

# **Annexe F**

**Legal framework in Scotland**

**September 2005**

**© Crown copyright 2005**

This publication (excluding the OFT logo) may be reproduced free of charge in any format or medium provided that it is reproduced accurately and not used in a misleading context. The material must be acknowledged as crown copyright and the title of the publication specified.

# CONTENTS

<i>Chapter</i>		<i>Page</i>
1	Local authorities in Scotland: legal and regulatory framework for property search information	1
2	Tables	9



# **1 LOCAL AUTHORITIES IN SCOTLAND: LEGAL AND REGULATORY FRAMEWORK FOR PROPERTY SEARCH INFORMATION**

- 1.1 When setting fees and access conditions for unrefined property information, and when using that information to compile Property Enquiry Certificates (PECs), Scottish local authorities (LAs) refer to a framework of legislation, regulations and guidelines. Tables 2.1 to 2.3 list the relevant statutes, regulations and guidelines, and the access conditions and any fees pertaining to each type of property information held by LAs in Scotland.
- 1.2 The information in this annexe and in the accompanying table of statutes, regulations and guidelines was compiled from a variety of different sources (such as the Law Society of Scotland, the Registers of Scotland and a sample of Scottish LAs). The information presented here is believed to be essentially correct but, due to the number and complexity of the statutes and regulations involved and the interrelationships between them, there remains the possibility of some gaps and inaccuracies.
- 1.3 The statutory framework in Scotland is less complex than that in England and Wales. There are no statutory or official searches. Searches compiled by Scottish LAs, PECs, are non-statutory and their content varies across the 32 LAs in Scotland. The majority of the unrefined information held by LAs, and used to compile a PEC, is available for inspection by the public free of charge at all reasonable hours. In many LAs a growing proportion of unrefined information can be obtained electronically via a website, or from a computer terminal at the LA premises. PECs may also be ordered online in a few LAs (currently three).
- 1.4 A search of the unrefined property information held by LAs can be conducted in different ways. A PEC can be requested directly from the LA,

conveyancers<sup>1</sup> can search the unrefined information themselves, or more usually, commission a PEC from a competing retailer that will search the unrefined information held by an LA on their behalf. Currently, the main form of retailer competing with LAs are property search companies (PSCs), sometimes known as 'private search companies' or 'private searchers' in Scotland.

1.5 LAs operate under the following sets of obligations:

- LAs have to allow access to all of the unrefined information kept on public registers to any member of the public or to his agent (for example a PSC). In some cases the statute requires that the registers should be open to public inspection free of charge. In other cases the statute provides for a power to charge but this power has not been exercised by making any regulations under the power. In a third category of cases, the statute is silent as to whether the LA can charge or not and there is no charging power, so access to the information must be provided free. The requirement to keep a public register, and the specific terms of access, are set out in the various statutes relating to each type of property information
- LAs have an obligation to keep and update all the statutory public registers where property information is held, but
- LAs are not obliged to provide PECs.

1.6 In the remainder of this annexe we describe each of the relevant statutes, regulations and guidelines according to whether they relate to:

- PECs

---

<sup>1</sup> We use the term conveyancer to refer to both licensed conveyancers and solicitors carrying out conveyancing work.

- private searches of the unrefined information held by LAs and used to compile a PEC, or
- property search activities in general (both compiled property searches and the underlying unrefined information).

## **Property enquiry certificates**

- 1.7 LAs are under no statutory obligation to provide PECs, which are provided on a discretionary basis. There is no standard PEC form, such as the Con29 form in England and Wales, and the format and content of PECs varies across different LAs. However, in designing a PEC, LAs may draw on the scoping work undertaken by bodies such as the Council of Mortgage Lenders and the Law Society of Scotland in terms of the information requirements necessary in most property transactions.
- 1.8 PECs are designed to provide prospective purchasers with information in relation to a building (or parcel of land) that may impact on the value of the property, such as any breaches of statutory provisions in relation to the property, or legal action taken by the LA.
- 1.9 The information on a PEC usually relates to:
- planning applications (since October 1990)
  - whether it is a Listed Building, in a Conservation Area, affected by an Article 4 Direction, or subject to an enforcement notice
  - recent building warrant decisions
  - roads information (whether the road access is adopted by the LA for maintenance purposes)
  - transport proposals affecting the property
  - statutory notices served for repairs to the property, or served under housing, environmental protection and health and safety legislation, and
  - whether the property is listed in the Contaminated Land Register.

