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Airedale, Wharfedale and Craven CCG  
Bradford City CCG  
Bradford Districts CCG

# **FREEDOM OF INFORMATION ACT AND ENVIRONMENTAL INFORMATION REGULATIONS PROCEDURES**

Procedure approved by: Audit and Governance Committees

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# **Freedom of Information and Environmental Information Regulations Procedures.**

## **1 Management of Freedom of Information and Environmental Information Request process**

Day to day management of Freedom of Information Act 2000 (FOIA) and Environmental Information Regulations 2004 (EIR) requests received by the CCG is contracted to eMBED Health Consortium (eMBED). The CCG will agree procedures and timescales with eMBED and ensures that key contacts at the CCG are identified to support those processes and ensure timely responses are sent.

## **2 Advice and assistance to applicants**

FOIA and EIR require the CCG to provide advice and assistance to applicants and would-be applicants. eMBED on behalf of the CCG provides this service, taking into account other statutory duties including, but not limited to, the Disability Discrimination Act 1995 and the Equality Act 2010.

If the applicant requests advice and assistance or has not provided enough information for the request to be dealt with, one or more of the following steps will be taken by eMBED team, depending on the situation:

- give guidance on how to access the information from the CCG's Publication Scheme and the general rights of access
- inform the applicant of the progress of his/her request
- explain the basis for any charges or fees levied or exemption/exceptions applied
- suggest other routes by which the applicant can access information, including directing them to other public authorities
- identify independent sources of help for applicants
- direct applicants to the FOIA/EIR review or complaints procedure and/or the Office of the Information Commissioner if they are dissatisfied with any outcome

## **3 General rights of access by means of written requests**

FOIA and EIR give a general right of access to recorded information held by the CCG. This means that any person who makes a request has the right to:

- Be informed in writing whether the CCG holds or does not hold the information requested and;
- If the CCG holds that information, have it communicated to them provided it is not subject to an FOIA exemption or EIR exception.

## **4 General rules applicable to FOI and EIR requests**

### **4.1 How to recognise a FOI request**

A request for information does not need to be marked as such; there is no need for the applicant to say they are making an FOIA or EIR request. It is for a public authority to ensure the correct process is applied to any request for information received. Therefore requests for information could be included in a compliment or complaint letter.

A request for access under FOIA must be made in writing, giving the name of the applicant, an address for correspondence and a description of the information requested. Email is an acceptable form of correspondence.

### **4.2 What is an EIR request?**

Requests for information under EIR can be made verbally although it would be good practice to record the request and send a dated copy to the requester inviting them to confirm or make any amendments as necessary.

### **4.3 When is a request not an FOI or EIR request?**

It is also important to distinguish between requests for information and routine correspondence. Requests for information which can easily be answered (such as requests for recruitment brochures, press releases, leaflets, contacts) and which do not include any detailed or specific questions should be treated as business as usual.

Similarly requests that are not for recorded information but which pose questions (please comment on your policy on Y? Why have you decided on X?) ought to be treated as routine correspondence although caution is required as the enquirer may think they were applying for information under the FOIA or EIR.

Request for personal information of living individuals or medical records of living or deceased patients are not FOIA or EIR requests as these have their own sets of rules which govern how these must be handled.

### **4.4 Time limits for FOI and EIR requests**

FOIA and EIR require that requests are responded to within 20 working days. If the CCG decides to apply a condition or exemption/exception to withhold information, or requires extra time to conduct a public interest test under FOIA, or to respond to a complex and voluminous request under EIR, the applicant will be informed of this within 20 working days.

## **4.5 Obtaining clarification of a request**

As recommended in the Lord Chancellor's code of practice, the CCG will set out details about how requests for information will be dealt with, and this will be available to the public. This document fulfils that requirement. Whilst the CCG cannot ask the applicant the reason or purpose for his/her request, it can contact the applicant to obtain more detail about the information requested and narrow down what might otherwise be a vague or broad request.

## **5 The difference between FOIA and EIR information.**

FOIA potentially covers all information which is not related to living or deceased individuals and which is not served by EIR. EIR is the set of regulations which govern how requests for environmental information should be handled. These two bodies of legislation as well as other supporting regulations governing specific areas such as fees are enforced by the Information Commissioner.

## **6 Key points of procedure at eMBED**

The CCG has contracted with eMBED for the processing, management, response drafting and internal reviews for all requests for information under FOIA and EIR. The following processes will be carried out by eMBED to a detailed and high standard agreed by both parties.

If a request is received directly at the CCG it should be emailed to eMBED immediately. The CCG will endeavour to ensure all staff recognise an FOIA or EIR request and know where to send it. Similarly a request received through the post should be scanned and emailed to eMBED without delay, ensuring all pages have been scanned.

## **7 Processing a request**

Please refer to Appendix 1 for summary and detailed process charts for the FOIA and EIR process.

### **7.1 Recording requests**

When dealing with a request, the following information will be recorded by the FOIA/EIR team of eMBED (referred to hereafter as the FOIA team):

- Unique reference number, allocated to each request received by eMBED
- Initial date received by the CCG or direct at eMBED
- Name of the applicant
- Contact details of the applicant
- Description of the information requested

- Who at the CCG the request has been referred to the CCG in order to source the information
- Date the request has been referred to a contact at the CCG
- Follow up action taken if necessary
- Date by when the request must be processed, in other words the 20 working day deadline, or a 40 working day deadline where a public interest test is required as described below in section 7.10).
- Details of any exemptions/exceptions applied along with reasons
- Dates of all significant communications with the CCG or the applicant, such as reminder emails, escalation emails, clarifications, public interest test letters and fees letters
- Date the response is completed and communicated to the applicant

## **7.2 Acknowledging a request**

The FOI team will write to the applicant confirming receipt of the request within 3 working days. This will state that the CCG intends to reply to the request within 20 working days, unless the request involves a public interest test where up to an extra 20 working days can be added.

The FOIA team will check for cases of vexatious or repeat requests, or where a series of requests from the same applicant or a group of applicants acting in concert or as part of a campaign can be aggregated as one request for the purposes of the appropriate limit. The team will advise the CCG on the specific rules which apply in each of these cases.

## **7.3 Identifying and locating the information**

The FOIA team will liaise with the appropriate person or people at the CCG to obtain the information that the applicant has requested. The CCG staff will be given a timescale to deal with this request. This is referred to as the internal deadline. Any problems should be immediately brought to the attention of the FOIA team.

Any information inherited from previous PCTs which is no longer needed for the commissioning and management of services should be destroyed or transferred according to the relevant document retention and destruction dates shown in part 2 of the NHS Code of Practice for Records Management. If such information is still held by the CCG, it should be released in response to an FOIA or EIR request.

## **7.4 Identifying exemptions and exceptions**

Once located, the information should be forwarded to the FOIA team. While the FOIA team will endeavour to advise of instances where FOIA exemptions or EIR exceptions may apply, the CCG also acknowledges that it needs to make known to the team any requests which it feels should be refused wholly or in part and share that information with the team so that the team can investigate all suitable exemptions/exceptions.

