicate that an offence has taken place (e.g. reliable evidence from a credible eye witness).

4.4 It is likely that most allegations of the commission of a relevant offence which come directly to the attention of the SIC (as mentioned at 4.1.2 above), will arise in respect of applications made to the SIC. However, where applicants who are simply dissatisfied with the response from a Scottish public authority make an allegation of the commission of a relevant offence against that authority to the SIC without exhausting the avenues of review and an application to the SIC, then, in the first instance, the SIC will advise the applicant to proceed with a review and/or an application to the SIC, unless the applicant can provide some evidence to substantiate their allegation and the Commissioner reasonably believes that there is evidence to suggest that an offence may have taken place.

## 5. Process of Investigation

5.1 When a decision has been made by Police Scotland to refer an allegation of criminality to the SIC, or *vice versa*, no investigation will be undertaken until such times as the other organisation has been made aware of the allegation. This will allow for joint consideration of the matter and agreement on the manner in which the joint investigation will proceed.

5.2 Where an allegation of criminality concerning a body which is subject to FOISA/the EIRs (other than Police Scotland) is made directly to Police Scotland, the full circumstances of the allegation should be referred without delay in writing to the Police Scotland Head of Information Management within three working days of the allegation being made known to the police. The Police Scotland Head of Information Management will thereafter ensure that this information is passed in writing to the SIC's Head of Enforcement (or, in her absence, to one of her deputies) at the earliest opportunity, but before expiry of five working days.

5.3 Where an allegation of criminality is made directly to the SIC or uncovered by the SIC in the course of an investigation, and the SIC decides to refer the allegation to Police Scotland, the SIC's Head of Enforcement will notify the Police Scotland Head of Information Management of the allegation (refer to paragraph 4.3).

- 5.4 In order to consider fully the allegation made, an Investigating Officer from Police Scotland and an Officer from the SIC will be identified within five working days of the allegation being intimated to either body to consider the allegation and, where relevant, carry out a joint investigation. Where an allegation of criminality is made against a member of Police Scotland (including support staff), then the Police Scotland Head of Information Management will alert the Deputy Chief Constable (Designate) seeking the appointment of an appropriate Investigating Officer.
- 5.5 Both the Police Scotland Head of Information Management and the SIC's Head of Enforcement will allocate their relevant investigating officers and ensure that appropriate liaison takes place between both within a further five working days following appointment.
- 5.6 The Investigating Officer and the SIC's Officer will initially consider whether the allegations made will be the subject of a joint investigation (see paragraphs 4.2 and 4.3). Where it is agreed that a joint investigation will take place, then the Investigating Officer and the SIC's Officer will agree the steps to be taken and the various actions which will be progressed by each. Such liaison will take full cognisance of the statutory provisions contained within FOISA and EIRs and other relevant statutory provisions and may include the interviewing of appropriate witnesses, the seizing of evidence and consideration of an application for a warrant to enter and search specific premises in terms of Schedule 3 of FOISA (see paragraph 6).
- 5.7 Any actions identified should be progressed jointly wherever possible (e.g. joint interview of witnesses) where this can be done without compromising progress of the investigation. While, at present, joint interviews of suspects will not be possible, SIC staff can assist by remotely monitoring interviews as they are taking place and by advising the interviewing officers on the various technical aspects of the legislation and of the associated Codes of Practice. Any interviews with suspects should be tape recorded wherever possible.
- 5.8 The relevant offences are not punishable by imprisonment and, consequently, the police have no power to detain suspects for interview. The SIC's staff have no power of detention in relation to these offences and any interviews of suspects will require to be conducted on a voluntary basis.
- 5.9 No power of arrest is attached to these offences, although police officers may use common law powers of arrest in appropriate circumstances.

## **6. Search Under Warrant**

- 6.1 Schedule 3 of FOISA (see Appendix B) grants powers of entry, search and seizure to the SIC and to his/her staff under warrant where it is reasonably suspected that a relevant offence has been or is being committed and evidence of the commission of such an offence is to be found within specific premises.