- 1.10 This unrefined information is collated from registers and databases held in various LA departments, such as planning and transportation, housing, environment, finance and consumer protection.
- 1.11 LAs do not have to take responsibility for the information on the forms by statute, or provide compensation for mistakes, and PEC forms contain a disclaimer to this effect. The Law Society of Scotland is not aware of any statutory compensation scheme. LAs do have, however, a 'duty of care', and there has been a legal case in which an LA was forced to provide compensation on these grounds. Some LAs have indemnity insurance cover for their PEC service (for example Edinburgh, East Lothian and South Ayrshire).
- 1.12 LAs set the fees charged for the PEC at their discretion, and there are no specific guidelines on fee setting for PECs. Input from the Scottish Executive is limited to an expectation that LAs will 'maximise their fees and charges income in order to minimise their net revenue expenditure. In doing so they should adhere to any existing rules and regulations dictating which services they can and cannot run at a profit and the needs and ability to pay of their customers'.<sup>2</sup>
- 1.13 Fees vary across LAs, reflecting variations in the content of different PECs, differing policies on cost recovery, and the absence of central guidelines on fee setting. For example, East Lothian Council recently reduced their charge for a full PEC including a water and drainage search obtained from Scottish Water from £130 to £65 in an attempt to compete with the fees levied by PSCs for providing an equivalent PEC. Edinburgh Council sets the PEC fee at a level sufficient to recover the costs of running the PEC service, maintaining databases and investing in IT systems, but the costs of the information itself (kept on public registers) are met from general reserves. We checked all 32 Scottish LA websites and found that the median charge

---

<sup>2</sup> Local Government Group, Scottish Executive, 22 March 2005.

across Scotland for residential properties is £85, ranging from £50 in East Ayrshire to £150 in Comhairle Nan Eilean Sir.

- 1.14 A sample copy of a typical PEC form is at Annexe J. In the next section, we discuss the legal and regulatory framework relevant to the unrefined property information used to compile a PEC.

## **Searches of unrefined property information by the public and PSCs**

- 1.15 With one limited exception,<sup>3</sup> there are no categories of unrefined property information with associated statutory fees for access (like the Local Land Charges Register in England and Wales). Neither do there appear to be categories of unrefined property information only available to the public at the discretion of LAs (such as building regulations, highways to be adopted, road schemes and traffic schemes in England and Wales).
- 1.16 As far as we are aware, all the unrefined information typically used to compile a PEC is available for inspection by the public free of charge, save for statutory notices under the Housing Act 1987. LAs have to allow access to public registers by any member of the public, including representatives of PSCs. The conditions of access are set out in a variety of different statutes and associated regulations, statutory instruments and guidelines, depending on the type of unrefined information (see Table 2.2). In some cases the relevant statute states that the information holder must make the register 'available for inspection at reasonable times free of charge' (or wording to that effect). In others the statute either provides for a charging power which has not been exercised, or else does not provide for a charging power, which means effectively that LAs cannot charge.

---

<sup>3</sup> There is a fee payable to obtain information concerning any statutory notices recorded in the Register of Sasines or the Land Register against an unregistered or registered property.

- 1.17 According to our research, the unrefined property information used to compile a PEC and available to the public free of charge includes: listed buildings, conservation areas, structure and local plans, planning applications and simplified planning zones, notices and orders, tree preservation orders, natural heritage areas, scheduled ancient monuments, smoke control orders, building warrants and completion certificates, road and transport proposals and adoptions, sites of special scientific interest, areas of special advertisement control and contaminated land.
- 1.18 The costs of maintaining the statutory registers holding unrefined property information, and the costs of granting statutory public access, tend to be met out of each LA's general funds, although sometimes with a contribution from PEC revenues as well, as happens in Dundee Council, for example.
- 1.19 The next section discusses the key regulatory and legal instruments with relevance to property information in general, for both compiled property searches and the underlying unrefined information.

## **Generic statutes and regulations**

- 1.20 There are two pieces of legislation of relevance to property information held by LAs:
- the Freedom of Information (Scotland) Act 2002 ('FoISA'), and
  - the Environmental Information (Scotland) Regulations 2004 ('the EIS Regulations').
- 1.21 The Data Protection Act 1998 (DPA) and the Copyright, Designs and Patents Act 1988 (CDPA) also apply to property information in Scotland in the same way that they apply in England and Wales (see Annexe E). However, the protections for personal data in the DPA and the rights of copyright holders in the CDPA have not prevented Scottish LAs from making Scottish property information available.