In general the FOIA team will be more likely to identify areas where class-based exemptions/exceptions should apply, while the CCG will be more likely to identify requests where prejudice-based exemptions/exceptions could apply. Class-based exemptions/exceptions are those which only apply to a particular category or class of information, while prejudice-based exemptions/exceptions require evidence of harm or damage which would result from disclosure. Such harm might be known to the CCG and not the FOIA team.

## **7.5 Chasing and escalating overdue information**

When a request approaches its internal deadline (at around working day 8) and the person or people contacted at the CCG has/have not yet sent all of the information to the FOIA team, a reminder email will be sent to the appropriate contacts at the CCG. When the internal deadline has passed a second reminder will be sent.

If information has not been received by working day 15, the request will be escalated to a senior manager at the CCG. Note that these timescales may be reviewed should best practice suggest otherwise.

## **7.6 Clarifying the applicant's request**

If the CCG feels that the applicant's request requires clarification in order to understand the nature of the request, the CCG will ask the FOIA team to send a clarification email or letter to the applicant. The FOIA team will send a clarification letter or email to the applicant. This will include those questions which require clarification, or will describe where a precise scope or meaning is required.

If the applicant does not provide clarification within 20 working days, the request will be closed. Neither the FOIA nor the EIR specify this timescale, but this reflects normal practice in many organisations. Note that the timescales may need to be reviewed should best practice suggest otherwise. If clarification is received after this time, the request will be treated on a case by case basis as it may be easier to treat as a new request.

While the FOIA team will endeavour to detect instances where a clarification may be useful, it is not always in the best place to decide as the request may not be understood by the FOIA team in the same way as the CCG. The FOIA team will try to provide proactive advice and offer assistance to the CCG where this can help to clarify the meaning of a request, especially where the FOIA or EIR provide alternative approaches to handling the request.

## **7.7 Guidelines for providing, clarifying and refusing the request**

The CCG is in the best position to understand complex clinical information, so it is important that the information provided directly answers the questions presented in a manner that can be interpreted correctly by the FOIA team and understood by the applicant. This will ensure that the draft produced by the FOIA team correctly represents the CCG's answers, avoids subsequent queries from the FOI team or the applicant and ensures re-drafts are reduced. In turn the possibility of breaches of the legal deadline and requests for internal reviews are avoided.

If the CCG feels that all or part of the requested information cannot be provided then a clarification, exemption/exception, appropriate limit refusal or transfer can be arranged. In all other situations the CCG has a legal duty to provide information, although the FOIA team can provide expert advice on specific cases of concern to the CCG.

Please refer to Appendix 2 for further information.

## **7.8 Difference between extracting or compiling existing information and creating new information**

The legislation requires a public authority to provide information in the manner requested if this is reasonably practicable. Public Authorities do not have to create new information to respond to requests. However, Public Authorities are not creating new information where:-

- it presents information it holds in the form of a list or schedule
- creating an answer to a request involves simple manipulation of information already held
- it extracts information from an electronic database by searching using a reporting or query function

What amounts to a simple calculation depends on the level of skill and judgement required to carry it out. If extracting the necessary information requires a high level of skill and judgement, or several intervening steps, this would amount to creating new information not already held.

## **7.9 Preparing the response to the applicant**

If no exemptions/exceptions apply and there are no fees or charges to be levied, eMBED aims to draft a response letter for approval by the CCG within 4 working days of receiving all of the required information from the CGG. The FOIA team will check that the information provided answers each question raised by the applicant, so that no question is omitted or answered with an implied answer which may not be apparent to the applicant. The team will also check that the information is not subject to any class based exemptions/exceptions which should apply, such as where a response includes the personal data of a third party.

The FOIA team manager or the team leader will also spot check responses for quality and appropriateness. The draft will then be sent to the appropriate person within the CCG for provider approval. Once the draft has been approved, it will be converted to PDF and emailed or posted to the applicant usually on the same day, but no later than the following day.

### **7.10 Public interest tests**

Where the CCG has raised concerns over possible issues of prejudice (harm) resulting from the release of the requested information, such as in cases of commercial sensitivity or confidentiality agreements, or where the FOIA team has detected a qualified exemption/exception which may apply, the team will need to conduct a public interest test.

The Information Commissioner states that “In effect something in the public interest is something which serves the interests of the public. When applying the test, the public authority is simply deciding whether in any particular case it serves the interests of the public better to withhold or to disclose information.” The public interest will depend on the request and the exemption being considered. The FOIA team on behalf of the CCG will consider the public interest on a case by case basis and advise the CCG of the results of the test. In some cases it may be necessary to obtain legal advice. The public interest does not include protecting an authority or individual from embarrassment.

In certain circumstances there may be a public interest in releasing personal data which would normally be subject to an absolute exemption. This is because in these cases the public interest in disclosure outweighs the individual’s right to privacy. Examples of this would be the remuneration and expenses of Governing Body members or the names or senior members of the management team.

### **7.11 Information obtained from a third party**

Where the request contains information obtained from or about a third party, the FOIA team will contact that party on behalf of the CCG to ascertain its views on whether the information requested can be disclosed and to ensure sufficient evidence of harm which would result from disclosure has been received. This evidence will be considered in a prejudice test which feeds into the public interest test. The FOIA team will record the third parties’ views and evidence but the CCG is under no legal obligation to comply with the third party.

A public interest test must be carried out for every qualified exemption/exception. Using its detailed knowledge of exemptions/exceptions, the FOIA team will consider the relevant factors in favour of disclosure along with the appropriate considerations against disclosure. These factors will be weighted according to the risk and importance of each.

The factors to consider will vary depending on which exemption/exception is being considered and in some cases additional rules need to be followed before the exemption can be applied. Therefore each qualified exemption/exception under consideration will require its own public interest test. The FOIA team will undertake all public interest tests on behalf of the CCG and will record the results of each test.

### **7.12 Extension of time for a Public Interest Test**

When a public interest test needs to be conducted for an FOIA exemption, the CCG is entitled to apply for extra time, up to a further 20 working days. This time should be used to consider the factors and not as extra time to gather the required information. In cases where this extra time is needed, a public interest test letter (a refusal notice as described in the FOIA) will be sent to the applicant within the initial 20 working day period specifying the amount of extra time required to conduct the test and explaining which qualified exemptions/exceptions are under consideration.

Extra time for a public interest test is not allowed under the EIR, although up to an extra 20 working days are allowed for complex and voluminous requests.

The results of the public interest test will be communicated to the CCG as a recommendation to either disclose or withhold all or part of the requested information. The CCG may wish to review and amend the test scores and reject the FOIA team's recommendation at its discretion.

The FOIA team can only advise the CCG that according to the FOIA or EIR, the information in question should be released or withheld. The CCG is free to decide otherwise, in the full knowledge that if a decision to withhold is challenged at a later date, responsibility for withholding such information lies with the CCG and not eMBED, which will not be liable for any advice not followed.

An FOIA exemption or EIR exception may apply to part of the information, making the rest of the information appropriate to release. In practical terms this means that a document may need to be summarised or an extract created, or a redacted copy prepared of the original document. Redaction is where the exempt information is made illegible or removed, traditionally by using black-lines. In the electronic age neater and more secure methods are available, so redaction should be undertaken by the FOIA team, or following the advice of the FOIA team.

