Passage of the

Freedom of Information (Amendment) (Scotland) Bill 2012

SPPB182
Passage of the

Freedom of Information (Amendment) (Scotland) Bill 2012

SP Bill 14 (Session 3), subsequently 2013 asp 2

SPPB 182
# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td></td>
</tr>
<tr>
<td><strong>Introduction of the Bill</strong></td>
<td>1</td>
</tr>
<tr>
<td>Bill (As Introduced) (SP Bill 14)</td>
<td></td>
</tr>
<tr>
<td>Explanatory Notes (and other accompanying documents) (SP Bill 14-EN)</td>
<td>7</td>
</tr>
<tr>
<td>Policy Memorandum (SP Bill 14-PM)</td>
<td>14</td>
</tr>
<tr>
<td>Delegated Powers Memorandum (SP Bill 14-DPM)</td>
<td>23</td>
</tr>
<tr>
<td><strong>Stage 1</strong></td>
<td>27</td>
</tr>
<tr>
<td>Stage 1 Report, Finance Committee</td>
<td></td>
</tr>
<tr>
<td>Annexe A: Report by the Subordinate Legislation Committee</td>
<td></td>
</tr>
<tr>
<td>Annexe B: Extracts from the minutes of the Finance Committee</td>
<td></td>
</tr>
<tr>
<td>Annexe C: Oral evidence to the Finance Committee</td>
<td></td>
</tr>
<tr>
<td>Annexe D: Written evidence to the Finance Committee and additional correspondence</td>
<td></td>
</tr>
<tr>
<td>Extract from the Minutes of the Parliament, 15 November 2012</td>
<td>180</td>
</tr>
<tr>
<td>Official Report, Meeting of the Parliament, 15 November 2012</td>
<td>181</td>
</tr>
<tr>
<td><strong>Before Stage 2</strong></td>
<td>204</td>
</tr>
<tr>
<td>Correspondence from Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities with Scottish Government response to the Stage 1 Report, 27 November 2012</td>
<td></td>
</tr>
<tr>
<td>Correspondence from the Scottish Information Commissioner to the Finance Committee with briefing on proposed Stage 2 amendments, 3 December 2012</td>
<td>208</td>
</tr>
<tr>
<td><strong>Stage 2</strong></td>
<td>213</td>
</tr>
<tr>
<td>Marshalled List of Amendments for Stage 2 (SP Bill 14-ML)</td>
<td></td>
</tr>
<tr>
<td>Groupings of Amendments for Stage 2 (SP Bill 14-G)</td>
<td>219</td>
</tr>
<tr>
<td>Extract from the Minutes, Finance Committee, 5 December 2012</td>
<td>220</td>
</tr>
<tr>
<td>Official Report, Finance Committee, 5 December 2012</td>
<td>221</td>
</tr>
<tr>
<td>Bill (As Amended at Stage 2) (SP Bill 14A)</td>
<td>235</td>
</tr>
<tr>
<td>Revised Explanatory Notes (SP Bill 14A-EN)</td>
<td>243</td>
</tr>
<tr>
<td>Supplementary Delegated Powers Memorandum (SP Bill 14A-DPM)</td>
<td>247</td>
</tr>
<tr>
<td><strong>After Stage 2</strong></td>
<td>249</td>
</tr>
<tr>
<td>Report on the Freedom of Information (Scotland) Bill as amended at Stage 2, Subordinate Legislation Committee</td>
<td></td>
</tr>
<tr>
<td><strong>Stage 3</strong></td>
<td>255</td>
</tr>
<tr>
<td>Marshalled List of Amendments selected for Stage 3 (SP Bill 14A-ML)</td>
<td></td>
</tr>
</tbody>
</table>
Groupings of Amendments for Stage 3 (SP Bill 14A-G) 259
Extract from the Minutes of the Parliament, 16 January 2013 261
Official Report, Meeting of the Parliament, 16 January 2013 263

Bill (As Passed) (SP Bill 14B) 297
Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:
• Introduction, followed by publication of the Bill and its accompanying documents;
• Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

The Finance Committee’s Stage 1 Report did not include the oral and written evidence received by the Committee. This material was originally published on the web only, and is now included in full in this volume.

The Subordinate Legislation Committee’s report at Stage 1 is included as Annexe A of the Finance Committee’s report. The Subordinate Legislation Committee did not take oral evidence on the Bill and agreed its report without debate. No extracts from the minutes or the Official Report of the relevant meeting of the Committee are, therefore, included in this volume.

The Subordinate Legislation Committee considered the delegated powers in the Bill after Stage 2, and agreed its report without debate. No extracts from the minutes or the Official Report of the relevant meeting of the Committee are, therefore, included in this volume.
Rule 9.12.2 of the Parliament’s Standing Orders requires the Presiding Officer to determine whether each Bill As Introduced requires a financial resolution. In the case of this Bill, the Presiding Officer determined that the Bill did not require a resolution.

The rules for how proceedings on amendments at Stages 2 and 3 are conducted where a Bill As Introduced does not have a financial resolution are set out in Rule 9.12 of the Parliament’s Standing Orders. This Rule is further explained by A Guide to Rule 9.12 (Financial Resolutions), which is a supplement to the Guidance on Public Bills and is available on the Parliament’s web-site.

In the case of the Freedom of Information (Amendment) (Scotland) Bill, the Presiding Officer determined that amendment 9, lodged by Elaine Murray at Stage 2, would cause the Bill to require a financial resolution. No motion for a resolution was lodged. In accordance with Rule 9.12.6(a), therefore, amendment 9 was debated but the question on the amendment could not be put.

The Presiding Officer also determined that an amendment lodged by Elaine Murray at Stage 3 would cause the Bill to require a financial resolution. As no motion for such a resolution was lodged, in accordance with Rule 9.12.6B no proceedings could be taken on the amendment.
# Freedom of Information (Amendment) (Scotland) Bill

[AS INTRODUCED]

## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Amendments</th>
<th>General</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Royal exemption</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Refusal notice</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Accessible information</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Historical periods</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Time limit for proceedings</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>References to the FOI Act</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Commencement</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Short title</td>
<td></td>
</tr>
</tbody>
</table>

**Amendments**

**1 Royal exemption**

(1) Section 2 (effect of exemptions) of the FOI Act is amended as follows.

(2) In subsection (2)—

(a) the word “and” immediately preceding paragraph (e) is repealed,

(b) after paragraph (e) there is inserted “; and

(f) section 41(a) so far as relating to communications with—

(i) Her Majesty,

(ii) the heir to, or the person who is for the time being second in line of succession to, the Throne, or

(iii) a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne.”.

(3) After subsection (2) there is inserted——

“(3) For the purposes of subsection (2)(f), communications made or received on behalf of a particular member of the Royal Family are to be regarded as communications with that member.”.

**2 Refusal notice**

In section 18 (further provision as respects responses to request) of the FOI Act, in subsection (1), after the words “sections 28 to 35,” there is inserted “38,”.

**3 Accessible information**

In section 25 (information otherwise accessible) of the FOI Act, for subsection (3) there is substituted—
“(3) For the purposes of subsection (1), information is to be taken to be reasonably obtainable if—

(a) it is available—

(i) on request from the Scottish public authority which holds it, and

(ii) in accordance with the authority’s publication scheme, and

(b) any associated payment required by the authority is specified in or determined under the scheme.”.

4 Historical periods

In section 59 (power to vary periods mentioned in sections 57 and 58) of the FOI Act, after subsection (1) there is inserted—

“(1A) An order under subsection (1) may make different provision for—

(a) records of different descriptions,

(b) exemptions of different kinds,

(c) different purposes in other respects.”.

5 Time limit for proceedings

After section 65 of the FOI Act there is inserted—

“65A Time limit for proceedings

(1) Proceedings for an offence under section 65(1) may be commenced within the period of 6 months beginning with the date on which evidence that the prosecutor believes is sufficient to justify the proceedings came to the prosecutor’s knowledge.

(2) No such proceedings may be commenced more than 3 years—

(a) after the commission of the offence, or

(b) in the case of a continuous contravention, after the last date on which the offence was committed.

(3) In the case of a continuous contravention, the complaint may specify the entire period during which the offence was committed.

(4) A certificate signed by or on behalf of the prosecutor stating the date on which the evidence referred to in subsection (1) came to the prosecutor’s knowledge is conclusive as to that fact (and such a certificate purporting to be so signed is to be regarded as being so signed unless the contrary is proved).

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

6 References to the FOI Act

In this Act, “the FOI Act” means the Freedom of Information (Scotland) Act 2002.
7 Commencement
(1) Section 6, this section and section 8 come into force on the day after Royal Assent.
(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.
(3) An order under subsection (2) may include transitional, transitory or saving provision.

