

# Freedom of Information Policy

<b>Approval date:</b>	<b>12 September 2022</b>
<b>Version number:</b>	<b>1.1</b>
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<b>Review date:</b>	<b>12 September 2025</b>
<b>Security classification:</b>	<b>OFFICIAL – Green: unclassified information</b>

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Document reference number: HRPOL048

## NHS Shetland Document Development Coversheet\*

<b>Name of document</b>	Freedom of Information Policy		
<b>Document reference number</b>	HRPOL048	<b>New or Review?</b>	New
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<b>Review date</b>	12 September 2025		
<b>Security classification</b>	OFFICIAL – Green: unclassified information		

<b>Proposed groups to present document to:</b>		
IGSG	DISG	CGC
Office of the Scottish Information Commissioner (OSIC)		

Date	Version	Group	Reason	Outcome
31/05/2022	0.1	OSIC	Opinion sought from external regulator on content	MR
14/06/2022	0.1	IGSG	PI/PO	PRO
05/07/2022	0.2	DISG	PI/PO	PRO
12/09/2022	0.6	CGC	FA	Approved

Examples of <b>reasons</b> for presenting to the group	Examples of <b>outcomes</b> following meeting
<ul style="list-style-type: none"> <li>Professional input required re: content (PI)</li> </ul>	<ul style="list-style-type: none"> <li>Significant changes to content required – refer to Executive Lead for guidance (SC)</li> </ul>
<ul style="list-style-type: none"> <li>Professional opinion on content (PO)</li> </ul>	<ul style="list-style-type: none"> <li>To amend content &amp; re-submit to group (AC&amp;R)</li> </ul>
<ul style="list-style-type: none"> <li>General comments/suggestions (C/S)</li> </ul>	<ul style="list-style-type: none"> <li>For minor revisions (e.g. format/layout) – no need to re-submit to group (MR)</li> </ul>
<ul style="list-style-type: none"> <li>For information only (FIO)</li> </ul>	<ul style="list-style-type: none"> <li>Recommend proceeding to next stage (PRO)</li> </ul>
<ul style="list-style-type: none"> <li>For proofing/formatting (PF)</li> </ul>	<ul style="list-style-type: none"> <li>For upload to Intranet (INT)</li> </ul>

<ul style="list-style-type: none"><li>• Final Approval (FA)</li></ul>	<ul style="list-style-type: none"><li>• Approved (A) or Not Approved, revisions required (NARR)</li></ul>
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**\*To be attached to the document under development/review and presented to the relevant group**

**Please record details of any changes made to the document in the table below**

Date	Record of changes made to document
19 May 2022	First draft prepared by Sam Collier-Sewell, Information Governance Manager & Deputy DPO and saved as version 0.1
27 June 2022	Changes made to Section 3 – Definition of terms, following feedback from the Office of the Scottish Information Commissioner, to clarify that not all EISR exceptions are subject to the public interest test. Saved as version 0.2
28 July 2022	Changes made to section 4.6 to clarify role/responsibilities of FOI Handler. Added Complaints Officer to Roles and Responsibilities section. Added stats reporting duties to FOI Lead responsibilities. Saved as version 0.3
2 August 2022	References to FOI Administrator corrected / changed to FOI Officer. Saved as version 0.4
25 August 2022	Added section on ‘Releasing information where numbers are less than five’
29 August 2022	Added RIC – saved as version 0.6
12 September 2022	Changes made to sections 4, 4.7 and 11 following review by CGC – clarifications made around the provision of information to the FOI Officer by FOI Handler(s). Hyperlinks added and minor corrections made. Approved by CGC and saved as version 1.0
25 April 2024	Note on FTRs / closing requests added to section 9 (Timescales) following guidance issued by OSIC

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## 1. Introduction

As a Health Board constituted under the National Health Service (Scotland) Act 1978, Shetland Health Board (commonly and hereinafter referred to as NHS Shetland) is a Scottish public authority and is subject to legislation regarding freedom of information.

The Freedom of Information (Scotland) Act 2002 (FOISA) came into force on 1 January 2005. Under FOISA, any person who requests information from the Scottish public authority which holds it is entitled to be given it by the authority, subject to certain conditions and exemptions set out in the Act.

FOISA also obliges Scottish public authorities to use publication schemes to proactively publish certain information about their activities.