### **7.13 Communicating the information to the applicant**

Information will be communicated to applicants in one or more of the following methods:

- contained within the response letter
- a photocopy or printed copy of the information
- requested files transferred by electronic means
- transferred on CD-ROM or floppy disk
- a summary of the information, or a combination of the formats mentioned above

Any attachments sent as part of an electronic response will be converted to PDF wherever possible, depending on practicality and reflecting any stated preference of format by the applicant which must be observed.

The response will be communicated within 20 working days of the date of receipt of the request, or up to 40 working days where extra time has been claimed under FOIA for a public interest test or under EIR for a complex and voluminous request.

The response will also include details of any exemptions/exceptions which have been applied, the justification for the use of the exemptions/exceptions and in the case of any qualified exemptions/exceptions, the factors considered in each public interest test conducted.

If an absolute exemption has been applied to part of the information, then the CCG is exempt from the duty to confirm or deny whether or not the organisation holds the information. In these circumstances, the applicant will also be informed that the CCG is not obliged to confirm that it holds the information requested.

### **7.14 Statutory information to be included in the response**

The response will also include details of:

- the CCG's internal review procedure should the applicant not be satisfied with the outcome
- the right to appeal to the Information Commissioner should the applicant remain dissatisfied after an internal review
- the right to re-use the information on request, subject to the applicant stating the intended re-use purpose and subject to licence conditions which may result from that purpose

## **7.15 Fees for disbursements**

In most cases the applicant will request the information electronically and the FOIA team will either attach the document to an email or provide a link to where the information can be found. This basic service will not attract a fee. However, the applicant is entitled to ask for information in any format, so the FOIA team may need to print out the information or place it on other forms of media such as CD-ROM, DVD or tape. While most responses sent by post will not result in significant cost, there could be instances where the applicant has requested a large quantity of information to be printed or placed on DVD or CD-ROM, or cases where the applicant has requested multiple copies.

In such instances, the CCG agrees that eMBED can recover the cost of such disbursements from the applicant. The FOIA team will send the applicant a Fees Notice where the estimated cost of all such disbursements will be detailed. The request will be placed on hold by the team until the applicant has paid the fee and the payment has been cleared.

Once payment has been received and cleared, the 20 working day clock will be restarted from where it was stopped and the response will be finalised by the FOIA team with information the CCG will already have located. By definition, the information ought to have been located by the CCG for an estimate of the costs of for example printing to have been calculated by the team, so a Fees Notice for disbursements should not precede the identification and location phase.

If payment is not received within 3 months of the date of the Fees Notice for FOIA requests and 60 working days for EIR requests, the request will be closed by the FOIA team. Any payment received after this time will be treated on a case by case basis as cost may have changed and the request may need to be treated as a new request if the information has changed.

Other costs which fall under disbursements are costs of printing photographs, document binding, conversion of information into Braille or large type, or translation into a language other than English, although eMBED on behalf of the CCG will not charge for any such costs which arise out of our joint obligations under disability and equality legislation.

In most cases VAT at the current rate will have to be charged on disbursement fees.

As the cost of processing small payments can be greater than the sums collected, eMBED with the agreement of the CCG will not collect disbursement fees below £10 and may waive other costs in respect of disbursements in agreement with the CCG..

## **7.16 The 'appropriate limit' and fees which may result.**

The FOIA gives public bodies the right to refuse a request or make a charge, where the cost and staff time of meeting that request would be excessive and a strain on that authority's resources. This point at which this can apply is known as the appropriate limit. The criteria for dealing with such a request are defined at Section 12 of the FOIA and in associated regulations.

As a first step, the CCG with the assistance of the FOIA team should estimate how long a large request would take to:-

- determine whether the information is held,
- locate that information,
- retrieve it, and
- edit or extract that information from any documents or systems which may contain it.

In practice, the CCG needs to calculate the number of records which need to be searched, times the number of minutes to view each record. This will produce a basic estimate, although in some cases it will be possible to produce a more sophisticated estimate.

This calculation needs to be done for two reasons. The lawful appropriate limit applicable to a CCG is 18 hours, so the CCG must be able to evidence that any such request would take more than this before it is refused in case the decision is later challenged. If the estimate falls below 18 hours, the CCG would be obliged by law to continue to process the request.

The second reason is that eMBED on behalf of the CCG will have to inform the applicant that the request will be closed unless the applicant wishes to pay a fee for the time it would take the CCG to determine, locate, retrieve and edit the information. This fee is calculated at a standard £25 per hour multiplied by 18 hours (or the total number of hours which the estimate produces). Hence the FOIA team will need details of this time estimate so that the request can be refused unless the fee is paid, or conversely that the estimate is reasonably accurate and not an over or under estimate should the applicant choose to pay the fee.

The intention of this provision within the FOIA is to discourage excessive requests as most applicants will not wish to pay £450 or more. However, the obligation on the CCG to provide advice and assistance means that eMBED on behalf of the CCG must suggest ways in which the time and cost of the request can be brought below the appropriate limit. The FOIA team will therefore prepare a Fees Notice in which details of the fee and the calculation are accompanied by suggestions of how the applicant can narrow the scope of the request, or define the criteria more tightly.

The request will be placed on hold until the fee has been paid for a maximum of 3 months from the date of the Fees Notice. If the fee is not paid within this time limit, the request will be closed. Should the applicant pay the appropriate limit fee, the 20 working day clock will be restarted from where it was stopped as soon as the payment has been cleared by the bank.

Any appropriate limit costs would be in addition to any disbursement costs which might also apply.

The appropriate limit ruling described above does not apply to requests for environmental information under EIR. Instead extra time can be claimed under Regulation 5 of the EIR for voluminous or complex requests but without the option to set a charge for the extra time. Disbursement fees may of course still apply.

### **7.17 Aggregation of requests for the purpose of the appropriate limit**

The FOIA also allows public bodies to apply the appropriate limit to:-

- two or more similar or essentially the same requests received within 60 working days from the first to the last request
- from the same applicant, or from applicants who appears to be working in concert with each other, for instance as part of a campaign

In such cases, all requests which meet this condition can be treated as the same request when estimating whether the appropriate limit has been exceeded.

In a similar way to normal appropriate limit cases, an estimate needs to be prepared by the CCG and a fees letter sent to the applicant by the FOIA team which should include guidance on how the requests can be brought under the appropriate limit . Similarly, all requests which are part of this aggregation will be placed on hold by the FOIA team for 3 months, or until the fee has been paid and has been cleared by the bank.

Should the applicant agree to pay the appropriate limit fees, all requests which are subject to this aggregation will be re-started by the FOIA team. The CCG will continue to identify and locate the information for all these requests and the FOIA team will prepare the responses once the information has been passed to the team.

Should the applicant refuse to pay the fee and chooses not to redefine the requests, the CCG may find that it has to process the first of these requests if by itself, this request does not exceed 18 hours to determine, locate, retrieve and edit/extract the information. All remaining requests which were subject to this aggregation and which took the aggregate time limit above 18 hours will be closed by the FOIA team.