8 Short title
The short title of this Act is the Freedom of Information (Amendment) (Scotland) Act 2012.
Freedom of Information (Amendment) (Scotland) Bill

[AS INTRODUCED]


Introduced by: Bruce Crawford
On: 30 May 2012
Supported By: Brian Adam
Bill type: Executive Bill
These documents relate to the Freedom of Information (Amendment) (Scotland) Bill (SP Bill 14) as introduced in the Scottish Parliament on 30 May 2012.

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Freedom of Information (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 30 May 2012:
   - Explanatory Notes;
   - a Financial Memorandum;
   - Scottish Government Statement on legislative competence; and
   - the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 14–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND


5. The 2002 Act has been in force since 1 January 2005. Two areas of the 2002 Act have been identified as requiring amendment which can only be achieved through primary legislation.

6. The two areas concern:
   - the order-making power relating to the definition of what constitutes a ‘historical record’ and the lifespans of certain exemptions, and
   - the ability to prosecute in the event of information not being disclosed due to, for example, alteration, destruction or concealment.

7. The Bill also seeks to make similar amendment to the 2002 Act in respect of the exemption relating to communications with Her Majesty as has been made to the equivalent section of the UK Freedom of Information Act 2000 (‘the 2000 Act’).

8. In addition, the Bill proposes two minor amendments intended to add clarity and strength to the 2002 Act. Both these amendments arise from the Special Report to the Scottish Parliament submitted by the then Scottish Information Commissioner in January 2012.

THE BILL – SECTIONS

Section 1 – Royal exemptions

9. Section 2 of the 2002 Act sets out those exemptions which are ‘absolute’. This means there is no requirement to consider the public interest when applying the exemption.

10. The Constitutional Reform and Governance Act 2010 (CRAG) introduced amendments subdividing section 37(1)(a) of the 2000 Act (the UK equivalent of section 41(a) of the 2002 Act). These amendments included making separate reference to communications with the

1 http://www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReport2012.asp
These documents relate to the Freedom of Information (Amendment) (Scotland) Bill (SP Bill 14)
as introduced in the Scottish Parliament on 30 May 2012

Sovereign; communications with the heir to, or the person who is for the time being second in line of succession to, the Throne; and communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne.

11. The Bill seeks to replicate the effect of the CRAG amendments by specifying that certain information falling within the section 41(a) exemption (as set out in new section 2(2)(f) of the 2002 Act, inserted by section 1(2)(b) of the Bill) no longer requires to be assessed in terms of the public interest. Therefore, when applying the section 41(a) exemption to information falling within new section 2(2)(f), the public interest in whether or not to release does not need to be considered.

12. The Bill further reflects the relevant CRAG amendments by clarifying (as set out in new section 2(3) of the 2002 Act, inserted by section 1(3) of the Bill) that communications made or received on behalf of a particular member of the Royal Family are regarded as being communications with that member – and therefore afforded the same level of exemption.

13. Communications made with the Royal Family and the Royal Household (other than those on behalf of Her Majesty, the heir to, or the person who is for the time being second in line of succession to, the Throne, and a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne) continue to be subject to assessment against the public interest in whether or not to release them.

Section 2 – Refusal notice

14. Section 18 of the 2002 Act sets out that a Scottish public authority can issue a refusal notice in responding to a request for information, if to reveal whether the information existed or was held would be contrary to the public interest. Such a response, usually referred to as ‘neither confirm nor deny’ can only be issued in relation to certain exemptions which would apply to the information, if held.

15. The Bill adds section 38 (which provides exemption for personal information) to those exemptions listed at section 18 of the 2002 Act, enabling a ‘neither confirm nor deny’ response to be issued where a request concerns personal information. The amendment also brings the Bill into line with the Environmental Information (Scotland) Regulations 2004 which already provide for a ‘neither confirm nor deny’ response to be issued in respect of personal information.

Section 3 – Accessible information

16. Section 25 of the 2002 Act concerns information which is otherwise accessible. All public authorities subject to the 2002 Act are required to satisfy the requirement to adopt a publication scheme. The Bill clarifies that any information made available under an approved publication scheme is exempt and does not need to be provided to the applicant.

Section 4 – Historical periods

17. Section 57(1) of the 2002 Act defines the period of time after which a record becomes a ‘historical record’. Section 58 of the 2002 Act identifies those exemptions which are time...
limited, including, at section 58(1), those exemptions which cannot be applied to information contained in a ‘historical record’.

18. Section 59 of the 2002 Act contains order-making powers to reduce the period of time after which a record becomes ‘historical’ (thereby reducing the period of time those exemptions mentioned at section 58(1) can be applied) and also the lifespans of those exemptions mentioned at section 58(2). At present, an order amending the specified time period at section 57(1) would affect all those exemptions mentioned at section 58(1) – it is not possible to reduce the lifespan of just some of the exemptions mentioned at section 58(1).

19. The Bill allows separate provision to be made for individual exemptions and records of certain descriptions, as specified in any order. The enhanced order-making power also applies to those exemptions coming under section 58(2) of the 2002 Act.

Section 5 - Time limit for proceedings

20. Section 65 of the 2002 Act sets out that a person who, with the intention of preventing disclosure of information subject to a request, alters, defaces, blocks, erases, destroys or conceals the information is guilty of an offence. An offence under section 65 is a summary only offence with a fine not exceeding, at current levels, £5,000. As a summary only offence, any prosecution must be brought within six months of the commission of the offence, in accordance with section 136 of the Criminal Procedure (Scotland) Act 1995.

21. The Bill amends the 2002 Act by specifying that the time period within which a prosecution must be brought is six months from the date on which evidence, sufficient in the opinion of the prosecutor to justify proceedings, comes to his or her knowledge. No proceedings can be commenced more than three years after the commission of the offence.

Section 7 – Commencement

22. This section brings into force sections 6 to 8 on the day after Royal Assent. Other sections come into force on such a day as Scottish Ministers may by order determine.

FINANCIAL MEMORANDUM

INTRODUCTION

23. This document relates to the Freedom of Information (Amendment) (Scotland) Bill (‘the Bill’) introduced in the Scottish Parliament on 30 May 2012. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

24. The provisions in the Bill are of a largely technical nature.
25. The Bill is intended to modify, improve and strengthen existing measures in the Freedom of Information (Scotland) Act 2002 (‘the 2002 Act’).

**COSTS ON THE SCOTTISH ADMINISTRATION**

26. The changes set out in the Bill will have no cost implications for the Scottish Administration. In respect of the amendment by section 4 of the Bill of the order-making power in section 59 of the 2002 Act concerning historical records, following enactment, an order will be brought forward formally setting out revised lifespans for certain exemptions. The order will be subject to appropriate consultation including an assessment of the resource implications of administering revised lifespans.

27. While the lifespans of certain exemptions have yet to be reduced as a matter of law, from 2009 it has been Scottish Government’s policy to open historical files at 15 years (rather than at 30). This has resulted in the National Records of Scotland (NRS) making over 12,000 files publicly available earlier than would ordinarily have been the case.

28. The costs involved in organising the early release of these files, which were met from existing NRS budgets, are estimated to have been in the region of £60-65,000 over a two year period. Though as yet not quantified, it would be anticipated that the earlier release of information would over time reduce the number of requests (as more information would be publicly available).

29. Information requests are estimated to cost the Scottish Government £2362 each (considerably more if the request continues to review and appeal stages). However, it is premature to identify long term savings from the Scottish Government’s policy of early release of information.

30. In respect of the amendment of the time period for bringing a prosecution under section 65 of the 2002 Act, it should be noted that no prosecutions have yet been brought. In the event of a prosecution, costs would be borne by the Scottish Court Service (part of the Scottish Administration) and the relevant public authority or individual. In the event of the offence coming to light during an investigation by the Scottish Information Commissioner it could also be expected that there would be cost implications for that authority.

31. Given prosecution is the role of the Scottish Court Service it is anticipated that any relevant costs would be borne as part of existing budgets and should not be seen as an additional cost on top of standard financial requirements.

32. In the absence of evidence from section 65 prosecution figures, estimating potential costs involved are taken from two reports into the costs of the Scottish Criminal Justice System. The first, published in 2008, suggests a maximum figure of about £2,200 (though the data is from

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2 http://www.scotland.gov.uk/About/FOI/FOICostReport
These documents relate to the Freedom of Information (Amendment) (Scotland) Bill (SP Bill 14) as introduced in the Scottish Parliament on 30 May 2012

2005/06\(^3\). This is though consistent with an Audit Scotland report published in September 2011 which suggests a figure of £2,100\(^4\).