The Environmental Information (Scotland) Regulations 2004 (EISR) sit alongside FOISA and govern access to environmental information held by Scottish public authorities. The EISR require every Scottish public authority to publish environmental information and make it available on request.

Both of these pieces of legislation (hereinafter collectively referred to as ‘the regimes’) are intended to encourage a more open culture across the public sector by conferring on the public a statutory right of access to information of any age that is held by Scottish public authorities.

Compliance with the regimes is a legal duty and is overseen by the Scottish Information Commissioner (SIC or ‘Commissioner’). Non-compliance with the regimes can result in regulatory action, criminal conviction and fines against both organisations and individuals

The regimes only cover information held by Scottish public authorities. Information held by public authorities in England, Wales and Northern Ireland, and by UK-wide public authorities based in Scotland are covered by the regimes UK law equivalents: the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR).

## 2. Purpose and scope

This policy applies to all NHS Shetland staff and sets out NHS Shetland’s obligations under FOISA and EISR, and our commitment to openness, transparency and best practice in the way that we work.

The regimes and this policy do not cover requests for personal data of individuals. In the case of living individuals, such requests come under the Data Protection Act 2018 (DPA 2018) and UK General Data Protection Regulation (UK-GDPR) and are referred to as Data Subject Access Requests (DSARs). Requests for the records of deceased patients are covered by the Access to Health Records Act 1990 (AHRA).

This policy covers requests for recorded information, regardless of format, held by NHS Shetland. This includes, but is not limited to:

- information in all electronic formats, including removable media and on work-issued mobile devices
- information on paper
- emails
- official documentation such as policies, procedures, etc.

- minutes of meetings
- information on network/shared drives
- information in online systems/environments such as M365, SharePoint or other cloud-based applications
- video and audio recordings
- microfiche
- information in Microsoft Teams including in channel feeds, files and chat messages
- information relating to NHS Shetland business held in unapproved messaging applications (e.g. WhatsApp or Signal) (see note below)

Note – there are significant practical issues in retrieving information from such applications and this result in governance / legal compliance risks for NHS Shetland. No organisational business or discussions should be conducted using unapproved messaging applications.

### 3. Definition of terms

The following terms are used in this policy:

- **applicant** – a legal person (which can be an individual, a company or other body) who makes a request for information from a Scottish public authority under the regimes
- **Code of Practice ('the s 60 Code')** – the regimes require that Scottish Ministers publish a code of practice providing guidance to Scottish public authorities in connection with the authorities' duties under the regimes. The current Code of Practice on the Discharge of Functions by Scottish Public Authorities can be found here:  
[FOI/EIR: section 60 code of practice](#)
- **exception** – a condition under which requested information may be withheld from disclosure (EISR only). All exceptions listed in reg 10 are subject to the public interest test (see below); those relating to personal data (listed in reg 11) are not.
- **exemption** – a condition under which requested information may be withheld from disclosure (FOISA only). There are two types of exemption, absolute and qualified:
  - absolute exemptions – these are exemptions that do not need to be balanced against the public interest in disclosure before they can be applied
  - qualified exemptions – these are exemptions that must be balanced against the public interest in disclosure before they can be applied
- **public interest test** – both FOISA and EISR contain a presumption in favour of disclosure – there is a presumption that it is in the public interest to disclose information unless the public authority can show why there is a greater public interest in withholding the information. This process of balancing competing interests is known as the public interest test. Because of the presumption in favour of disclosure, if the competing interests are evenly balanced, the information should be disclosed.
- **Scottish Information Commissioner (SIC)** – the Commissioner is appointed by the Crown and reports directly to the Scottish Parliament. The Commissioner is responsible

for the enforcement and promotion of Scotland's freedom of information laws and of good practice by Scottish public authorities.

#### **4. Roles and responsibilities**

As noted above, compliance with the regimes is a legal duty. Therefore, with respect to requests made under the regimes, all staff must be confident that the organisational processes or actions and decisions in which they are involved are compliant with the regimes. Any questions about legal compliance should be referred to the specialist FOI staff listed below. The decision to release information and/or apply exemptions/exceptions is the responsibility of the FOI Lead or SIRO.

NHS Shetland is also committed to following the best practice guidance set out in the [s 60 Code](#).