## **7.18 Handling of payments of fees.**

As the cost of disbursements will fall upon eMBED in the course of processing that request for the CCG, the CCG agrees that any disbursement fees will be retained by eMBED.

Payments in respect of appropriate limit fees (also known as a Section 12 provision of the FOIA) will be paid direct to the CCG by the applicant as this reflects the cost to that CCG.

A receipt will not be issued by eMBED unless requested by the applicant, although in cases of appropriate limit payments, if an early response to the request is not possible, a receipt should be sent by CCG.

As the 20 working day clock is affected by clearance of a payment, the payment must be banked by eMBED or the CCG as soon as possible following receipt.

Should it become clear that a fee has been over-estimated by more than £5, the over-charged amount will be reimbursed to the applicant. Where a fee has been under-estimated, in most cases an additional Fees Notice is not allowed. It is therefore important that all appropriate limit time estimates and fee calculations are as accurate as possible.

## **7.19 Refusing a request**

The entire request may be refused if:

- all of the information requested is exempt under the FOIA or EIR
- the cost of compliance exceeds the appropriate limit or
- the request can be demonstrated to be vexatious or repeated

The applicant will be notified in writing of the refusal decision within 20 working days of the request (or up to 40 working days where extra time has been claimed under FOI for a public interest test, or under EIR for a complex and voluminous request). The applicant will be informed of the following:

- the exemption(s)/exception(s) that has/have been applied
- the justification for the use of each exemption/exception and the factors considered in the public interest test carried out for each qualified exemption/exception
- details of the CCG's internal review procedure if the applicant is not satisfied with the outcome
- details of the right to appeal to the Information Commissioner

If an FOIA exemption is absolute, then the CCG is exempt from the duty to confirm or deny (that is the duty to tell the applicant whether or not the organisation holds the information). In these circumstances, the applicant will be informed within 20 working days of the following:

- when appropriate, the fact that the CCG is exempt from the duty to confirm or deny
- specify the exemption or exception in question

- state why the exemption or exception applies (unless it would be otherwise apparent)

Note that there are no absolute exceptions under the EIR.

Apart from where a public interest test is involved, if for any reason a response is expected to be significantly late beyond the 20 working day limit (or 40 working days in the case of a public interest test), the FOIA team on behalf of the CCG will send a courtesy letter to the applicant apologising for this delay and informing the applicant when a response can be expected. Both eMBED and the CCG recognise that this does not alter the fact that a late response in such cases is a breach of the FOIA or EIR.

## **7.20 Copyright**

Any information supplied under FOIA or EIR continues to be protected by the Copyright, Designs and Patents Act 1988. Disclosure in response to a written request is placing the information into the public domain, in effect a disclosure to the world and not to an individual.

While copyright permission to re-use information for the private or educational purposes of an applicant is implied in the CCG's response, the copyright of the CCG's information still needs to be safeguarded once released. Hence a suitable copyright statement should accompany every release of information under FOIA or EIR.

## **7.21 Re-use regulations**

Under the Re-use of Public Sector Information Regulations 2015, in addition to requesting information, an applicant can ask for permission to re-use that information. The aim is to open up public sector information which could assist with research and innovation in both the academic and industrial sectors. The re-use request may form part of the initial request for information, or take the form of a supplementary request at a later date.

Re-use cannot be refused. The FOIA team will advise the CCG of licencing options to consider, depending on the nature of the re-use request. A free licence would normally be recommended for most purposes including research purposes.

The CCG can adopt its own conditions or use the Open Government Licence. The FOIA team can advise the CCG on this matter and draft the re-use part of the FOIA or EIR response. If a request for re-use is submitted after the FOIA or EIR request has been completed, a separate re-use response will be drafted. Once approved by the CCG the re-use response will be sent to the applicant by the FOIA team.

## **7.22 Transferring a request to another authority**

Where the information requested is not held by the CCG, the normal procedure is to identify which authority holds that information and advise the applicant to apply to that authority. Contact details of the relevant FOIA/EIR section should be provided in the response. However, all or part of a request can also be transferred to another public authority. A transfer should only occur if it has been established that the other authority actually holds the information concerned.

Where a transfer is under consideration, the FOIA team will contact the FOIA/EIR section of the appropriate authority to ascertain whether they hold the information and would be willing to accept a transfer. If the authority agrees, the FOIA team on behalf of the CCG must write to the applicant to explain that the CCG does not hold the information and give the applicant the following options:

- to send a new request to the identified authority(ies) using the contact details provided
- to have the existing request transferred to the identified authority(ies) by the CCG on behalf of the applicant

A request must not be transferred outside the CCG without the applicant's consent, although transfer to eMBED for processing is explained on the website and in our acknowledgement letters.

## **7.23 Receiving a transferred request.**

If the CCG (or eMBED on behalf of the CCG) receives a request from another authority to transfer an existing FOIA or EIR request to that CCG, the CCG should first ascertain whether it holds that information. The CCG should inform the FOIA team who will then liaise with the authority wishing to arrange the transfer.

If the CCG does not hold the information the request will not be transferred. If the CCG does hold the information, the authority wishing to arrange the transfer must communicate that fact to the applicant and seek his/her permission to transfer the request before transferring it. If the applicant agrees then the request can be transferred.

Once the request has been transferred to the CCG from another authority, the request is regarded as a new request for that CCG within the FOIA and EIR. Therefore a new 20 working day period will start.

## 7.24 Personal information

Personal data is information about a living individual from which that individual can be identified. It may take any of the following forms:

- Computer documents
- Information processed by a computer or other equipment (e.g. CCTV)
- Information in medical and other records
- Information in some form of structured manual records
- Unstructured personal information held in manual form by a public authority (the applicant is likely to be asked to provide extra details to locate the information requested). The General Data Protection Regulations (GDPR) which will be brought into law on 25th May 2018 extends the scope to more manual filing systems than was the case under the DPA.

Under the new GDPR personal information also includes online identifiers such as IP addresses and even pseudonymised data in some circumstances.

If the person requesting the information is the subject of the information then that person should be redirected to the subject access provisions available under the Data Protection Act. From 25th May 2018 the Subject Access Request procedure will be replaced by the GDPR's Right of Access procedure.

If the information requested contains personal data about someone other than the applicant, there is an absolute exemption under FOIA and EIR. The public authority should still consider if disclosure would breach any of the Data Protection principles (or after 25th May 2018, the similar principles and regulations of the GDPR) and apply a public interest test to determine whether disclosure or refusing a request would be in the public interest. The FOIA team will advise and assist the CCG whenever a FOIA or EIR request involves the personal data of a third party.

As the subject also has the right to object to disclosure, the CCG undertakes to ensure that all requests for personal information from a third party are handled in consultation with the subject and with advice from eMBED's Information Governance experts, the SIRO and Caldicott Guardian as appropriate. The CCG will endeavour to balance an individual's right to privacy with the accountability that goes with working in the public sector. It is important to note that under the new GDPR, as well as a stronger obligation to obtain a positive opt-in consent, there will also be a specific right to object in addition to several new rights such as the right to be forgotten.