33. The cost of court proceedings will inevitably vary depending upon the complexity of each case. Duration will also vary depending on the point at which the case is concluded. It should be noted that the 2008 report cited above shows that only 7% of cases concluded at evidence led trial (resulting in the highest level of potential cost) whereas 45% of cases were resolved at the first stage of proceedings (with costs of about £250).

34. The 2008 report also provides separate figures for criminal legal aid costs including in respect of Sheriff Court summary cases. The figures suggest an average cost, in cases where legal aid is paid, of £687.

COSTS ON LOCAL AUTHORITIES

35. As with the Scottish Administration above, the technical changes to the 2002 Act will have no financial implications for local authorities. In the event of an order being brought forward under an amended section 59, the views of local authorities would be invited providing an opportunity for them to set out any anticipated costs incurred relating to revised lifespans. However, it would be anticipated that any costs incurred by local authorities would be met from existing budgets. Equally, with respect to section 65, in the event of a local authority being subject to prosecution it would be expected that relevant costs would be met from existing budgets.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

36. The technical changes in the Bill have no implications for other bodies, individuals or businesses. However, any subsequent order brought forward under amended order-making powers would potentially affect all public authorities subject to the 2002 Act – particularly those holding records of significant longevity.

37. In the event of an order being brought forward setting out revised lifespans for certain exemptions, consultation would provide other bodies etc. with an opportunity to assess anticipated costs relating to revised lifespans. It should also be noted that the Office of the Scottish Information Commissioner does not anticipate any reduction in the number of applications as the result of a subsequent order reducing the lifespan of certain exemptions.

38. It would be a matter for individual authorities to decide whether to proactively release information if exemptions no longer applied - or to await a request for the information itself. However, as noted above in respect of NRS, in the event of authorities proactively releasing information in line with revised lifespans, costs would be expected to be borne from existing budgets.


\(^4\) http://www.audit-scotland.gov.uk/utilities/search_report.php?id=1706
39. As noted earlier, the costs of bringing a prosecution in terms of section 65 would primarily fall on the Scottish Court Service and the relevant public authority or individual. However, it could also be expected that there would be limited cost implications for the Scottish Information Commissioner in the event of the offence being discovered during an investigation by the Commissioner’s office.

40. As the former Scottish Information Commissioner notes in his consultation response, section 65 has been a factor in only a very small number of cases – in none of which did time allow for prosecution to be brought. Any resources involved in pursuing potential prosecution would be an integral part of the costs of investigation – with such costs expected to be met from existing budgets.

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**SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE**

41. On 30 May 2012, the Cabinet Secretary for Parliamentary Business and Government Strategy (Bruce Crawford MSP) made the following statement:

“In my view, the provisions of the Freedom of Information (Amendment) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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**PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE**

42. On 29 May 2012, the Presiding Officer (Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Freedom of Information (Amendment) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Freedom of Information (Amendment) (Scotland) Bill (‘the Bill’) introduced in the Scottish Parliament on 30 May 2012. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 14–EN.

OVERVIEW OF THE BILL

2. The Freedom of Information (Scotland) Act 2002 (‘the 2002 Act’) provides a statutory right of access to information held by Scottish public authorities. The legislation is widely recognised as playing a significant part in making Scotland a more open, transparent and accountable society and as having been successfully implemented since coming into force in 2005.

3. The Scottish Government supports freedom of information as an essential part of open democratic government and responsive public services in providing significant and important rights to access information. The Six Principles of Freedom of Information¹ published in 2007 set out the Scottish Government’s approach to freedom of information and working with the 2002 Act. One of these principles commits the Scottish Government to adjusting the regime where it is necessary and sensible to do so. The Bill fulfils this objective by proposing limited modification to the 2002 Act intended to add strength and clarity and improve its operation.

4. The decision to bring forward a Bill intended to improve the operation of the 2002 Act was made following the identification of two weaknesses in the legislation which could only be remedied by amendment. The Bill also seeks to mirror recent changes to UK Freedom of Information legislation to ensure consistency of approach to information relating to communications with Her Majesty and others, as well as making two further minor changes improving effectiveness.

5. The key elements of the Bill:

¹ http://www.scotland.gov.uk/About/FOI/6principles
reflect amendments recently made to the UK Freedom of Information Act 2000 in respect of the exemption relating to communications with Her Majesty, with other members of the Royal Family or with the Royal Household, to ensure such communications remain suitably protected;

introduce greater flexibility in the order-making power relating to the definition of an ‘historical record’ and the lifespans of certain exemptions, with the intention of enabling a draft order to be brought forward reducing the lifespan of certain exemptions thereby making more information publicly available earlier in the interests of enhanced public sector openness, and

strengthen the ability to bring a prosecution in the event of records subject to a request being altered, defaced, blocked, erased, destroyed, or concealed with the intention of preventing disclosure.

POLICY OBJECTIVES OF THE BILL

Communications with Her Majesty etc.

6. The Constitutional Reform and Governance Act 2010 (CRAG)\(^2\) has introduced various changes to the United Kingdom’s Freedom of Information Act 2000 (‘the 2000 Act’)\(^3\). These changes include amendment to section 37(1)(a) of the 2000 Act which concerns communications with Her Majesty, with other members of the Royal Family or with the Royal Household.

7. Amendment introduced by CRAG subdivides section 37 to make separate reference to communications with the Sovereign, communications with the heir and second in line of succession to the Throne, communications with those acceding to the Throne or becoming heir or second in line to the Throne, communications with other members of the Royal Family, and communications with the Royal Household.

8. In respect of communications with the Sovereign, communications with the heir and second in line of succession to the Throne, as well as communications with those acceding to the Throne or becoming heir or second in line to the Throne, the exemption is made ‘absolute’ and there is no requirement to consider the public interest.

9. The equivalent section of the 2002 Act is 41(a) which, similarly, exempts information relating to communications with Her Majesty, with other members of the Royal Family or with the Royal Household. The Scottish Government considers it appropriate to broadly mirror the amendments introduced to the UK legislation in the interests of a common approach throughout the UK to the treatment of information relating to Her Majesty.

10. Given the position of Her Majesty as shared Head of State, the Scottish Government would wish to minimise the possibility of information relating to communications with Her Majesty and others becoming available under Scottish legislation while exempt under UK legislation and thereby compromising the position of Her Majesty and others.

\(^3\) [http://www.legislation.gov.uk/ukpga/2000/36/contents]
11. The Bill therefore proposes to make communications with Her Majesty, the heir to, or the person who is for the time being second in line of succession to, the Throne; or a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne, subject to absolute exemption. This necessitates amendment to section 2(2) of the 2002 Act which lists those exemptions (or part of exemptions) where the public interest need not be considered. The Bill also clarifies, in line with CRAG, that communications made or received on behalf of a particular member of the Royal Family are regarded as being communications with that member - and therefore afforded the same level of exemption.

12. In the event of enactment, it is the intention of the Scottish Government to amend the lifespan of the section 41(a) exemption, by order under section 59(1) of the 2002 Act, to mirror changes also introduced by CRAG. If agreed, information exempted under section 41(a) would remain withheld for a period of five years beginning with the date of the ‘relevant death’ and the end of the period of twenty years from the date the record containing the information was created, whichever was the later. The relevant death being, as applicable, that of Her Majesty, the heir or the second in line to the Throne, another member of the Royal Family, or, in respect of communications with the Royal Household, the death of the Sovereign reigning when the record containing the information was created.

Alternative approaches

13. Few responses commented specifically on this amendment. While it was acknowledged that a common approach across the UK was sensible there was also criticism of the intention to remove the requirement to consider the public interest when applying certain elements of section 41(a) and that the current arrangements afforded sufficient protection.

14. However, the Scottish Government considers that in the interests of ensuring consistency across the UK in the handling of communications with Her Majesty and others the Scottish legislation should be amended to reflect changes to the UK legislation. As previously noted, the Scottish Government does not wish to compromise the position of Her Majesty whereby information might be released under the 2002 Act but exempted under the 2000 Act.

Further provision as respects responses to request

15. Section 18 of the 2002 Act sets out that a Scottish public authority can issue a refusal notice in responding to a request for information if to reveal whether the information existed or was held would be contrary to the public interest. However, such a response, usually referred to as ‘neither confirm nor deny’ can only be issued in the event of certain exemptions applying – were the information held.

16. At present, it is not possible to respond in terms of ‘neither confirm nor deny’ where personal information is concerned. In the event of a request being received for information which potentially would be exempt in terms of section 38 of the 2002 Act (personal information), it would not therefore be possible to respond in terms of section 18. A response would therefore make it clear whether someone’s personal information was held or not.

17. The Bill proposes to add section 38 to those exemptions listed at section 18 of the 2002 Act, enabling a ‘neither confirm nor deny’ response to be issued where a request concerns
personal information. The addition of section 38 to those exemptions listed at section 18 provides additional protection for personal information. The amendment also brings the Bill into line with the Environmental Information (Scotland) Regulations 2004 which already provide for a ‘neither confirm nor deny’ response to be issued in respect of personal information.