Compliance with this policy is compulsory for all staff employed by NHS Shetland. Any member of staff who fails to comply with this policy may be subject to disciplinary action under the [NHS Scotland Conduct Policy](#).

##### **4.1. Chief Executive**

The Chief Executive has overall strategic responsibility for freedom of information in NHS Shetland. As Accountable Officer they are responsible for the management of the organisation and ensuring compliance with the law.

##### **4.2. Senior Information Risk Owner (SIRO)**

The SIRO has responsibility for monitoring compliance with the regimes and reporting issues and performance to the Board.

All responses will be signed off by the SIRO (or their delegated deputy) prior to being released to the applicant.

##### **4.3. Directors and senior/departmental managers**

The responsibility for compliance with this policy is devolved to the relevant directors, service and departmental managers, who have overall responsibility for ensuring information is provided on time and that all activities are in compliance with this policy and any associated policies and procedures.

##### **4.4. Freedom of Information (FOI) Lead**

The FOI Lead has the responsibility of providing advice and support to all service or functional areas throughout NHS Shetland on all matters relating to FOISA and EISR, as well as ensuring measures and processes are in place to support full compliance with the law.

The FOI Lead will act as NHS Shetland's point of contact with the Scottish Information Commissioner to seek advice or to respond to requests for audit or other information.

The FOI Lead is responsible for monitoring and reporting on NHS Shetland's performance under the regimes, in accordance with part 1, section 2 of the [s 60 Code](#) and this Policy.



#### **4.5. Complaints Officer / Complaints Team**

The Complaints Officer, with support from the Complaints Team, is responsible for conducting requests for review made under the regimes to NHS Shetland.

#### **4.6. Freedom of Information (FOI) Officer**

The FOI Officer will be the first point of contact regarding requests made under the regimes and is responsible for responding to all requests, supported by the Information Governance Team (IGT). The FOI Officer will notify other health boards and/or the Scottish Government of any requests or issues that may be of interest to them. Where appropriate the FOI Officer will also notify the FOI Lead. The FOI Officer will maintain a central record of all FOI requests, logs and responses.

#### **4.7. Freedom of Information (FOI) Handler**

The FOI Handler is initially identified and assigned requests by the FOI Officer and is responsible for liaising with and updating the FOI Officer throughout the course of a request. The FOI Handler is responsible for identifying and collating all the information required for a response and sending it to the FOI Officer. If the requested information is not within the remit of the FOI Handler, they must inform the FOI Officer as soon as possible and, where possible, suggest an alternative FOI Handler.

If the FOI Handler has any questions about providing the information requested they should contact the FOI Officer.

**Important** – other than in circumstances where the sensitivity of the requested information is such that there are concerns about the appropriateness of sharing the information with the FOI Officer, it is the responsibility of the FOI handler to provide the information requested to the FOI Officer, regardless of whether they believe an exemption/exception applies.

If the requested information is of such sensitivity that there are concerns about the appropriateness of sharing the information with the FOI Officer, the FOI Handler should seek advice from the FOI Lead, Data Protection Officer (DPO) and/or SIRO.

#### **4.8. All staff**

All staff, both clinical and non-clinical, are responsible for processing information and maintaining records in accordance with legislation and NHS Shetland policies on information governance and records management.

Staff have a responsibility to recognise and forward requests which are (or appear to be) made under the regimes to the FOI Officer as soon as possible.

### **5. Training**

FOI e-learning will be made available on NHS Shetland's staff training system and will be mandatory for all staff.

Staff who are routinely involved in NHS Shetland's FOI processes will undertake supplementary training at a level appropriate to their roles.

## 6. Records management

Managing records effectively is essential to making records accessible under the regimes and is a requirement of both the Public Records (Scotland) Act 2011 (PRSA) and the [Code of Practice on Records Management by Scottish Public Authorities](#) (s 61 Code). As noted in the s 61 Code, the access rights provided in the regimes “are of limited value if information cannot be found when requested or, when found, cannot be relied upon as authoritative”.

Effective records management covers all stages in the lifecycle of records through creation, storage and disposal. Good records should be factual, relevant and up to date, clear and concise, and complete. The right information should be available in the right place at the right time.