Whilst the Data Protection Act and the new GDPR only applies to living individuals, the personal data of deceased persons may be subject to a duty of confidentiality under Common Law which extends beyond death.

Requests for personal data covered by the Data Protection Act Subject Access Request procedure and from 25th May 2018 requests under the GDPR's Right of Access procedure will be transferred to the CCG for processing in line with the CCG's Access to Records Procedure.

## **8 Conditions, exemptions and exceptions**

### **8.1 Conditions**

The CCG can postpone dealing with a request and place that request on hold:-

- When the CCG is awaiting clarification of the request from the applicant and a clarification letter or email has been sent to the applicant
- When payment of disbursement fees or appropriate limit costs is awaited from the applicant and a Fees Notice has been issued

The CCG can refuse a request:-

- When the applicant does not provide clarification of a request within a set period of time currently 20 working days, when this clarification has been requested by the FOIA team on behalf of the CCG
- When the applicant has not paid the disbursement or appropriate limit fees requested by the FOIA team on behalf of eMBED or the CCG respectively
- When the applicant has not redefined or re-scoped a request which has exceeded the appropriate limit and that applicant has also not paid the appropriate limit fees (although please note that part of the information requested, or the earliest of a series of aggregated requests should be considered for completion)
- When the request is vexatious. The FOIA team will advise the CCG on specific rules governing vexatious and repeat requests, but essentially when the request is patently designed to cause disruption with no benefit to the public interest, the request can be considered as vexatious.
- When the CCG has recently complied with a request for information then it is not required to comply with a subsequent identical or very similar request unless a reasonable time interval has elapsed. A log of all requests will be kept by the FOIA team for monitoring purposes and this can be used to identify repeat requests.

### **8.2 Exemptions and exceptions**

The FOIA and EIR specify a number of exemptions and exceptions respectively and state in what circumstances they can be applied. FOIA exemptions can be grouped into two principal groupings, namely absolute and qualified. All EIR exceptions are qualified. Both FOIA exemptions and EIR exceptions are subject to a secondary classification according to whether they are class-based or prejudice-based.

An absolute exemption means that the CCG is exempt from the need to confirm or deny it holds the information and furthermore exempt from disclosing that information. The FOIA team will endeavour to alert the CCG where an absolute exemption should apply. All absolute exemptions are class-based exemptions and tend to involve legal bars to disclosure which must be followed.

A qualified exemption means the CCG has to consider the public interest before making a decision whether to release that information and whether to confirm or deny whether it holds that information. The FOIA team will conduct the public interest test on behalf of the CCG, although the final decision on whether to disclose or withhold the information lies with the CCG at the CCG's sole liability. Qualified FOIA and EIR exemptions are equally divided between class based and prejudiced based.

In practice, the FOIA team on behalf of the CCG will not confirm that the CCG holds the information if that information has been communicated within the response as such a confirmation is self-evident.

A class-based exemption/exception is one where the exemption/exception applies to a particular category or 'class' of information. Where a request for information aligns itself with such a class-based exemption, especially where the exemption is an absolute exemption, the FOIA team will endeavour to advise the CCG of this fact.

Before applying a prejudice-based exemption/exception, harm resulting from disclosure has to be demonstrated. All prejudice-based exemptions/exceptions are also qualified exemptions/exceptions. Therefore a public interest test is required to balance the prejudicial effects of disclosure against the public interest in disclosure.

While the CCG is not expected to be conversant with the details of these prejudicial exemptions/exceptions, the likelihood is that concerns over the harmful effects of disclosure will be raised by the CCG first, as the FOIA team will not always be aware of the potential harm to commercial interests or confidentiality agreements. The FOIA team will conduct public interest tests on behalf of the CCG.

The CCG will endeavour to use these exemptions appropriately and sparingly in line with the FOIA and EIR. Any decision to use an exemption/exception will be taken by the CCG following advice and guidance from the FOIA team other senior colleagues at eMBED as appropriate. The final decision on whether to disclose or withhold the information lies with the CCG at the CCG's sole liability.

Please see Appendix 3 for a list of exemptions and exceptions.

## **9 Public sector contracts**

When starting a procurement exercise, or entering into agreements and contracts, the CCG should limit the contractual terms which are intended to restrict the disclosure of information held by the CCG. The CCG cannot 'contract out' of its obligations under the FOIA or EIR. The Lord Chancellor's Code of Practice states that "unless an exemption provided for under the Act is applicable in relation to any particular information; a public authority will be obliged to disclose that information in response to a request, regardless of the terms of any contract".

Pre-qualification Questionnaires (PQQs) or Invitations to Tender (ITTs) should include a statement advising bidders of the CCG's obligations under the FOIA or EIR and inviting bidders to declare any commercially sensitive or confidential information contained. Any information so declared should only be used to advise and guide the CCG and should not be used as a veto over the CCG's responsibilities under the FOIA or EIR.

Contractors may put pressure on the CCG to accept confidentiality clauses covering information about the terms of a contract, its value and performance. Where it is necessary to include a non-disclosure provision in a contract, in exceptional circumstances both parties could agree a schedule with the contractor that clearly identifies the information that should not be disclosed. The organisation would have to be aware that any restrictions on disclosure in such a schedule could be overridden by the CCG's obligations under the FOIA or EIR.

The CCG should not hold information 'in confidence' that is not confidential in nature. The confidential information exemption under the FOIA and EIR only applies if the release of such information constitutes a breach of confidence actionable in a court of law.

## **10 Disclosure logs**

A disclosure is an optional part of the otherwise mandatory Publication scheme. The Publication Scheme itself is described in the FOI and EIR Policy. The aim of the disclosure log is to make available all previous responses in the hope that it will reduce requests for similar information from other applicants, but the log can be regarded as best practice in respect of the CCG's commitment to openness and transparency.

Before responses can be published as part of a disclosure log, a copy of the original response must be cleaned of all information which can identify the applicant. This anonymising also extends to removing details of organisational names and contact details which may be found on questionnaires submitted by the organisation for completion by the CCG.

As the name suggests, a disclosure log should provide an index of responses, organised by year and month and which gives an indication of the subject of the request. Ideally these responses should also be searchable using the search facility found on each CCG's website.

Anonymising of requests is an optional service, which can be provided by eMBED according to a specific agreement to provide this service. Uploading of anonymised responses and maintenance of the index is a communications and website maintenance operation undertaken by the CCGs.

Each CCG will endeavour to maintain a disclosure log.

## **11 Internal reviews**

### **11.1 Requests for internal reviews**

If an applicant is dissatisfied with the CCG's response to a request for FOIA or EIR information, the applicant has the right to an internal review. A request for an internal review under the EIR is referred to as a representation.

The request for an internal review will normally relate to a decision to withhold all or part of the information, although it could also relate to a procedural aspect of the FOIA or EIR service such as promptness and timeliness, standard and quality of communications, fees levied or a decision to close a request due to the absence of a clarification or non-payment of a fee.