- 6.2 Any such warrant can only be granted to the SIC, who must provide evidence on oath to a sheriff in relation to the alleged offence, albeit such a warrant can be executed by the SIC or any member of his/her staff. There is no provision for police officers to obtain such a warrant or to participate in the subsequent search of premises or seizure of property (see paragraph 6.7). As such, the SIC will be responsible for obtaining and executing such warrants, and for complying with the requirements of Schedule 3, although Police Scotland will provide any appropriate assistance in this process. This is without prejudice to police officers' powers at common law.
- 6.3 The decision to search any premises or to crave a warrant will only be taken by the SIC following discussions between the Investigating Officer and the SIC's Officer appointed to consider the allegation in question. This will allow full consideration of the available evidence and allow the Investigating Officer to advise on the presentation of that evidence to the sheriff. It will also allow further technical guidance to be sought prior to the search (e.g. consultation with the Force Computer Crime Unit).
- 6.4 Where a warrant is granted, the Investigating Officer will arrange for the police to be in attendance when the warrant is to be executed. While police officers will be unable to take any part in the execution of the warrant or in the examination or seizure of records or equipment, they will attend to prevent disorder and to advise the SIC on search procedures.
- 6.5 Although Schedule 3 of FOISA contains the offences of intentionally obstructing the execution of a warrant and failing to offer reasonable assistance to a person executing a warrant, no specific power of arrest is attached to these offences.
- 6.6 This would not preclude a police officer arresting a person obstructing the execution of a warrant where such a person was committing another offence, e.g. breach of the peace.
- 6.7 Where documents or other material are seized during the search of a premises by the SIC, Police Scotland will offer the SIC reasonable assistance in the examination of such documents or other material (e.g. forensic examination of computers, handwriting examination) and will also advise on the presentation and continuity of evidence required by a court. Where a significant amount of documents or equipment requires to be examined, Police Scotland may approach the SIC in advance of this work being carried out to intimate any fee which may be chargeable to the SIC.

## **7. General Provisions**

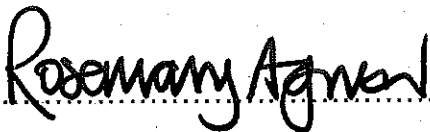
- 7.1 While this MOU sets out the processes to be followed during the investigation of a criminal offence, nothing contained within this MOU shall preclude further consultation or discussion taking place in relation to specific investigations or in relation to investigations more generally.

7.2 Each of the organisations party to this MOU will offer appropriate training and guidance, as necessary, to enable each to participate effectively in criminal investigations under FOISA and EIRs. In the case of Police Scotland and COPFS this may include training in relation to criminal procedure, search procedures and the securing and presentation of evidence.

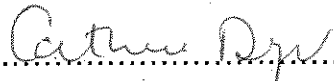
7.3 It is accepted by all parties that any information shared in relation to criminal investigations is provided for that specific purpose. The sharing of such information is permitted in terms of the Data Protection Act 1998 and by section 45(2) of FOISA (which, by virtue of regulation 19 of the EIRs, applies to information held in respect of the SIC's functions under the EIRs). However, such information will not be shared further without reference to the organisation which originally supplied that information. This will apply to any request made under section 1(1) of FOISA or regulation 5 of the EIRs where the views of the organisation which provided the information will be sought prior to any information being disclosed.

8. **Review**

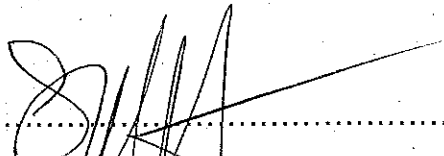
8.1 This MOU will be the subject of regular review.

 ..... Date 09 April 2016

**Rosemary Agnew, Scottish Information Commissioner**

 ..... Date 9 July 2015

**Catherine Dyer, Crown Agent**

 ..... Date 24/1/2015

**Sir Stephen House, Chief Constable of the Police Service of Scotland**

## APPENDIX A

### Freedom of Information (Scotland) Act 2002

#### Section 65: Offence of altering etc. records with intent to prevent disclosure

(1) Where -

- (a) a request for information is made to a Scottish public authority; and
- (b) the applicant is, under section 1, entitled to be given the information or any part of it,

a person to whom this subsection applies who, with the intention of preventing the disclosure by the authority of the information, or part, to which the entitlement relates, alters, defaces, blocks, erases, destroys or conceals a record held by the authority, is guilty of an offence.