Information otherwise accessible

18. Section 25 of the 2002 Act concerns information which is otherwise accessible – for example information that is already in the public domain. In the event of requested information being available it is not necessary to provide it and the request can be refused.

19. However, simply because it is reasonably obtainable does not ensure that the exemption can be applied. As set out at section 25(3) of the 2002 Act, to be reasonably obtainable it must be made available in accordance with the authority’s publication scheme – which sets out all the information which is proactively made available by the relevant public authority.

20. It has long been considered that the wording of section 25(3) lacks clarity. The point is reflected in an Opinion of the Court of Session\(^4\) and was also identified by the former Information Commissioner in his Special Report to the Scottish Parliament.

21. The Bill therefore proposes to improve the 2002 Act by making it clearer that any information made available in line with an approved publication scheme is exempt and does not, therefore, need to be provided to the applicant.

Historical records

22. Section 57(1) of the 2002 Act provides that a record becomes an ‘historical record’ after a period of 30 years. Section 58(1) then sets out those exemptions which cannot apply once a record has become an ‘historical record’, that is to say which exemptions ‘fall away’ after 30 years. The relevant exemptions are listed below at paragraph 39 and include protection for information relating to the formulation of Scottish Administration policy and the effective conduct of public affairs.

23. Under section 59(1) of the 2002 Act Scottish Ministers have the power to amend by order the definition of ‘historical record’ by reducing the 30-year time period. Any such reduction would automatically reduce the lifespan of the ‘30-year’ exemptions. The 60 and 100 year time limits on those exemptions set out at section 58(2), which include Her Majesty’s prerogative of honour, law enforcement and elements of those exemptions concerning investigations and personal information, can also be reduced by order.

24. The Scottish Government is committed to openness and transparency and as part of this commitment since 2009 has been opening its archived files at 15 rather than 30 years (unless longer closure periods apply, for example for personal data and national security). However, it is recognised that 15 years might not be an appropriate lifespan for all public authorities given the large variety of information held across the public sector.

25. Consultation in 2009 on reducing the period of time at which a record is defined as being ‘historical’ raised concerns about reducing the lifespan for certain exemptions and types of record. For example, section 33(1) (which provides exemption for trade secrets and commercial interests) and section 36 (which provides exemption for information supplied in confidence). Some concerns have been raised in respect of the earlier release of (for example) social work records, adoption records and information bequeathed for research purposes. However the order-making powers contained in section 59(1) of the 2002 Act cannot be used selectively for individual ‘30-year’ exemptions. An order under section 59(1) would therefore affect the lifespan of all those exemptions at section 58(1).

26. In order to accommodate this need for a flexible approach to reducing the lifespan of certain exemptions, as evidenced following consultation, the Bill allows for different arrangements in terms of lifespan for individual exemptions and for particular records, as defined in an order. This flexibility also extends to those longer-term exemptions at section 58(2) of the 2002 Act. The order-making power can only be used to reduce the relevant lifespan.

27. It is the intention of the Scottish Government, in the event of enactment, to bring forward an order to put into effect the more flexible powers proposed. The order will be subject to appropriate consultation but with the key aim of enabling as much information to be placed in the public domain as early as practicably possible.

Alternative approaches

28. Almost all responses received to the consultation on the draft Bill were supportive of the amendment introducing the flexibility to consider the lifespan of individual exemptions and particular records, especially as a means of increasing openness and transparency. A small number of responses reflected concern about a more flexible approach to lifespans increasing complexity and the need for clarity with the intended order. Consultation on the draft order, which will set out the Scottish Government’s own proposals, will provide greater opportunity to explore issues of concern including those around increased complexity.

29. As a preliminary stage of preparation for the anticipated order the consultation paper invited views on the appropriate lifespans of certain exemptions, primarily those at sections 33(1) – trade secrets and commercial interests, 36 – confidentiality, and 41(a) – communications with Her Majesty etc. The consultation paper set out the Scottish Government’s preliminary view that the lifespan of section 33(1) should be reduced to 15 years, that section 36 should remain at 30 years and that section 41(a) should mirror those changes introduced by the Constitutional Reform and Governance Act 2010 (CRAG). However, as stated, the order will be subject to consultation. Any order made under section 59(1) would be subject to affirmative procedure and must therefore be approved by resolution of the Scottish Parliament.

Offence of altering etc. records with intent to prevent disclosure

30. It is an offence under section 65 of the 2002 Act to alter, deface, block, erase, destroy or conceal a record held by a public authority and subject to an information request, with intent to prevent disclosure. Such an offence, which is summary-only, must be prosecuted within six
months of commission due to section 136(1) of the Criminal Procedure (Scotland) Act 1995\(^5\) which specifies the time limit for certain offences.

31. However, in practice, due to the timescales set out in the 2002 Act, it is potentially ten months from the commission of the offence before an application for a decision is made to the Commissioner at appeal stage (allowing for the maximum number of days to process a request, ask for a review, process a review and then apply to the Commissioner for a decision). Only then can an investigation commence into how the request has been handled. Given this potential timescale, even if evidence of an offence is found, a prosecution could not go ahead.

32. It would seem essential that an appropriate period of time is available in order for a prosecution to be brought in the event of there being sufficient evidence of an offence being committed. The Scottish Government considers that the alteration, destruction or concealment of information with intent to prevent disclosure is a serious offence and that the power to prosecute should be made fully effective.

33. While six months is the default time period for prosecuting a summary-only offence, the Criminal Procedure (Scotland) Act 1995 contains provision for specifying an alternative time period. The draft Bill therefore proposes that a prosecution should be commenced at any time within six months of sufficient evidence to justify proceedings coming to the knowledge of the prosecutor, with no proceedings being commenced more than three years after the commission of the offence.

**Alternative approaches**

34. The consultation version of the Bill proposed the time limit for prosecution be extended to twelve months from six. However, while all consultation responses agreed that the time period should be extended in order to be fully effective, a number of respondees commented that 12 months would not necessarily be sufficient to ensure the effectiveness of this section.

35. For example, the response from the then Scottish Information Commissioner argued that even at twelve months there might not be enough time to gather evidence relating to the alleged offence before it can be determined whether the evidence is sufficient for a referral for prosecution to be made. Other consultation responses had similar concerns.

36. The proposal of the former Commissioner, also reflected by others, was that summary proceedings for an offence under section 65 should be commenced at any time within the period of six months from the date on which evidence, sufficient in the opinion of the prosecutor to justify proceedings, came to his/her knowledge, with no proceedings being commenced more than eighteen months after the commission of the offence. There is considerable precedent for a variation of this kind in other legislation, though most commonly with a ‘long stop’ of three years.

37. The Scottish Government takes its obligations under the 2002 Act very seriously. It is clearly important that section 65 operates as effectively as possible and that the current weakness

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in terms of adequate timescale is rectified. The Scottish Government is persuaded by arguments favouring an alternative approach to section 65 from that originally proposed. The Bill as introduced reflects this revised approach proposing that prosecution can be brought within six months of sufficient evidence coming to the knowledge of a prosecutor but that no proceedings can be commenced more than three years after the commission of the offence.

CONSULTATION

38. The Scottish Government is committed to operating as openly as possible in the interests of promoting transparent and accountable public administration. In 2009 the Scottish Government published its Improving Openness consultation inviting comment on proposals to reduce the period of time after which certain exemptions could not be applied. In consulting on such a reduction, the Scottish Government considered that since freedom of information legislation had come into force there had been a shift in culture among public authorities towards greater openness and accountability. Moreover, public expectations of being able to access more information earlier had significantly increased.

39. Consultation was on the basis of reducing the lifespan of the ‘30-year’ exemptions at section 58(1) of the 2002 Act to 15 years. The relevant exemptions are:

- Section 28 Relations within the UK
- Section 29 Formulation of Scottish Administration policy
- Section 30 Prejudice to the effective conduct of public affairs
- Section 33(1) Commercial interests and the economy
- Section 36 Confidentiality
- Section 37 Court records
- Section 40 Audit functions
- Section 41(a) Communications with Her Majesty, other members of the Royal Family, or with the Royal Household.

40. Reducing the period of time information can be withheld potentially allows earlier access to information held by Scottish public authorities subject to the 2002 Act – thereby promoting openness, accountability and transparency across the public sector. Indeed, from 2009 it has been Scottish Government policy to open preserved files at 15 years rather than 30 years resulting in over 12,000 files being placed in the public domain by the National Records of Scotland earlier than scheduled. More information is therefore available, for example concerning UK relations, Scottish Administration policy, commercial interests and confidentiality.