A request for an internal review will ordinarily be sent by email to eMBED. Where a request for an internal review is emailed or posted to the CCG, this should be passed to the FOIA team as soon as possible. A posted request for an internal review should be scanned and emailed to the FOIA team without delay, taking care not to omit any pages.

If an EIR representation is received after 40 working days of the original EIR response, the representation can be disregarded. However such a course of action is not recommended as the Information Commissioner advises flexibility in all such cases. There is no similar cut-off for FOIA requests for internal reviews.

The FOIA team will send an acknowledgement to the applicant in respect of the request for an internal review. In some circumstances the written request for an internal review will not provide enough details and it will be necessary to contact the applicant for clarification.

A detailed record of the internal review should be maintained by the FOIA team, recording all correspondence with the applicant which may arise.

### **11.2 The internal review process**

A request for an internal review, or any reply by the applicant to a refusal notice should be handled with the same rigour and seriousness as would a complaint, in an independent, open-minded and professional manner with the aim of reconsidering the initial decisions. As specialist knowledge of FOIA or EIR is required, the internal review should be handled by a senior member of the FOIA or IG team wherever possible.

Internal reviews must be conducted in a fair and impartial manner and should involve:–

- a fresh consideration of the initial request
- a review all information and paperwork and
- a thorough re-examination of the original decision to apply an exemption and/or withhold the information and/or the handling of a request

The internal review must be open to the genuine possibility of an amendment or reversal of the original decision. In order to satisfy this requirement, the original decision must be re-examined, including any and all exemptions/exceptions and the results of any public interest tests which were used to decide the balance of public interest wherever a qualified exemption/exception was applied. If necessary the public interest test(s) should be re-run with new evidence or re-evaluated factors.

Where the request for an internal review concerns an exemption/exception and information withheld as a result, the investigation should be conducted by a senior staff member not involved in the initial response. Where the issue is centred on a procedural aspect of the FOIA/EIR service, the investigation can be handled by either a senior member of the FOIA team or a senior member of the CCG.

### **11.3 The decision of the internal review**

Once the internal review has been completed, the findings and recommendations should be shared with the CCG and should inform the decision of the CCG. Nonetheless the CCG, as the legal entity for FOIA and EIR requests, will make the final decision whether to uphold or overturn the original decision. If a decision is challenged at a later date, responsibility lies with the CCG and not eMBED, which will not be liable for any advice not followed.

If the decision of the CCG is to reverse the original decision, then there may be a need to obtain further information as part of the response to the internal review or prepare a refund of part or all the fees charged. Where the decision is to provide the information which was originally withheld, the request should be reactivated and processed as a new request.

### **11.4 Communicating the decision of the internal review**

A response to an internal review request should be despatched to the applicant within 20 working days in the case of the FOIA or 40 working days for EIR representations. The response should explain the decision of the internal review and provide a summary of the findings. If the decision of the internal review is to overturn an original decision, the response may need to state that the information will be communicated within 20 working days, or that a refund of any incorrectly charged fee will be arranged shortly.

When the applicant is informed of the outcome of the internal review, the applicant must be informed of his/her right to appeal to the Information Commissioner if still dissatisfied with the outcome of the internal review and provided with contact details of the Information Commissioner's Officer.

## 12 Records Management

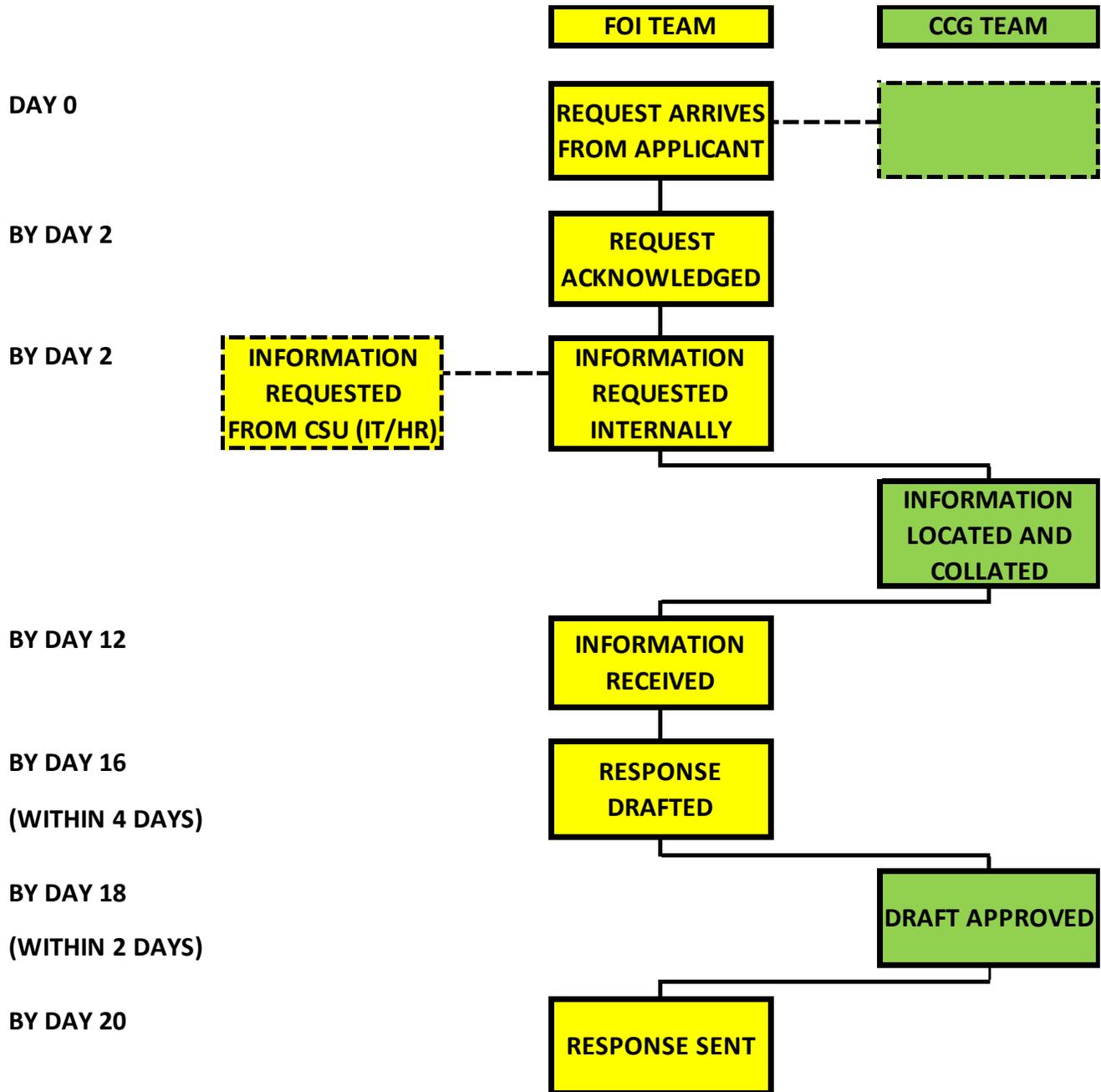
Good records management is the key to complying with all requests for information in an efficient and accurate manner, not only FOIA and EIR requests. The CCG has a Records Management Policy and supporting guidelines which provide comprehensive guidance for the management of all records which are consistent with:

- the Records Management Code of Practice - Department of Health 2006
- The Lord Chancellor's Code of Practice on the Management of Records under Section 46 of the Freedom of Information Act 2000 (November 2002)

Any information inherited from previous PCTs which is no longer needed for the commissioning and management of services should be destroyed or transferred according to the relevant document retention and destruction dates shown in part 2 of the NHS Code of Practice for Records Management. Otherwise these records remain liable to an FOIA or EIR request.