## **Freedom of Information (Scotland) Act 2002<sup>4</sup>**

- 1.22 The FoISA, which came into force on 1st January 2005, gives a general right of access to information held by LAs. In principle, the FoISA applies to all LA property information not already encompassed by the DPA. It covers unrefined information used to compile the PEC form, even if the information is contained on a public or statutory register. The fact that such information is required under statute to be made 'available for inspection' is not enough to automatically exclude registers from the FoISA. So the FoISA, potentially at least, offers an entirely new access route for unrefined property information. As discussed below, however, the FoISA is unlikely to have any practical application to the property information held by LAs.
- 1.23 Legitimate reasons for not supplying information under the FoISA are where there is an exemption under Part 2. One of the relevant exemption categories is where the information is 'otherwise widely available', or available on a 'publication scheme', which the FoISA obliges public authorities to adopt and maintain. Unrefined property information, such as building warrants and planning applications, is already available: either on a PEC (for a fee), or under another statutory regime.<sup>5</sup> In our view, the majority, if not all, of the property information held by Scottish LAs is likely to be exempt from the FoISA, although case by case examination will be necessary. Our discussions with LAs indicate that they also interpret the FoISA in this way.

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

- 1.24 The EIS Regulations require public authorities to make available environmental information to applicants who request it. The definition of 'environmental information' is identical to that in the Environmental Information Regulations 2004 for England and Wales (see Annexe E). The

---

<sup>4</sup> The Freedom of Information Act 2000 also applies to Scotland, but only in relation to public bodies that are not devolved under the Scotland Act.

<sup>5</sup> For the two examples given above, the statutory regimes are the Building (Scotland) Act 2003 and Town and Country Planning (Scotland) Act 1997, respectively.

definition is very broad and is likely to encompass parts of the property information held by LAs.

- 1.25 The EIS Regulations provide that environmental information should be made available to an applicant that requests it in most cases within a period of 20 days. There are a number of exemptions from the requirement to make environmental information available. Again, these are similar to those in the regulations for England and Wales, though the wording suggests that in Scotland the exemptions are narrower, or will be more narrowly applied, than in England and Wales.
- 1.26 Given the 20 day period a Scottish public authority has to respond to a request for environmental information, it is doubtful whether the EIS Regulations will be used to access unrefined property information.

## 2 TABLES

**Table 2.1: Official search forms**

Search form	Access Fee	Who sets fees?	Relevant statutes, regulations and guidelines
PEC	<ul style="list-style-type: none"> <li>▪ Fees in 2005: range £50 - £150, averaging £85 (residential).</li> <li>▪ N.B. PEC content varies across LAs.</li> </ul>	Fees set at discretion of each LA.	<ul style="list-style-type: none"> <li>▪ No specific guidance from Scottish Executive: but LAs expected to '<i>maximise their fees and charges income in order to minimise their net revenue expenditure</i>' (subject to any regulations dictating whether or not services can be profit-making, and the needs and ability to pay of their customers).</li> <li>▪ Value Scotland audits accounts and conducts <i>ad hoc</i> value-for-money studies.</li> </ul>

**Table 2.2: Public access to unrefined property information**

Information type	Statutory duty to maintain a register or other duties	Access conditions	Relevant statutes, regulations and guidelines
Listed Buildings	Statutory obligation to keep copies of registers open to inspection at reasonable times free of charge	Free access, in statute.	<ul style="list-style-type: none"> <li>▪ Planning (Listed Buildings and Conservation Areas) Scotland 1997: Part I Ch1 s1 (listing); s2 (3) and (4), s34 (9) (enforcement notices).</li> <li>▪ LA copy kept under Housing (Scotland) Act 1987.</li> <li>▪ Free for public inspection at reasonable hours in convenient places; access via <a href="http://www.pastmap.org.uk">www.pastmap.org.uk</a></li> </ul>
Conservation Areas	Statutory obligation to compile a list containing particulars as the Secretary of State may determine of any part which has been designated as a conservation area.	Free access, in statute.	<ul style="list-style-type: none"> <li>▪ Planning (Listed Buildings and Conservation Areas) Scotland 1997: Part II s61 (Designation of Conservation Areas) and s62.</li> <li>▪ Free for public inspection at reasonable hours in convenient places.</li> </ul>