41. However, the Scottish Government accepts that this approach of early release may not be appropriate for all public authorities given the variety of information held by different bodies, including local authorities, the police, Health Boards and educational institutions. And, while

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6 http://www.scotland.gov.uk/Publications/2009/07/01094653/0
responses to the Improving Openness consultation reflected strong support for reducing the 30-year time period, concerns were raised by various authorities in respect of certain exemptions and types of record, particularly when information was held in terms of confidence.

42. At present, the 2002 Act does not allow for the ‘30-year’ exemptions to be considered individually. As a consequence of the Improving Openness consultation, the Scottish Government considers that the lifespans of these exemptions should be assessed separately, and further, that provision should also be made for consideration of different types of records.

43. The draft Freedom of Information (Amendment) (Scotland) Bill was published on 16 December 2011 for public consultation. The consultation ran for a period of 12 weeks with 52 responses being received. The Bill, reflecting the second of the Scottish Government’s Six Principles of Freedom of Information, seeks limited modification to the Freedom of Information (Scotland) Act 2002 to improve its effectiveness. It does not make proposals with respect to extension of coverage of the legislation to other bodies as the power to do so has always been part of the 2002 Act.

44. While respondents were broadly supportive of the proposals, certain aspects gave rise to alternative suggestions or modifications.

45. During the consultation period the then Information Commissioner published a special report ‘Informing the Future – the State of Freedom of Information in Scotland’. While not a formal response to the consultation, the report was intended to inform debate on the Bill. The report included various recommendations aimed at developing transparency and openness in Scotland. While not all recommendations were of relevance to the Bill, the Scottish Government proposes to take forward in the Bill two of the proposals – in respect of sections 18 and 25 of the 2002 Act – as discussed above.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Impact on human rights

46. The Scottish Government is of the view that this Bill is compatible with the European Convention on Human Rights.

Impact on equal opportunities

47. The Bill does not affect the existing rights to access information established by the Freedom of Information (Scotland) Act 2002. The right of access provided by the 2002 Act is exercisable equally by all, irrespective of the applicant’s sex, marital status, ethnic background, disability, age, sexual orientation, language, social origin, or other personal attributes, including beliefs or opinions, such as religious beliefs or political persuasion. No provision within the Bill affects the current right of access.

8 http://www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReport2012.asp
Impact on island and rural communities

48. The Bill does not impact upon the existing rights of access to information established by the 2002 Act. The right of access is independent of the location of the applicant. Residents in island or rural communities will continue to benefit from the right of access to information in the same way as residents in other parts of Scotland.

Impact on sustainable development

49. The Bill will have no negative impact on sustainable development. The Scottish Government supports Freedom of Information as a key element in ensuring good quality and responsive public services.

Impact on local government and other Scottish public authorities

50. All Scottish public authorities currently subject to the 2002 Act will also be subject to the provisions contained in this Bill. However, the provisions will have minimal, if any, impact on those authorities.

51. Amendment to section 65 will make this provision more effective in ensuring a sufficient timeframe in which to prosecute an individual or organisation responsible for the altering etc. of information with the intention to prevent disclosure. It is considered that after over seven years of operation public authorities should have effective resources including guidance and records management practices in place to minimise the likelihood of such an offence being committed.

Impact on business

52. There are no regulatory implications for business arising from the Bill. In the event of the amendment to the Part 5 order-making powers becoming law, the Scottish Government intends to bring forward a draft order setting out revised lifespans for certain exemptions. The draft order will be subject to consultation which will include a Business Regulatory Impact Assessment (BRIA) to allow for full analysis of any business impact of altered lifespans.
FREEDOM OF INFORMATION (AMENDMENT)  
(SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Freedom of Information (Amendment) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions


3. The key provisions of the Bill:
   - reflect amendments recently made to the United Kingdom Freedom of Information Act 2000 in respect of the exemption relating to communications with Her Majesty, with other members of the Royal Family or with the Royal Household, to ensure such communications remain suitably protected;
   - introduce greater flexibility in the order-making power relating to the definition of an “historical record” and the lifespans of certain exemptions, with the intention of enabling a draft order to be brought forward reducing the lifespan of certain exemptions thereby making more information publicly available earlier in the interests of enhanced public sector openness, and
   - strengthen the ability to bring a prosecution in the event of records subject to a request being altered, defaced, blocked, erased, destroyed or concealed with the intention of preventing disclosure.

Rationale for subordinate legislation

4. The Scottish Government has had regard, when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill, to:
   - the fact that the Bill seeks to enhance existing subordinate legislative powers;
   - the need to maintain the flexibility to respond to changing circumstances; and
the fact that an order under section 59(1) of the 2002 Act is subject to the affirmative procedure.

5. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of parliamentary procedure has been considered appropriate. Both delegated powers are order-making powers.

**Delegated powers**

**Section 4 – historical periods**

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order made by Scottish statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Affirmative procedure</td>
</tr>
</tbody>
</table>

**Provision**

6. This power enhances the order-making power already set out at section 59(1) of the 2002 Act by enabling the Scottish Ministers to make different provision for records of different purposes, exemptions of different kinds, or different purposes in other respects. The amendment does not alter the existing procedure under the 2002 Act.

**Reason for taking power**

7. The Scottish Government’s Improving Openness consultation\(^1\) in 2009 considered whether the period of 30 years at which a record is considered “historical” should be reduced. Reducing the period at which point records are considered to be “historical” impacts on the lifespan of the exemptions set out at section 58(1) of the 2002 Act. A consequence of reducing the 30-year period could therefore be to make more information publicly available earlier.

8. At the time of the Improving Openness consultation, the Scottish Government considered that the practice of making records routinely available after 15 years should be applied to all Scottish public authorities subject to the 2002 Act. However, the Scottish Government also acknowledged that these authorities subject to freedom of information legislation are wide ranging and numerous and that other authorities might have different views on the appropriate lifespan of the “30 year” exemptions, dependent on the nature of the information that they hold.

9. This was borne out in consultation responses\(^2\) highlighting particular issues with certain exemptions and certain types of records, often specific to certain types of authority – for example, social work records, adoption records and information bequested for research purposes. Consequently, the Scottish Government has considered that, while the specified time period at section 57 of the 2002 Act should be reduced, separate provision should be made for particular exemptions and types of record to ensure that adequate protection for certain information remains.

\(^1\) [http://www.scotland.gov.uk/Publications/2009/07/01094653/0](http://www.scotland.gov.uk/Publications/2009/07/01094653/0)

Choice of procedure

10. An order made under this section is subject to the affirmative procedure in order that the Parliament may be given opportunity to consider any issues arising from a decision to reduce the lifespan of exemptions set out at section 58 of the 2002 Act.

Section 7 – commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010

Provision

11. This provision enables the Scottish Ministers to appoint a day or days on which the provisions of the Bill come into force (other than sections 6, 7 and 8, which come into force on the day after Royal Assent). The Scottish Ministers may make such transitional, transitory or saving provision in the commencement order as might be required (section 7(3)).

Reason for taking power

12. This provision will enable the Scottish Ministers to appropriately commence the provisions of the Bill. It is desirable for the Scottish Ministers to be able to control commencement in case it is necessary to bring forward or delay the commencement of the Bill. It is anticipated that section 1 of the Bill will commence at such time as an order made under section 59(1) of the 2002 Act comes into force.

Choice of procedure

13. The power is subject to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10). This is typical for commencement orders.
Finance Committee

6th Report, 2012 (Session 4)

Stage 1 Report on the Freedom of Information (Amendment) (Scotland) Bill

Published by the Scottish Parliament on 2 November 2012
Finanace Committee

6th Report, 2012 (Session 4)

CONTENTS

Remit and Membership

Report

Bill purpose 1
Policy background 2
Section 1 (Royal exemption) 2
Scottish Government Consultation 3
Finance Committee consultation 4
Absolute exemption 4
Appropriate protections 5
Extremely wide-ranging 5
Inconsistency with international good practice principles 6
Westminster scrutiny 7
Recent ruling of the Upper Tribunal 8

Section 2 (Refusal notice) 8
Section 3 (Accessible information) 9
Section 4 (Historical periods) 9
Section 5 (Time limit for proceedings) 11
Extension of Coverage 12
Financial Memorandum 16
Policy Memorandum 17
Overall conclusion on the general principles of the Bill 18

Annex A: Report by other committees 19

Annex B: Extracts from the Minutes 19

Annex C: Index of oral evidence 19

Annex D: Index of written evidence 20
Finance Committee

Remit and membership

Remit:

1. The remit of the Finance Committee is to consider and report on-

   (a) any report or other document laid before the Parliament by members of the Scottish Executive containing proposals for, or budgets of, public expenditure or proposals for the making of a tax-varying resolution, taking into account any report or recommendations concerning such documents made to them by any other committee with power to consider such documents or any part of them;

   (b) any report made by a committee setting out proposals concerning public expenditure;

   (c) Budget Bills; and

   (d) any other matter relating to or affecting the expenditure of the Scottish Administration or other expenditure payable out of the Scottish Consolidated Fund.