NHS Shetland will continue to improve its records management systems in accordance with the Records Management Plan agreed under PRSA with the Keeper of the Records of Scotland, to better manage its corporate and clinical records in order to effectively respond to requests for information.

## 7. Publication scheme

NHS Shetland has a duty under FOISA to adopt, maintain and regularly review a publication scheme which specifies the kinds of information that we will publish routinely so that information can be accessed without people having to ask for it. The scheme must also set out how the information will be published and the details of any charges to be applied for accessing the information. NHS Shetland has chosen to adopt the Model Publication Scheme published by the Commissioner.

As a requirement of the Model Publication Scheme, NHS Shetland will also publish a guide to information available under the publication scheme.

## 8. Charging for information

NHS Shetland reserves the right to charge for access to information according to the terms prescribed in the regimes and set out in the charging policy of [NHS Shetland’s Guide to Information available through the Model Publication Scheme](#).

## 9. Timescales

The regimes require NHS Shetland to respond promptly to requests for information, and no later than twenty working days after receiving all the information required in a valid request.

The deadlines under the regimes are absolute and a failure to comply with this twenty-working day timescale is a breach of the law. In the event that NHS Shetland fails to comply with the timescales set out in the regimes, an apology will be provided to the applicant, along with an explanation for the delay and an estimated response date. The applicant must also be informed of their right to review NHS Shetland’s handling of their request (see [section 14 – Reviews and appeals](#)).

It is important to note that any valid request for information must be responded to within the statutory timescales, and in any case, at the earliest opportunity should the statutory timescale lapse. There are no grounds under the regimes for a valid request for information to be abandoned by an authority (although a request may be withdrawn by the requester).

themselves). This means that requests will stay open until answered and will be counted as Failures to Respond (FTR) in every quarter that they remain unanswered.

## 10. Release of employee names and details

As a public authority, NHS Shetland acknowledges that, depending on details of the specific request, it can sometimes be appropriate to disclose the names and contact details of employees in a response to a request made under the regimes. For example, NHS Shetland may release names of staff members whose details are already published on the Board's public website, without seeking additional consent.

Staff with public-facing roles or those whose details are already in the public domain are more likely to have their names released. Personal contact details (e.g. home address, home telephone number, personal email address) will never be released in response to a request under the regimes.

NHS Shetland may release the names, salaries (in 5k bands) and expenses of executive directors, department heads, managers, and other senior staff both clinical and non-clinical, unless the information is exempt from disclosure under section 38 of FOISA. For other staff, consent will be sought if the release of names in a response is considered to be appropriate.

Requests for salary information for staff (outwith those identified above) will be answered by providing [Agenda for Change pay bands](#). Where a person falls outside of Agenda for Change pay bands, their salary will be given in £5,000 bands. Information on executive director salaries (and those of other Board members and senior employees) is published in NHS Shetland's Annual Reports and so will be exempt from disclosure under FOISA s 25 ('Information otherwise accessible').

The final decision on release of information remains with the SIRO or their delegated deputy.

## 11. Releasing information where numbers are less than five – 'the <5 rule'

NHS Shetland understands that it has been common practice in health boards and other public authorities to apply a rule to FOI responses that if numbers relating to individual cases/patients are less than five, the information is likely to constitute personal data and is therefore exempt under FOISA s 38(1)(b) as read with s 38(2A). This is often referred to as the '<5 rule'.

However, it must be understood that the <5 rule is a convention and a guideline, albeit often a very useful one, and not a rule with a basis in FOI or data protection law.

When determining whether requested information is exempt under s 38(1)(b) the key considerations are as follows:

- Does the information constitute personal data under DPA 2018? That is, is it information that relates to a natural person who can be identified, or who is identifiable, directly from that information; or who can be indirectly identified from that information in combination with other information?
- If so, would the release of the information contravene any of the [data protection principles](#)? Most commonly it will be the integrity and confidentiality (or security) principle that will be relevant.

[Recital 26 of the GDPR](#) is helpful when determining whether a data subject can be identified from information:

“To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly.

To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments.”

With reference to the above, NHS Shetland considers that the blanket exemption of <5 values is not an appropriate approach. The law requires us to consider the nature of the requested information in each case and whether releasing it, in the context of other information likely to be available, would lead to the identification of the data subject. It may even be that, due to the specific details of the requested information, the threshold of <5 is too low, and a threshold of <10 or higher would be more appropriate in order to protect the rights of individuals.