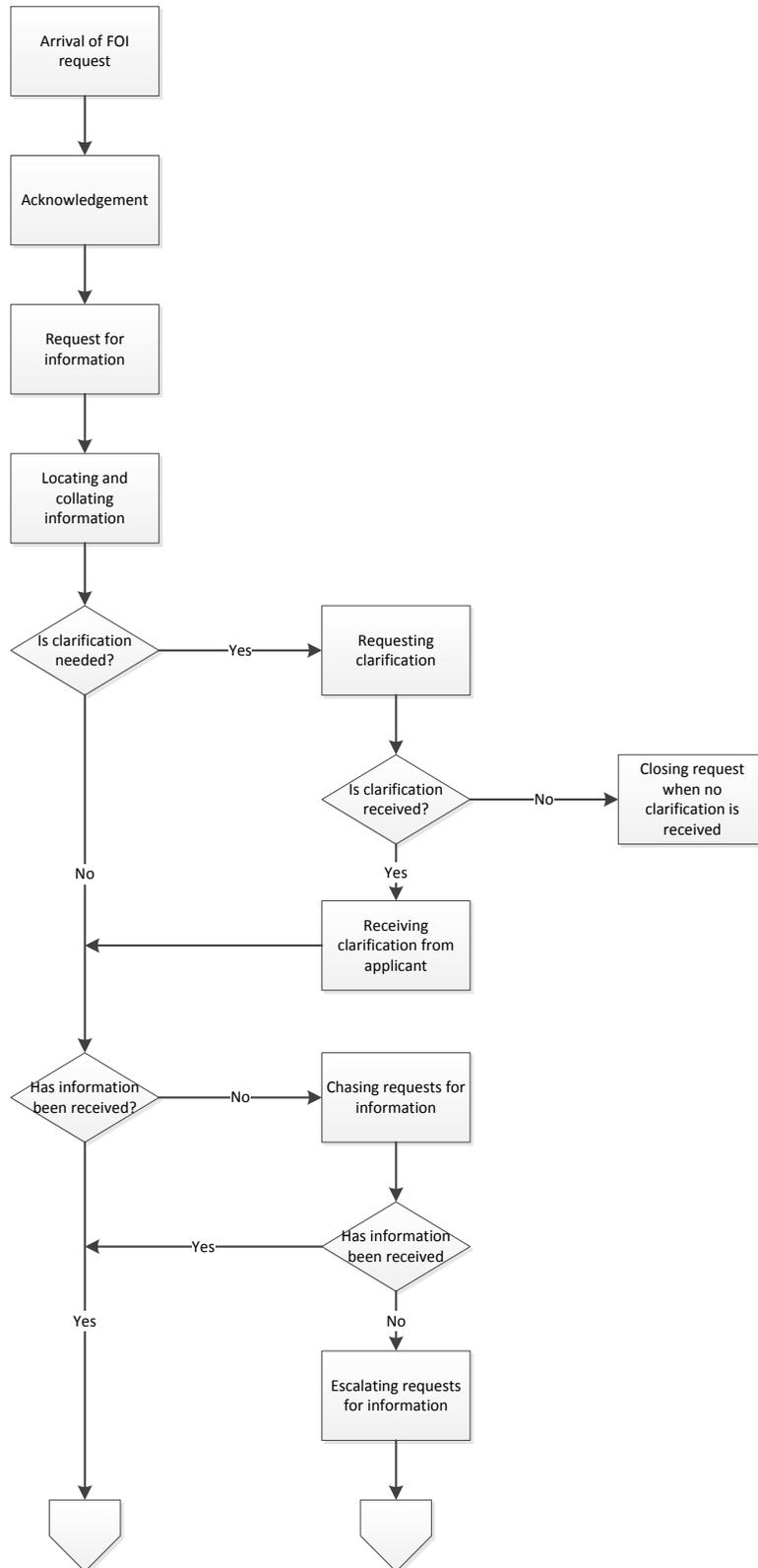
# APPENDIX 1 – Process charts for the FOIA and EIR process.