2. The Committee may also consider and, where it sees fit, report to the Parliament on the timetable for the Stages of Budget Bills and on the handling of financial business.

3. In these Rules, "public expenditure" means expenditure of the Scottish Administration, other expenditure payable out of the Scottish Consolidated Fund and any other expenditure met out of taxes, charges and other public revenue.

   (Standing Orders of the Scottish Parliament, Rule 6.6)
Membership:
Gavin Brown
Bruce Crawford (until 24 October 2012)
Kenneth Gibson (Convener)
Jamie Hepburn (from 25 October 2012)
John Mason (Deputy Convener)
Michael McMahon
Elaine Murray
Jean Urquhart (from 18 September 2012)

Committee Clerking Team:

Clerk to the Committee
Jim Johnston

Senior Assistant Clerk
Fergus Cochrane

Assistant Clerk
Lucy Scharbert

Committee Assistant
Parminder Kaur
The Committee reports to the Parliament as follows—

1. The Freedom of Information (Amendment) (Scotland) Bill\(^1\) was introduced in the Scottish Parliament by the Scottish Government on 30 May 2012. The Finance Committee was designated by the Parliamentary Bureau as the lead committee. The role of the lead committee at Stage 1 is to consider and report on the general principles of the Bill.

2. The Committee issued a general call for written evidence on 14 June 2012 and all submissions are available via the Committee’s webpage.\(^2\) The Committee also heard oral evidence at its meetings on 5 and 12 September 2012 including from the Scottish Information Commissioner (SIC) and the Campaign for Freedom of Information in Scotland (CFIS). The Committee is grateful to all of those who took the time to contribute to its evidence gathering, both written and oral.

Bill purpose

3. The purpose of the Bill is—

   ‘to amend provisions of the Freedom of Information (Scotland) Act 2002 relating to the effect of various exemptions and the time limit for certain proceedings.’

4. The Subordinate Legislation Committee considered the delegated powers provisions on 4 September 2012 and reported on sections 4 and 7 of the Bill as follows—

   ‘Section 4 – Historical periods
   The Committee is satisfied in principle with the power in section 4 of the Bill. The Committee is also satisfied that the amended power in section 59 of the 2002 Act will continue to be subject to the affirmative procedure.

\(^1\) Freedom of Information (Amendment) (Scotland) Bill. Available at: www.scottish.parliament.uk/parliamentarybusiness/Bills/51531.aspx

Section 7 – Commencement
The Committee is content with the power in section 7 which allows the Scottish Ministers to commence the provisions in the Bill (except for sections 6, 7 and 8, which will come into force the day after Royal Assent) and for that power to be subject to the laying requirement set out in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.\(^3\)

Policy background
5. The Scottish Government’s ‘Six Principles of Freedom of Information\(^4\)’ set out its approach to FoI. One of these principles commits it to adjusting ‘the regime where it is necessary and sensible to do so’. According to the Scottish Government, the Bill seeks to fulfil this principle.

6. The Freedom of Information (Scotland) Act 2002\(^5\) provides a statutory right to access information held by Scottish public authorities such as the Scottish Parliament, local authorities, NHS boards, Scottish Ministers. Generally speaking the information requested must be provided unless it falls under one or more of the exemptions within the Act. The Act also establishes the arrangements for enforcement and appeal.

7. The Bill seeks to address what the Scottish Government regards as ‘weaknesses’ in two areas of the Act and which can only be remedied by amendment under primary legislation. These relate to the inflexibility of the order-making powers (section 59 of the Act) and the practical ineffectiveness of the offence provision (section 65). The Bill also seeks to mirror recent changes to the UK FoI legislation in relation to a royal exemption as well as making two further minor changes improving effectiveness.

8. Sections 1-5 of the Bill amend provisions within the 2002 Act and this report will consider each section in turn.

Section 1 (Royal exemption)

9. This provision seeks to amend section 2 of the 2002 Act. At present, if applying the exemption for ‘information relating to communications with Her Majesty, with other members of the Royal Family, or with the Royal Household’, the public interest in whether or not to release must also be considered. The ‘public interest test’ is in practice a balancing act requiring the public authority to weigh the arguments in favour of release against arguments in favour of withholding.

10. A limited number of exemptions are ‘absolute’ meaning the public interest does not need to be considered (section 2 of the Act). The amendment proposes to...
make absolute those elements of the exemption relating to communications with Her Majesty, the Heir, and second in line to the Throne.

11. The Scottish Government states that the purpose of the amendment is to ensure consistency of approach across the British Isles given the ‘shared Monarchy’ and in doing so ensure the maintenance of an appropriate level of confidentiality regarding such communications. To ensure absolute clarity, the amendment confirms that communications made, or received, on behalf of a particular member of the Royal Family are to be regarded as communications with that member.

Scottish Government consultation
12. The Scottish Government consulted on proposals for the Bill and published the consultation responses and its report alongside the Bill. Broadly there was overall support for the Bill and its intentions. However, a number of concerns were expressed on this particular issue. The then SIC stated—

‘However, I hold significant concerns in relation to the proposal to introduce an absolute exemption for aspects of section 41(a) (Communications with Her Majesty, etc.). Absolute exemptions are not regarded as good practice, and I consider this measure to be unnecessary.’

13. Similarly UNISON stated—

‘we are opposed to making communications with Her Majesty, the heir, the second in line, or the relevant member of the Royal Family subject to ‘absolute’ exemption, therefore not requiring the application of a public interest test. As Mr Dunion [the then SIC] pointed out, the effect of this proposal, combined with the proposed lifespan for the 41(a) exemption, would result in “an absolute exemption for information relating to communications, which would in some cases last for more than the current 30 years.”’

14. The Scottish Government said in response that it considered it ‘appropriate’ to adopt the position taken by the UK Government as it is ‘vital to ensure that the monarch, as well as the heir and second in line, can operate according to established constitutional conventions’. It also considers that the proposed amendment is consistent with policy formulation at the time of the original legislation in considering it reasonable to take into account common interests. In areas where it was considered advisable to ensure cross-border co-operation, exemptions in the

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6 Scottish Government. Consultation on Proposals for A Freedom of Information (Amendment) (Scotland) Bill. Available at: www.scotland.gov.uk/Publications/2011/12/13125045/0
7 Scottish Government. Freedom of Information (Amendment) (Scotland) Bill Consultation Responses. Available at: www.scotland.gov.uk/Publications/2012/04/4515/downloads
Scottish legislation were intended to be compatible with the relevant provisions in the UK legislation.\(^\text{11}\)

15. Further, it has highlighted the minimal number of requests made to Scottish Ministers where section 41(a) of the Act has relevance and the minimal number of applications made to the SIC for a decision. Moreover, the modification to this subsection relates only to the monarch, heir and second in line. The requirement to consider the public interest continues to apply in respect of communications with all other members of the Royal Family, as well as with the Royal Household (other than communications concerning the monarch, heir or second in line).

**Finance Committee consultation**

16. Given the importance of this provision, and the strong concerns expressed against it, the Committee in its Stage 1 call for evidence, asked—

‘In response to the Scottish Government’s consultation on the Freedom of Information (Amendment) (Scotland) Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?’

17. Several responses continued to highlight concerns about this matter. In particular, the SIC raises the following concerns in her written submission:

- it creates an absolute exemption that sets aside the need for a public interest test for information that may be appropriate to release in the public interest. In doing so it erodes the right to information enshrined in the Act;
- the FoI Act currently contains appropriate protections;
- the proposed exemption will be extremely wide-ranging;
- the amendment will create a fresh inconsistency in the handling of requests under Scottish legislation;
- the amendment would be inconsistent with international good practice principles;
- the Westminster amendment was not subject to full scrutiny.

18. This section of the report now considers each of these issues in turn.

**Absolute exemption**

19. The SIC in oral evidence to the Committee emphasised her view that the proposed absolute exemption erodes the right to information enshrined in the Act—

“My concern, which has raised a point of contention, is fundamentally about the creation of another absolute exemption. Making an exemption absolute further undermines and erodes rights to information. It removes from Scottish public authorities, including me and the Government, the flexibility needed to consider the public interest in relation to what can and cannot be disclosed”.\(^\text{12}\)


20. In response to questioning from the Committee the SIC went on to argue that an absolute exemption would be a “retrograde step.”

21. The CFIS supports this view and stated in oral evidence that it—

“has always been opposed in principle to an absolute exemption. We believe that a public interest exemption should be retained, and we urge the committee not to accept the bill on that point.”