The small population of Shetland will be a significant factor when determining whether a person is identifiable from the requested information, along with other factors such as the rarity of diagnosis/medication. The sensitivity of the information in question will also be a key factor, as this has the potential to increase harm to the data subject should they be identifiable from information disclosed.

As noted in [section 4.7](#) of this policy, other than in circumstances where the sensitivity of the requested information is such that there are concerns about the appropriateness of sharing the information with the FOI Officer, it is the responsibility of the FOI Handler to provide the information requested to the FOI Officer, regardless of whether they believe an exemption/exception applies.

If an FOI Handler believes that there is a risk of unlawful disclosure of personal information, they should raise these concerns to the FOI Officer when providing the requested information.

If the requested information is of such sensitivity that there are concerns about the appropriateness of sharing the information with the FOI Officer, the FOI Handler should seek advice from the FOI Lead, Data Protection Officer (DPO) and/or SIRO before providing the requested information.

The above relates to information about living individuals, but it is also worth noting that information that constitutes a deceased person’s health record is exempt information under FOISA s 38(1)(d).

## **12. Duty to provide advice and assistance**

NHS Shetland has a duty under the regimes to provide advice and assistance to people who have made, or wish to make, requests for information. NHS Shetland will ensure that systems, procedures and published information and guidance are in place to meet this duty.

## **13. Business as usual (BAU) requests**

Although any written request for recorded information is technically a request under the regimes, NHS Shetland will operate a BAU approach to ensure that certain requests can be dealt with promptly and without the need to initiate more involved administrative processes.

A BAU request is a request for information that a service area would expect to receive in its normal day-to-day operations and must meet **all** the following criteria:

- the request **must not** indicate that it is a FOISA/EISR request
- the request must be simple and straightforward
- it must be unlikely that the applicant will be dissatisfied with the response
- all the information requested will be provided on time and without restrictions or exemptions

Processing a request under BAU does not remove the rights a person has to request information under the regimes. If a request is received that could be treated as BAU but which makes reference to the regimes, the FOI Officer may (with support from the FOI Lead, where necessary) ask the applicant if they agree to the request being processed as BAU or if they still wish it to be processed under the regimes.

#### **14. Reviews and appeals**

If the applicant is dissatisfied with the way NHS Shetland has handled their request, they have the right to seek a review of any decisions or actions (as well as inaction or failure to reach decisions).

Reviews are intended to allow NHS Shetland to take a fresh look at its response, should be fair and impartial, and should allow for different decisions to be taken. Reviews therefore should be carried out by a person who did not respond to or advise on the original request.

If the applicant is still dissatisfied following the review process, they have the right to ask for advice, assistance or to make a formal appeal to the Commissioner. The Commissioner has powers to enforce the applicant's rights under the regimes.

NHS Shetland will publish details of how applicants can submit a request for review and make an appeal to the Commissioner on its website, and will include the same details in its responses to requests and other notifications to the applicant.

#### **15. Monitoring and reporting**

The central record of FOI requests, logs and responses maintained by the FOI Officer will be used to monitor performance and provide data for regular internal reports and statistics submissions to the Commissioner.

The Information Governance Subgroup (IGSG) and the Digital and Informatics Support Group (DISG) will receive monthly reports on FOI statistics and performance. Performance/compliance issues will be escalated as required through NHS Shetland's Information Governance structure. The SIRO provides an additional route for escalation and can raise issues directly with the Chief Executive and NHS Shetland Board.

#### **16. Dissemination and implementation**

This policy will be accessible to staff via the NHS Shetland website and on the Freedom of Information pages on the intranet.

This policy will be supported by a procedure for processing requests made under the regimes.

## 17. Related documents

This policy should be read in conjunction with NHS Shetland policies on confidentiality, data protection and accessible information and policies on management, retention and disposal of corporate records.

## 18. Legislation, guidance and resources

### 18.1. Legislation

- [Freedom of Information \(Scotland\) Act 2002](#)
- [The Environmental Information \(Scotland\) Regulations 2004](#)
- [Data Protection Act 2018](#)
- [UK General Data Protection Regulation](#)
- [Public Records \(Scotland\) Act 2011](#)
- [The Freedom of Information \(Fees for Required Disclosure\) \(Scotland\) Regulations 2004](#)
- [The Freedom of Information \(Fees for Disclosure under Section 13\) \(Scotland\) Regulations 2004](#)

Please refer to the Commissioner's [website pages on FOI law](#) for further information on relevant legislation.