- (2) Subsection (1) applies to the authority and to any person who is employed by, is an officer of, or is subject to the direction of, the authority.
- (3) A person guilty of an offence under subsection (1) is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.

#### Section 65A: Time limit for proceedings

- (1) Proceedings for an offence under section 65(1) may be commenced within the period of 6 months beginning with the date on which evidence that the prosecutor believes is sufficient to justify the proceedings came to the prosecutor's knowledge.
- (2) No such proceedings may be commenced more than 3 years –
  - (a) after the commission of the offence, or
  - (b) in the case of a continuous contravention, after the last date on which the offence was committed.
- (3) In the case of a continuous contravention, the complaint may specify the entire period during which the offence was committed.
- (4) A certificate signed by or on behalf of the prosecutor stating the date on which the evidence referred to in subsection (1) came to the prosecutor's knowledge is conclusive as to that fact (and such a certificate purporting to be so signed is to be regarded as so signed unless the contrary is proved).

- (5) Section 136(3) of the Criminal Procedure (Scotland) Act 1995 applies for the purposes of this section as it does for those of that section.

## **Environmental Information (Scotland) Regulations 2004**

### **Regulation 19: Offences**

- (1) Where -
- (a) a request for environmental information has been made to a Scottish public authority under regulation 5; and
  - (b) the applicant would have been entitled to that information in accordance with that regulation,

any person to whom this paragraph applies who alters, defaces, blocks, erases, destroys or conceals any record held by the Scottish public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to which the applicant would have been entitled, is guilty of an offence.

- (2) Subject to paragraph (4), paragraph (1) applies to the Scottish public authority and to any person who is employed by, is an officer of or is subject to the direction of, that authority.
- (3) A person guilty of an offence under paragraph (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
- (4) Paragraph (2) applies to -
- (a) a member of the staff, or a person acting on behalf of, the Scottish Parliament or the Scottish Parliamentary Corporate Body;
  - (b) a member of the staff of the Scottish Administration
- as it applies to any other person, but none of these bodies is liable to prosecution under these Regulations.

### **Regulation 19A: Time limit for proceedings**

- (1) Proceedings for an offence under regulation 19(1) committed on or after 31 May 2013 may be commenced within the period of 6 months beginning with the date on which evidence that the prosecutor believes is sufficient to justify the proceedings came to the prosecutor's knowledge.
- (2) No proceedings for an offence referred to in paragraph (1) may be commenced more than 3 years -
- (a) after the commission of the offence, or
  - (b) in the case of a continuous contravention, after the last date on which the offence was committed.



- (3) In the case of a continuous contravention, the complaint may specify the entire period during which the offence was committed.
- (4) A certificate signed by or on behalf of the prosecutor stating the date on which the evidence referred to in paragraph (1) came to the prosecutor's knowledge is conclusive as to that fact (and such a certificate purporting to be so signed is to be regarded as so signed unless the contrary is proved).
- (5) Section 136(3) of the Criminal Procedure (Scotland) Act 1995 applies for the purposes of this regulation as it does for those of that section.

## APPENDIX B

### Freedom of Information (Scotland) Act 2002

#### Schedule 3 Powers of entry and inspection

##### *Grant of Warrants*

- 1 (1) If a sheriff is satisfied by evidence on oath supplied by the Commissioner that there are reasonable grounds for suspecting -
    - (a) that a Scottish public authority has failed or is failing to comply with -
      - (i) any of the requirements of Part 1 of this Act;
      - (ii) so much of a notice given to it by the Commissioner under subsection (5) of section 49 as, by virtue of subsection (6)(b) of that section, requires steps to be taken; or
      - (iii) an information notice or an enforcement notice; or
    - (b) that an offence under section 65(1) has been or is being committed,and that evidence of such a failure to comply or of the commission of the offence is to be found on any premises specified as part of that evidence, the sheriff, subject to paragraph 2, may grant to the Commissioner such warrant as is mentioned in sub-paragraph (2).
  - (2) The warrant is one which authorises the Commissioner, or any member of the Commissioner's staff, at any time within seven days after the date of the warrant -
    - (a) to enter and search the premises;
    - (b) to inspect and seize any documents or other material found there which may constitute the evidence in question; and
    - (c) to inspect, examine, operate and test any equipment found there in which information held by the authority may be recorded.
- 2 (1) A sheriff must not grant the warrant unless satisfied -
    - (a) that the Commissioner has given seven days' notice in writing to the occupier of the premises demanding access to them; and
    - (b) that either -
      - (i) access was demanded at a reasonable hour and was unreasonably refused; or
      - (ii) although entry to the premises was granted, the occupier unreasonably refused to comply with a request by the Commissioner, or any member of the Commissioner's staff, to permit the Commissioner or any such member of