22. In response to the concerns of witnesses regarding the absolute exemption the Cabinet Secretary for Infrastructure, Investment and Cities stated that the intention: “is to ensure consistency of approach across the UK in respect of both the current and the future head of state.” In response to questioning from the Committee the Cabinet Secretary went on to state that: “there is a strong and compelling argument that the arrangements for dealing with communications between the monarch and, for example, the Prime Minister’s office, should be the same as the arrangements that pertain to communications between the Queen and the First Minister’s office.”

23. The Cabinet Secretary also made the point that the exemption for royal communications has rarely been applied. However, she also agreed to “listen very carefully to the evidence given to the committee” and depending on the Committee’s Stage 1 report, consider whether amendments may be appropriate at Stage 2.

Appropriate protections

24. In her written submission the SIC argues that the current protections for information relating to senior members of the Royal Family are adequate and appropriate. She points out that the current Act provides for the protection of privacy of senior Royals particularly in relation to personal data. In oral evidence to the Committee the SIC argued that—

“there is already adequate provision for the royal family and for discussions that any public authority may need to have that are confidential, are covered by other rights or are a matter for national security.”

Extremely wide-ranging

25. The SIC also considers the proposed exemption would be extremely wide-ranging and, if enacted, would ‘have the effect of creating Scotland’s most wide-

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ranging absolute exemption in terms of its scope’. In oral evidence to the Committee the SIC stated that—

“The proposed wording “anything which relates to” makes the scope of the provision very wide and to, a great degree, very uncertain. That is in contrast to other absolute exemptions, in which the information that is exempt is very clearly defined, with boundaries and edges. That approach would not exist under the proposed wording.”

Inconsistency with international good practice principles

26. The SIC argues that while the Scottish Government argues that the aim of the amendment is to create consistency with the UK legislation it will in practice lead to inconsistency in the handling of requests within Scottish law. This is due to requests for environmental information under the Environmental Information (Scotland) Regulations 2004 (EIRs) which originate from an EU directive and contain no specific exemptions for communications with the Royal Family.

27. The Committee raised this issue with the SIC who stated—

“it is important to note that we could not automatically put that inconsistency right by amending the EIRs - we cannot simply amend them when that might lead to a restriction of rights, which is what an amendment would do. That would leave us with a somewhat ridiculous situation in which information could be withheld under FOISA but would have to be released under the EIRs, even if there was an absolute exemption under sections 2 and 41. Such inconsistency is undesirable and is confusing for requesters and for those who have to respond to information requests - the public authorities that we have a duty to advise. The proposed change would make giving advice more difficult. We should not lose sight of that.”

28. The issue was also highlighted in the written submission from South Lanarkshire Council—

‘At this time requests for environmental information must be processed under the Freedom of Information (Scotland) Act 2002 (FOISA) (if even only to apply the exemption set down in section 39(2) of it, after application of the public interest test) and the Environmental Information (Scotland) Regulations 2004 (the EI(S)Rs). This results in confusion by members of the public and is an additional complexity in relation to public bodies processing these requests. For instance it is possible to have a response that applies the exemption set down in section 39(2) of FOISA i.e. amounts to a refusal to provide information but the same response provides the information under the

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19 Scottish Information Commissioner. Written submission to the Finance Committee. Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/53567.aspx


EI(S)Rs. This is an anomaly that the Council suggests could be resolved by the current Bill without changing the general principles behind the proposals.  

23 The CFIS made a similar point when it stated—

“You are therefore creating an inconsistency with the Environmental Information (Scotland) Regulations 2004. We do not think that the existing public interest defence has been abused in any decisions. In fact, a decision for disclosure is rare”.

24 The Cabinet Secretary stated in response to this issue—

“On inconsistency between the FoI regime and European regulations, it is important to say that we are not dealing with a like-for-like situation. The origins of the two regimes are very different: one originated in Europe, the other is very much a devolved issue. There are already significant inconsistencies between the freedom of information and European regulations regimes. Whether we think that that is good or bad, it is a statement of fact that there are a number of inconsistencies between the two regimes. There is no easy match-up of exemptions and exceptions, and the terminology differs considerably, as does the scope of exemptions. We could eliminate inconsistency only if we combined the two regimes. What we are doing in the bill is ensuring that we do not open up inconsistency in the positions of Scotland and the rest of the UK when it comes to dealing with communications from Her Majesty”.

25 Westminster scrutiny

31. The SIC also points out that there was limited scrutiny of the Royal exemption at Westminster as an amendment to the Constitutional Reform and Governance Bill was only introduced during a late stage in the passage of the Bill.

32. Indeed, the Committee is aware, through the evidence of the SIC, that the House of Lords Constitution Committee in its report on the Bill stated—

“It is inexcusable that the Government should have taken so long to prepare this Bill that it has effectively denied both Houses of Parliament - and especially this House - the opportunity of subjecting this important measure of constitutional reform to the full scrutiny which it deserves.”


26 Constitutional Reform and Governance Act 2010. Available at: http://services.parliament.uk/bills/2009-10/constitutionalreformandgovernance.html

27 House of Lords Constitution Committee. 11th Report, Constitutional Reform and Governance Bill. Available at: www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/98/9802.htm
Recent ruling of the Upper Tribunal

33. Following her appearance before the Committee the SIC has written to the Committee highlighting a recent ruling of the Upper Tribunal (Administrative Appeals Chamber) which considers appeals against decisions of the Information Commissioner under the Westminster Freedom of Information Act (2000). The ruling relates to requests for correspondence between Prince Charles and several UK government departments. The Tribunal’s ruling required the disclosure of much of the withheld information and the SIC states that—

‘The particular issue to which I would like to draw to the Committee’s attention is a simple one – in making its decision, the Tribunal has clearly demonstrated that there are circumstances where it will be in the public interest for relevant information to be disclosed.’

34. The Committee recognises that substantial evidence has been provided by witnesses, including the SIC, in arguing against the inclusion of a Royal exemption. While the Committee notes the evidence from the Cabinet Secretary, such as that highlighted in paragraphs 22 and 23 above, it remains unconvinced of the need for this provision and therefore invites the Cabinet Secretary to remove it from the Bill at Stage 2.

Section 2 (Refusal notice)

35. This provision seeks to amend section 18 of the 2002 Act which allows an authority to respond to a request by ‘neither confirming nor denying’ whether information exists or is held, if to do so would be against the public interest. However, such a response can only be issued if a limited number of exemptions could be applied. At present, the exemption relating to personal information is not one of these.

36. The purpose of the amendment is to provide additional protection for personal information. It also brings the Act into line with both the EIRs and UK FoI legislation.

37. The amendment was a suggestion of the previous SIC in his Special Report to the Parliament in January 2012.

38. The current SIC considers this change to be one which will strengthen and enhance the 2002 Act. SEPA considers the amendment will ‘provide clarity’ while Highland Council considers this ‘one of the most important proposed amendments’ as ‘that ability is in itself a protection of that personal data’.

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28 Upper Tribunal (Administrative Appeals Chamber) decision, Evans v Information Commissioner. Available at: www.judiciary.gov.uk/media/judgments/2012/evans-v-information-commissioner
29 Letter from Scottish Information Commissioner to Convener of the Finance Committee, 28 September 2012. Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/52148.aspx
30 Gavin Brown MSP dissented from this paragraph.
considers this amendment will ‘adversely affect the right to access information from public authorities’.

39. In response to questioning from the Committee on this issue the Cabinet Secretary stated—

“As you know, currently, where information falls within certain exemptions the answer can be to neither confirm nor deny that the information is held, but that answer cannot be given if the exemption is because the information is personal information. It is important that that option exists. Let us say that the police were asked for information that impinged on personal data. Even for the police to say that they have information on that person - although they are applying the exemption and not releasing the information - could alert somebody to the fact that they are under surveillance, for example, in connection with a criminal investigation..... The exemption is not automatic - it would have to be applicable in terms of personal information - but it is important to have that option. In the Bill, we probably get the balance more right than it is in the 2002 Act”.  

Section 3 (Accessible information)

40. This provision seeks to amend section 25 of the 2002 Act. Where information is reasonably obtainable, for example, when it is already publicly available, it need not be provided to an applicant in response to a request. However, to be recognised as being ‘reasonably obtainable’ it should be available in accordance with an authority’s publication scheme (which sets out what information it proactively publishes). It has been noted that this section of the Act is not a ‘model of clarity’. While a 2009 Court of Session opinion provides assistance in interpretation, the amendment seeks to improve the Act by making clear that any information made available in line with an approved publication scheme is exempt and does not, therefore, need to be provided to the applicant.