### 18.2. Guidance and resources

- [Code of Practice on the Discharge of Functions by Scottish Public Authorities](#) (s 60 Code)
- [Code of Practice on Records Management by Scottish Public Authorities](#) (s 61 Code)
- Extensive guidance on FOI law and practice is published by the Commissioner at <https://www.itspublicknowledge.info/law-and-guidance>
- The Commissioner also publishes resources for organisations and individuals at <https://www.itspublicknowledge.info/resources>

## Appendix 1 – Rapid Impact Checklist

An Equality and Diversity Impact Assessment Tool:

<p><b>Which groups of the population do you think will be affected by this proposal?*</b></p> <p>All NHS Shetland staff and all FOI applicants. None of the groups listed below will be disproportionately affected.</p> <p><b>Other groups:</b></p> <ul style="list-style-type: none"> <li>• Minority ethnic people (incl. Gypsy/travellers, refugees &amp; asylum seekers)</li> <li>• Women and men</li> <li>• People with mental health problems</li> <li>• People in religious/faith groups</li> <li>• Older people, children and young people</li> <li>• People of low income</li> <li>• Homeless people</li> <li>• Disabled people</li> <li>• People involved in criminal justice system</li> <li>• Staff</li> <li>• Lesbian, gay, bisexual and transgender</li> </ul> <p>*the word proposal is used as shorthand for the policy, procedure, strategy or proposal that is being assessed</p>	
<p><b>In the following sections, please consider what positive and negative impacts you think there may be and which specific groups will be affected by these impacts?</b></p>	
<p><b>What impact will the proposal have on lifestyles?</b></p> <p>For example, will the changes affect:</p> <ul style="list-style-type: none"> <li>• Diet and nutrition</li> <li>• Exercise and physical activity</li> <li>• Substance use: tobacco, alcohol and drugs</li> <li>• Risk taking behaviour</li> <li>• Education and learning or skills</li> </ul>	<p>None</p>
<p><b>Will the proposal have any impact on the social environment?</b></p> <p>Things that might be affected include:</p> <ul style="list-style-type: none"> <li>• Social status</li> <li>• Employment (paid or unpaid)</li> <li>• Social/Family support</li> <li>• Stress</li> <li>• Income</li> </ul>	<p>None</p>

<p><b>Will the proposal have any impact on the following?</b></p> <ul style="list-style-type: none"> <li>• Discrimination?</li> <li>• Equality of opportunity?</li> <li>• Relations between groups?</li> <li>• Fairer Scotland Duty</li> </ul>	<p>Having a published policy statement available to all should support the rights that every person has under FOI legislation.</p>
<p><b>Will the proposal have an impact on the physical environment?</b></p> <p>For example, will there be impacts on:</p> <ul style="list-style-type: none"> <li>• Living conditions?</li> <li>• Working conditions?</li> <li>• Pollution or climate change?</li> <li>• Accidental injuries or public safety?</li> <li>• Transmission of infectious disease?</li> </ul>	<p>None</p>
<p><b>Will the proposal affect access to and experience of services?</b></p> <p>For example:</p> <ul style="list-style-type: none"> <li>• Health care</li> <li>• Transport</li> <li>• Social services</li> <li>• Housing services</li> <li>• Education</li> </ul>	<p>The consistent implementation of a clear policy on FOI will support both staff and applicants in the processing of FOI requests.</p>



## Summary Sheet

<b>Positive Impacts (note the groups affected)</b> A clear, published policy statement available to all and implemented consistently should support the rights that every person has under FOI legislation and the staff responsible for processing requests.	<b>Negative Impacts (Note the groups affected)</b> None identified
<b>Additional Information and Evidence Required</b> None	
<b>Recommendations</b> None	
<b>From the outcome of the RIC, have negative impacts been identified for race or other equality groups? Has a full EQIA process been recommended? If not, why not?</b> No negative impact identified	

Signature(s) of Level One Impact Assessor(s): David Morgan, Head of IG, FOI Lead and DPO

Date: 29 August 2022