

MEMORANDUM OF UNDERSTANDING

Between

THE KEEPER OF THE RECORDS OF SCOTLAND (“the Keeper”)

And

THE SCOTTISH INFORMATION COMMISSIONER (“the Commissioner”)

PURPOSE

1. The purpose of this memorandum is to set out the understanding between the Keeper and the Commissioner on the operation of the Code of Practice on Records Management (“the Code”) pursuant to section 61 of the Freedom of Information (Scotland) Act 2002 (“the Act”) and the cooperation between the parties in relation to the issuing of practice recommendations relating to records management under the Code in terms of section 44 of the Act.

BACKGROUND

2. The National Archives of Scotland (“the NAS”) is an agency of the Scottish Government. The NAS is headed by the Keeper, who is responsible to the Scottish Ministers for records transmitted to him under various statutory provisions including the Public Records (Scotland) Act 1937 and section 3 of the Public Records Act 1958, as well as for records of independent origin selected for preservation with the public records of Scotland. The Keeper is also responsible to the Lord President of the Court of Session for the efficient management of the court and other legal records in Scotland. The mission of the NAS is: to preserve, protect and promote the nation’s records; to provide the best possible inclusive and accessible archive that educates, informs and engages the people of Scotland and the world.

3. The Commissioner is responsible for enforcing and promoting the Act and the Environmental Information (Scotland) Regulations 2004 (the EIRs) which provide a general right of public access to information held by Scottish public authorities. He investigates applications for a decision from

any person who has requested information from a public authority and is dissatisfied with the authority's response. The Commissioner also promotes good practice in relation to freedom of information within the Scottish public sector and informs the public about their rights under the Act and the EIRs. The Commissioner's Enforcement Strategy sets out his approach to tackling persistent failings by Scottish public authorities where appropriate.

STATUTORY FRAMEWORK

4. The Code is issued by Scottish Ministers under section 61 of the Act. The Scottish Ministers must consult the Commissioner and the Keeper before issuing or revising the Code.

5. The Commissioner may issue a practice recommendation under section 44 of the Act if it appears to him that the practice of a Scottish public authority does not conform with the Code. A practice recommendation must be in writing and specify the provisions of the Code with which, in the opinion of the Commissioner, the authority's practice does not conform and the steps which ought to be taken in order to conform.

6. Under section 44(3) of the Act, the Commissioner must consult the Keeper before giving a practice recommendation to a Scottish public authority (other than the Keeper).

7. A generic Model Action Plan (hereinafter referred to as 'MAP') was produced by the Records Management Sub-Group¹ of the Scottish Freedom of Information Implementation Group which provides detailed operational guidance on compliance with the Code and the Act. The generic MAP is published by the Keeper.

8. A records management workbook has been produced by the National Archives of Scotland which permits and assists organisations, or auditors to check their records management procedures against the requirements in the section 61 code of practice issued under FOISA. This has been published by the Keeper and the NAS and can be accessed via the Freedom of Information page of the NAS website www.nas.gov.uk.

OPERATION OF MONITORING CONFORMITY WITH THE CODE

9. Scottish public authorities are responsible for internally monitoring their compliance with the Code. The Keeper will respond to requests from either of the Deputy Heads of Investigation within the Commissioner's office (i) to carry out joint audits of the records management arrangements of such public authorities, and (ii) for advice and comment on records management questions in support of the implementation of the Commissioner's Enforcement Strategy. Any referral made to the Keeper should be submitted to the NAS Freedom of Information Officer. The Keeper will also respond to requests from such public authorities for advice concerning their records management and their compliance with the Code, within the resources he has available; this may include directing authorities to alternative sources of advice.

OPERATION OF ISSUE OF PRACTICE RECOMMENDATIONS

10. Where the Keeper is made aware that a Scottish public authority has failed to conform with the Code in a serious or significant respect, he will raise this with the Commissioner. The Commissioner will then decide whether he considers it necessary to issue a practice recommendation to the public authority.

11. Where the Commissioner is made aware that a Scottish public authority has failed to conform with the Code, and where he considers that the non-conformance may be such that a practice recommendation may be issued, he will consult with the Keeper to establish whether the Keeper considers there has been such a failure. The Commissioner will then consider whether a practice recommendation should be issued.

12. The final decision as to whether or not a practice recommendation should be issued will be taken by the Commissioner.

13. The Commissioner is only under an obligation to consult with the Keeper prior to issuing a practice recommendation in relation to the section 61 code of practice. However, the Commissioner may consult with the Keeper in situations where he is made aware of an authority's failure to comply with the code of practice, but where he does not consider that a practice recommendation will be issued, with a view to obtaining (where resources allow) advice and assistance from the Keeper on the best way to guide the authority concerned to rectify the non compliance.

CONFIDENTIALITY OF INFORMATION

13. Should information be passed between the Keeper and the Commissioner in relation to the issue of a practice recommendation, such information will remain confidential until the issue, or otherwise, of such a recommendation. On the issue, or otherwise, of such a recommendation such information shall cease to be confidential unless it remains so by virtue of section 45 of the Act.

REVIEW OF THE MEMORANDUM OF UNDERSTANDING

14. The Commissioner and the Keeper will meet regularly by mutual agreement to review the operation of the memorandum and to consider any amendments to it. Any such amendment will be by agreement of both parties.

Kevin Dunion, Scottish Information Commissioner
Signed this day 6 August 2008

George MacKenzie, Keeper of the Records of Scotland
Signed this day August 2008