<b>Information type</b>	<b>Statutory duty to maintain a register or other duties</b>	<b>Access conditions</b>	<b>Relevant statutes, regulations and guidelines</b>
Structure and local plans	Statutory duty to make copies of plans open to inspection, no explicit reference to inspection being free of charge	Free access, the charging powers in section 21 not used.	<ul style="list-style-type: none"> <li>▪ Town and Country Planning (Scotland) Act 1997: Ch8 Part II s8 (4), s11-19 (especially s12(3)(a)).</li> <li>▪ Copies available for inspection at LA offices during reasonable office hours, or LA websites in some cases.</li> </ul>
Planning applications and simplified planning zones	Statutory duty to make copies of plans open to inspection, no explicit reference to inspection being free of charge	Free access, no charging powers.	<ul style="list-style-type: none"> <li>▪ Town and Country Planning (Scotland) Act 1997: Ch8 Part III s26-75 (especially s34 (1), s36(1) and (4)).</li> <li>▪ Public inspection of register at reasonable hours. May also be available electronically.</li> </ul>

<b>Information type</b>	<b>Statutory duty to maintain a register or other duties</b>	<b>Access conditions</b>	<b>Relevant statutes, regulations and guidelines</b>
Notices: enforcement, breach of condition, stop.	Statutory duty to maintain a register open no explicit reference to inspection being free of charge	Free access, no charging powers.	<ul style="list-style-type: none"> <li>▪ Town and Country Planning (Scotland) Act 1997: Ch8 Part IV s147(1) and (2); Part VI s123-158 (Enforcement); s189 (Compulsory purchase order).</li> <li>▪ Public inspection of register at reasonable hours. May also be available electronically.</li> </ul>
Tree preservation orders in Conservation Areas	Statutory duty to maintain a register which is to be open to public inspection free of charge	Free access, in statute.	<ul style="list-style-type: none"> <li>▪ Town and Country Planning (Scotland) Act 1997: Ch8 Part VII s175 (s172-175).</li> <li>▪ Available for public inspection free of charge at all reasonable hours and convenient places.</li> </ul>
Natural Heritage Areas	Statutory duty to maintain a register to be kept open to the public but there is no explicit reference to it being free of charge	Free access, charging powers not used.	<ul style="list-style-type: none"> <li>▪ Nature Conservation (Scotland) Act 2004 Sch 7 para 12</li> <li>▪ list made available for public inspection at reasonable hours and convenient places.</li> </ul>

<b>Information type</b>	<b>Statutory duty to maintain a register or other duties</b>	<b>Access conditions</b>	<b>Relevant statutes, regulations and guidelines</b>
Article 4 Direction Areas	No statutory register but Notices are to be made available for inspection	Free access, charging powers not used.	<ul style="list-style-type: none"> <li>▪ Town and Country Planning (General Permitted Development) (Scotland) Order 1992, Article 4 and 5.</li> </ul>
Scheduled ancient monuments	No statutory register but there is a duty to maintain a list of all monuments that are included in the schedule. No mention as to inspection being free of charge	Free access, charging powers not used.	<ul style="list-style-type: none"> <li>▪ Ancient Monuments and Archaeological Areas Act 1979: s1.</li> <li>▪ The Ancient Monuments (Class Consents) (Scotland) Order 1996.</li> <li>▪ Website access: <a href="http://www.pastmap.org.uk">www.pastmap.org.uk</a></li> </ul>
Smoke control	LA to keep a copy of any Orders open to public inspection at reasonable hours free of charge	Free access, in statute.	<ul style="list-style-type: none"> <li>▪ Clean Air Act 1993: Part III s18-22, Sch.1 (plus related Regulations and Orders under the Act).</li> <li>▪ Smoke control orders for public inspection free of charge at reasonable hours in convenient places.</li> <li>▪ Also available from <a href="http://www.uksmokecontrolareas.co.uk">www.uksmokecontrolareas.co.uk</a></li> </ul>