staff to do any of the things referred to in paragraph 1(2);  
and

- (c) that the occupier has, after the refusal, been notified by the Commissioner of the application for the warrant and has had an opportunity of being heard by the sheriff on the question of whether or not it should be granted.
- (2) Sub-paragraph (1) does not apply if the sheriff is satisfied that the case is one of urgency or that compliance with the provisions of that sub-paragraph would defeat the object of the entry.

### *Execution of Warrants*

- 3 A person executing the warrant may use such reasonable force as may be necessary.
- 4 The warrant must be executed at a reasonable hour, unless it appears to the person executing it that there are grounds for suspecting that the evidence in question would not be found if it were so executed.
- 5 (1) If the premises in respect of which the warrant is granted are occupied by a Scottish public authority and any officer or employee of the authority is present when the warrant is executed, that officer or employee must be shown the warrant and supplied with a copy of it; and if no such officer or employee is present a copy of the warrant must be left in a prominent place on the premises.
- (2) If the premises in respect of which the warrant is granted are occupied by a person other than a Scottish public authority and that person is present when the warrant is executed, the person must be shown the warrant and supplied with a copy of it; and if the person is not present a copy of the warrant must be left in a prominent place on the premises.
- 6 (1) A person seizing anything in pursuance of the warrant must give a receipt for it if asked to do so.
- (2) Anything so seized may be retained for so long as is necessary in all the circumstances; but the person in occupation of the premises must be given a copy of anything that is seized if that person so requests and the person executing the warrant considers that it can be done without undue delay.

### *Matters Exempt from Inspection and Seizure*

- 7 The powers of inspection and seizure conferred by the warrant are not exercisable in respect of information which is exempt information by virtue of section 31(1).
- 8 (1) Subject to the provisions of this paragraph, the powers of inspection and seizure conferred by the warrant are not exercisable in respect of -

- (a) a communication between professional legal adviser and client in connection with the giving of legal advice to the client with respect to the client's obligations, liabilities or rights under this Act; or
  - (b) a communication between professional legal adviser and client, or between such adviser or client and another person, made in connection with or in contemplation of proceedings under or arising out of this Act and for the purpose of such proceedings.
- (2) Sub-paragraph (1) applies also to -
- (a) a copy or other record of such communication as is there mentioned; and
  - (b) a document or article enclosed with or referred to in such communication if made in connection with the giving of any advice or, as the case may be, in connection with or in contemplation of and for the purpose of such proceedings as are there mentioned.
- (3) This paragraph does not apply to anything in the possession of a person other than the professional legal adviser or client or to anything held with the intention of furthering a criminal purpose.
- (4) In this paragraph references to the client of a professional legal adviser include references to a person representing such a client.

9 If the person in occupation of premises in respect of which the warrant is granted objects to the inspection or seizure under it of any material on the grounds that the material consists partly of matters in respect of which those powers are not exercisable, that person must, if requested, provide in response to the warrant a copy of so much of the material as is material in relation to which the powers are exercisable.

*Offences*

- 10 (1) A person who -
- (a) intentionally obstructs a person who is executing the warrant; or
  - (b) fails, without reasonable excuse, to give the person who is executing the warrant such assistance as that person may reasonably require for executing it,
- is guilty of an offence.
- (2) A person guilty of an offence under sub-paragraph (1) is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.

*Vessels, vehicles etc.*

- 11 In this schedule, "premises" includes vessel, vehicle, aircraft or hovercraft, and references to the occupier of premises include references to the person in charge of a vessel, vehicle, aircraft or hovercraft.