Summary Process chart



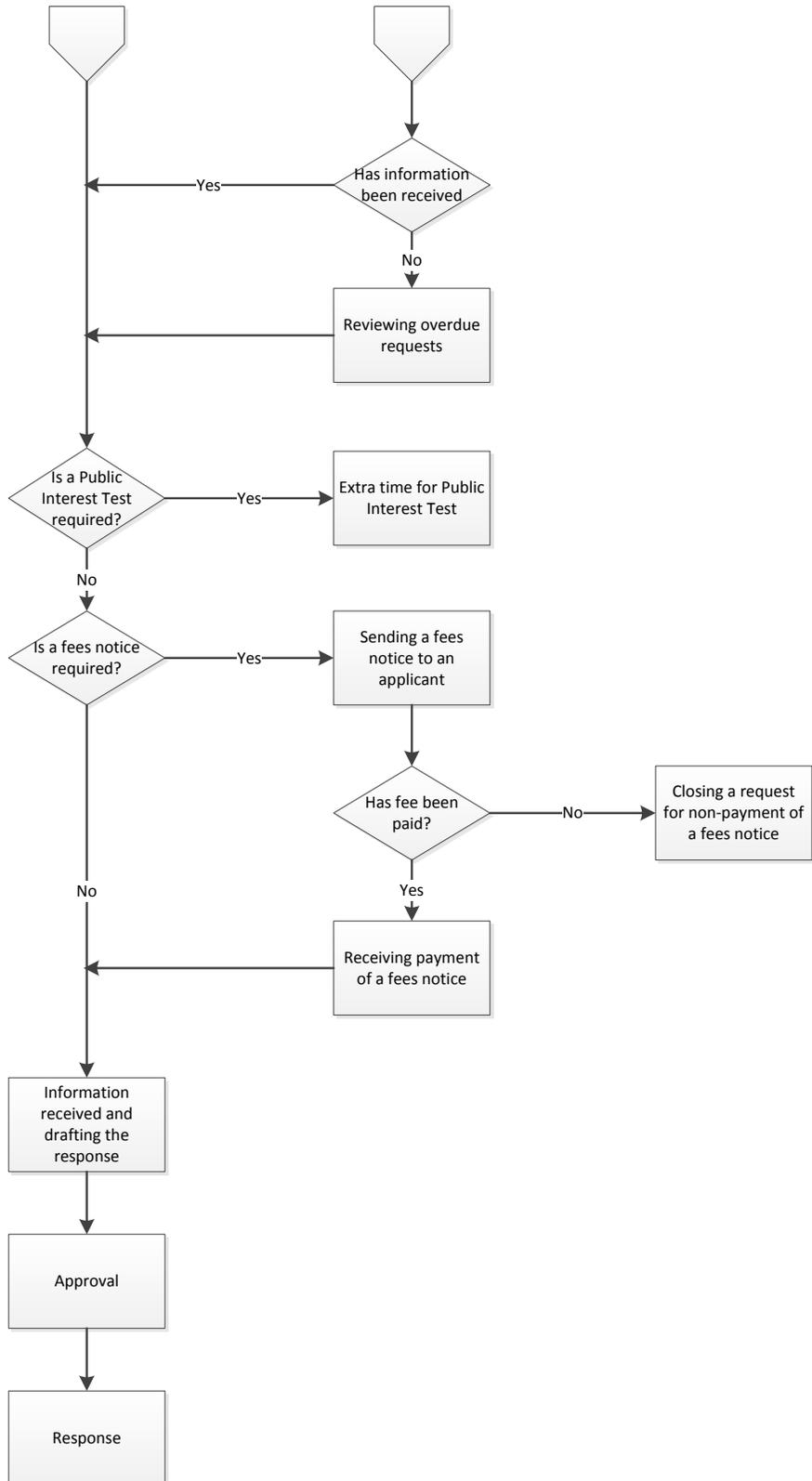
# APPENDIX 1 - Continued

## Detailed process chart



# APPENDIX 1 - Continued

Detailed process chart (continued)



## **APPENDIX 2 – Guidelines for providing, clarifying and refusing the request**

The following guidelines can help the CCG provide the necessary information: -

- Where a series of questions require answering, each response should be clearly identified with the relevant question. The best way to do this is to insert the response directly below the relevant question.
- Where a table, spreadsheet or questionnaire has been provided, the answers should be provided in the relevant spaces in the document.

In the following cases the CCG may wish to obtain clarification: -

- Where the request is ambiguous or not clear, the CCG should ask the FOIA team to request clarification from the applicant.
- If the CCG feels that the request would take over 18 hours to determine, locate, retrieve and edit the information, the CCG should ask the FOIA team to apply the appropriate limit to that request. Usually the CCG will be in the best position to decide if the request will take over 18 hours although the FOIA team may be able to recommend this course of action proactively. A reasonably accurate estimate of the time needed to determine whether the information is held, to locate and retrieve it and to edit or and extract the information will be necessary to apply this option.

In these instances the CCG may ask the FOI team to investigate an exemption/exception:-

- If the CCG knows the information requested is reasonably assessable via the CCG's website, publication scheme or other locations, or is intended for future publication, then the CCG should ask the FOIA team to apply the appropriate exemption. The FOIA team will always try to identify such information pro-actively.
- If the CCG feels that to provide the requested information would prejudice the commercial interests of the CCG or another organisation, prejudice the effective conduct of public affairs, or breach a duty of confidence, then the CCG should ask the FOI team to investigate whether a corresponding exemption/exception can be applied. Please note that some of these exemptions require evidence of harm and/or a public interest test which may mean that the exemption/exception cannot lawfully be applied.

Where the CCG cannot find the information or does not hold the information:-

- The CCG should inform the FOIA team of this fact as an exemption/exception is clearly not applicable. If the CCG knows that another public body holds the required information, the details of that public body should be passed to the FOIA team.

Final checks before returning the information to the FOIA team:-

- The CCG should ensure that all questions in the request (or attached table, spreadsheet or questionnaire) have been responded to in some way, either by providing the information requested or by asking the FOIA team for a clarification, exemption or an appropriate limit.
- If person contacted within the CCG is not the correct person to respond, the FOIA team should be informed as soon as possible, so that none of the 20 working days are lost. Wherever possible, the incorrectly contacted person should indicate who would be the correct person to respond and include this person within the email to the FOIA team.

## **APPENDIX 3 – List of FOIA exemptions and EIR exceptions**

### **Absolute exemptions available under FOIA**

Class based –

Section 21 - information already reasonably accessible by other means

*Section 23 - information supplied by or relating to security bodies*

Section 32 - litigation, tribunals or court records

Section 34 - covered by parliamentary privilege

Section 40(1) - personal information of the requester (dealt with by DPA SAR, and after 25th May 2018 by the Right of Access procedure of the GDPR)

Section 40(2) - data protection of third parties

Section 41 - information provided in confidence

Section 44 - statutory prohibitions on disclosure

There are no prejudice-based absolute exemptions.

### **List of Qualified exemptions available under FOIA**

Class based -

Section 22 - information intended for future publication

*Section 22a - Research*

*Section 24 - required for the purpose of safeguarding national security*

*Section 30 - information for purposes of criminal or certain other types of investigations*

*Section 35 - government policy, communications between ministers, advice of law officers, operation of ministerial private offices*

Section 37 - communications with the royal family and the granting of honours

Section 39 - environmental information (i.e. covered by the EIR and its exceptions)

Section 42 - legal professional privilege

Section 43 (1) – information containing trade secrets

Prejudice based

*Section 26 - prejudicial to defence or armed forces*

*Section 27 - prejudicial to international relations*

*Section 28 - prejudicial to relations within the UK (i.e. Scotland, Wales and NI)*

*Section 29 - prejudicial to the economy*

Section 31 - prejudicial to law enforcement

Section 31 (1) (a) – the prevention or detection of crime

Section 33 - prejudicial to audit functions

Section 36 - prejudicial to the effective conduct of public affairs

Section 38 - endangering health and safety

Section 43 (2) - prejudicial to commercial interests

Note that all exemptions and exceptions have been listed above: those which are unlikely to be applicable to the CCG are shown in small italics.

## APPENDIX 3 - Continued

### List of qualified exceptions available under EIR

#### Class-based –

Regulation 12 (3) – personal data of the applicant

Regulation 12 (4) (a) – information not held

Regulation 12 (4) (b) – request manifestly unreasonable

Regulation 12 (4) (c) – request formulated in too general a manner

Regulation 12 (4) (d) – material in the course of completion, unfinished documents and incomplete data

Regulation 12 (4) (e) – involves internal communications

Regulation 13 – personal information of a third party

#### Prejudice based –

*Regulation 12 (5) (a) – International relations, defence, national security or public safety*

Regulation 12 (5) (b) – may adversely affect the course of justice or jeopardise a fair trial, disciplinary or regulatory inquiry

Regulation 12 (5) (c) – infringe intellectual property rights

Regulation 12 (5) (d) – Prejudicial to the confidentiality of proceedings

Regulation 12 (5) (e) – confidentiality of commercial or industrial information

Regulation 12 (5) (f) – prejudicial to the interests of the provider of the information (i.e. provided under a duty of confidence)

*Regulation 12 (5) (g) – protection of the environment*

There are no absolute exceptions available under EIR.

Note that all exemptions and exceptions have been listed above: those which are unlikely to be applicable to the CCG are shown in small italics.

When applying an EIR exception, it is important to note that there is an even stronger presumption of openness in relation to all matters relating to the environment than there is under the FOIA.