<b>Information type</b>	<b>Statutory duty to maintain a register or other duties</b>	<b>Access conditions</b>	<b>Relevant statutes, regulations and guidelines</b>
Building warrants and completion certificates (and Statutory Notices from 1/5/05)	Statutory duty for a register to be kept but there is no explicit reference to inspection being free of charge	Open access, charging powers not used.	<ul style="list-style-type: none"> <li>▪ Up to 30/4/05: Building (Procedure) (Scotland) Regulations 1981: reg.50.</li> <li>▪ From 1/5/05 (and also including Statutory Notices): <ul style="list-style-type: none"> <li>○ Building (Scotland) Act 2003: s24;</li> <li>○ Building (Procedure) (Scotland) Regulations 2004: regs.57 and 58.</li> </ul> </li> <li>▪ Available for inspection at all reasonable hours; available electronically from 1/5/05.</li> </ul>
Road / transport proposals and adoptions	Statutory obligation to maintain a list of public roads to be kept open to inspection free of charge at reasonable hours.	Free access, in statute.	<ul style="list-style-type: none"> <li>▪ Roads (Scotland) Act 1984: s1 (3)(list of publicly adopted roads).</li> <li>▪ Proposals contained in local transport strategies.</li> <li>▪ New Roads and Street works Act 1991: s112 (register).</li> </ul> <p>Available for inspection free of charge at all reasonable hours.</p>

Information type	Statutory duty to maintain a register or other duties	Access conditions	Relevant statutes, regulations and guidelines
Statutory Notices / Orders: planning, property, roads, environment, health and safety	Statutory requirement to maintain a register of orders pursuant to the Housing Act 1987 only. Such Notice will be recorded in the register of Sasines or the land register in the case of registered land. Access to these registers can only be obtained upon payment of a fee.	Access upon payment of a fee.	<ul style="list-style-type: none"> <li>▪ Civic Government (Scotland) Act 1982: s87(1) (statutory notice repairs); s87(3) (emergency notice repairs); s92(6).</li> <li>▪ Housing (Scotland) Act 1987: s88 (improvement order); s89 (statutory notice repairs); s90, s108, s114, s157, s160, s161, s162 and s166.</li> </ul>
Sites of Special Scientific Interest		Free access, charging powers provided in s22 (3) not used.	<ul style="list-style-type: none"> <li>▪ Nature Conservation (Scotland) Act 2004: Part 2, Ch1 (especially s22).</li> <li>▪ Notifications and notices available for inspection at the Registers of Scotland, free of charge and at all reasonable times.</li> <li>▪ Also available at Scottish Natural Heritage and in Local Plans of most LAs.</li> </ul>

<b>Information type</b>	<b>Statutory duty to maintain a register or other duties</b>	<b>Access conditions</b>	<b>Relevant statutes, regulations and guidelines</b>
Areas of special advertisement control	There is a statutory obligation pursuant to Town and Country Planning (Control of Advertisements) (Scotland) Regulations 1984 Art 11 (4) for copies of a Direction made under the regulations to be kept open to inspection	Free access, charging powers not used.	<ul style="list-style-type: none"> <li>▪ Town and Country Planning (Scotland) Act 1997: Ch8 Part VII Chapter III s182-187.</li> <li>▪ Town and Country Planning (Control of Advertisements) (Scotland) Amendment Regulations 1992.</li> </ul> Town and Country Planning (Control of Advertisements) (Scotland) Regulations 1984 Art 11 (4)
Contaminated land	Statutory obligation to maintain a register which is to be open to public inspection free of charge	Free access, in statute.	<ul style="list-style-type: none"> <li>▪ Environmental Protection Act 1990: Part IIA s78R(1); s78B(3); s78G(3).</li> <li>▪ Contaminated Land (Scotland) Regulations 2000: Article 14.</li> </ul>

**Table 2.3: Generic statutes, regulations and guidelines**

Statute, regulation or guideline	Scope	Key features
Freedom of Information (Scotland) Act 2002 (FoISA)	<ul style="list-style-type: none"> <li>▪ In principle, covers all LAs and all LA property information.</li> </ul>	<ul style="list-style-type: none"> <li>▪ LAs may claim exemption from FoISA 2002 for information that is already available whether on a PEC, a publication scheme, or because statute requires it to be made available.</li> <li>▪ FoISA 2002 mutually exclusive with Data Protection Act 1998.</li> </ul>
Environment Information (Scotland) Regulations 2004  SI 2004/520	<ul style="list-style-type: none"> <li>▪ All environmental information, as widely defined</li> </ul>	<ul style="list-style-type: none"> <li>▪ LAs must make available on request environmental information that they hold. But they have up to 20 days to comply with this obligation, and there are a number of exemptions.</li> </ul>