41. This amendment was also a suggestion of the previous SIC in his Special Report.  

42. This amendment is supported by the Commission for Ethical Standards in Public Life in Scotland while SEPA considers the amendment provides ‘clarity’ as does the Chief Fire Officers Association (Scotland).

Section 4 (Historical periods)

43. This provision seeks to amend section 59 of the 2002 Act. The order-making power at section 59 can be used to reduce the lifespan of certain exemptions (those at section 58 of the Act). The Scottish Government has previously consulted on reducing the lifespan of the ‘30-year’ exemptions to 15 years.

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44. At present any reduction to the 30 year period could only be done in respect of all the relevant exemptions rather than individually. However, the Scottish Government’s consultation raised issues with particular exemptions, for example that concerning ‘confidentiality’, meaning a uniform reduction in lifespan was considered inadvisable. The amendment therefore allows for a more flexible approach with separate consideration for individual exemptions and types of record.

45. In due course it is the Scottish Government’s intention to being forward an Order revising the lifespans of the ‘30-year’ exemptions to enable as much information to be placed in the public domain as early as practicably possible.35

46. Concerns were expressed on this issue in responses to the Scottish Government consultation. For example the Commission for Ethical Standards in Public Life stated—

‘We are concerned that the level of flexibility proposed will lead to a more complex and less accessible Freedom of Information system. We consider a set historical record period to be much preferable to the flexible approach outlined in the draft amendment. A set time period provides for clarity and consistency. Flexible powers could result in a far more complex system with different historical record periods for each exemption, for each sub-section of an exemption, for each type of record and for any other purpose not yet identified. Currently, there are three historical records periods (30, 60 and 100 years). Your initial proposals recommend increasing this to six (5, 15, 20, 30, 60 and 100 years). Introducing different periods for paper and electronic records could quickly lead to 12 different historical record periods. There is potential for there to be over 200.’36

47. In response, the Scottish Government considered the proposed power to be ‘proportionate’ and that it provides public authorities flexibility in this area.37 It highlighted that the order to effect such changes will be subject to consultation and then affirmative procedure in the Parliament ensuring further comment and scrutiny. The Committee notes the response from the SIC to the Scottish Government’s Bill consultation—

‘I agree with the proposed amendment allowing greater flexibility in terms of the lifespan of exemptions. I also recognise and support the assertion in the consultation paper that FOISA has contributed to a shift in both public authority culture and public expectations, towards greater openness and accountability, and that this has led to the long lifespan for exemptions being increasingly out of step.’38

36 Scottish Government. Freedom of Information (Amendment) (Scotland) Bill Consultation Responses. Available at: www.scotland.gov.uk/Publications/2012/04/4515/downloads#res391088
38 Scottish Government. Freedom of Information (Amendment) (Scotland) Bill Consultation Responses. Available at: www.scotland.gov.uk/Publications/2012/04/4515/downloads#res391088
48. A number of submissions to the Committee’s Stage 1 consultation supported this amendment. For example, the Archives and Records Association ‘supports the flexible approach set out in the Bill’. This point about flexibility is also highlighted by East Lothian, North Ayrshire and Highland councils. NHS Lanarkshire welcomes the proposal as does the Scottish Council on Archives (although it does highlight an issue around private archives) and Consumer Focus Scotland.

49. The current SIC believes the Bill allows ‘greater flexibility’. She does acknowledge the concerns expressed ‘by a small number of respondents’ (to the Scottish Government’s consultation) but considers the positive impact of the amendment will ‘alleviate many of these concerns’.

50. However, the Commission for Ethical Standards in Public Life in Scotland continued to express concern that ‘the level of flexibility proposed could result in a far more complex system with different historical periods for each exemption’.

51. The Cabinet Secretary, following her oral evidence session, wrote to the Committee setting out the Scottish Government’s response to the concerns of the Commission.

Section 5 (Time limit for proceedings)

52. This provision seeks to amend section 65 of the Act. It is an offence under the Act to alter, deface, block, erase, destroy or conceal a record held by a public authority and subject to an information request, with intent to prevent disclosure. At present a prosecution must be brought within six months of the offence being committed. However, due to the timescales in the Act (20 working days to respond to a request, 40 working days for an applicant to ask for a review if dissatisfied, 20 working days to issue a review response, 6 months for an applicant to request the Information Commissioner investigates the handling of a request) it can be considerably more than six months before an offence comes to light.

53. The amendment therefore proposes to make this section fully effective by revising the time limit so that a prosecution can be commenced six months from when sufficient evidence of an offence comes to the knowledge of a prosecutor - with a ‘back stop’ of three years for a prosecution to be brought from the date of an offence.

54. In their submissions to the Committee the Law Society of Scotland is supportive of this amendment as are NHS Lanarkshire, the SIC, UNISON Scotland and Alistair Sloan.

55. In oral evidence to the Committee the SIC stated—

“There has to be proportionality. I see the three-year period as a long stop because, in reality, it would be difficult to effect a prosecution after that time. I am fairly confident that anything that was going to emerge would emerge

39 Letter from the Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities to the Convener of the Finance Committee, 13 October 2012. Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/52148.aspx
within 12 months of discovery. The key change here relates to discovery rather than commission, so I am not overly concerned about the three-year period.”

56. The Committee notes the letter from the CFIS which it sent following its oral evidence session—

‘CFIS has been persuaded that it is not sensible to introduce a time limit of three years for the s.65 offence. Disclosures arising in other jurisdictions such as in England over Hillsborough demonstrate the advantage of being able to act on evidence even after many years. Any destruction that took place should constitute a s.65 offence. If there is insufficient evidence, there will be no proceedings.”

Extension of Coverage

57. While the Bill does not include provisions for the extension of coverage of the 2002 Act the issue has been widely raised during the Stage 1 inquiry. For example, extending FoI coverage to public contracts with arm’s length organisations featured in a number of submissions including the CFIS, South Lanarkshire Council, Consumer Focus Scotland, SCVO, UNISON Scotland and the STUC.

58. The power to extend coverage of FoI already exists through section 5 of the 2002 Act which allows Scottish Ministers to bring forward a Scottish Statutory Instrument to designate ‘public authorities’ e.g. persons providing under contract a service on the council’s behalf.

59. The issue has been the focus of a number of consultations by previous and current administrations. Indeed, the Bill team stated—

“There has certainly been no lack of consultation on the extension of coverage.”

60. A number of witnesses expressed concern that, after all these consultations, this Bill does not address this matter and that the Scottish Government has not stated whether (and if so when and on what) it will bring forward firm proposals on it.

61. The 2008 consultation by the previous Scottish Government sought views on the possibility of using section 5 of the 2002 Act to include—

- contractors who provide services which are a function of a public authority;

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registered social landlords; and
local authority trusts or bodies set up by local authorities.

62. In its report on this consultation the Scottish Government stated it would consider extending coverage and that it would formally consult with a range of organisations on whether it is appropriate for them to be covered by FoI. The Scottish Government considered it was important that organisations which deliver key public services operate transparently and that people should be able to ‘follow’ the expenditure of public money through their access to information, in particular, in relation to PFI/PPP contracts which tend to be high value and long term.

63. Audit Scotland has published a report on how councils are utilising arm’s-length external organisations (ALEOs) and identified around 130 major ALEOs which are defined as—

‘companies, trusts and other bodies that are separate from the local authority but are subject to local authority control or influence. Control or influence can be through the council having representation on the board of the organisation, and/or through the council being a main funder or shareholder of the organisation.’

64. Audit Scotland was concerned that—

‘The fact that an ALEO may be a separate organisation from the council is unlikely to be at the forefront of service users’ and taxpayers’ minds. One consequence of using more complex delivery structures involving ALEOs is that the public may be less clear about who is responsible for services and, for example, who they should complain to if they are unhappy with the services they receive. Maintaining transparency is a key objective in good governance.’

65. In oral evidence to the Committee the CFIS refer to the Audit Scotland report and suggest that the increase in the number of ALEOs means that the right to access information is much weaker now than it was when the Act was introduced in 2002.

66. In July 2010 the Scottish Government launched a consultation on the possibility of extending the coverage of the 2002 Act to include certain contractors and bodies set up by local authorities to provide leisure, cultural and sport services. The then Minister for Parliamentary Business and Chief Whip has confirmed that, following the consultation, the Scottish Government “agreed to defer a decision on extension” until the Bill has been considered by the Parliament. He also stated in that letter that—

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45 Letter from the Minister for Parliamentary Business and Chief Whip to the Convener of the Finance Committee, 28 August 2012. Available at: [www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/52148.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/52148.aspx)
‘Scottish Ministers are acutely aware of the current economic climate and concerns over the impact additional regulation on hard pressed businesses could have at this time.’

67. This point was reiterated by the Cabinet Secretary in her letter to the Committee following her oral evidence session—

‘As the committee is aware, following consultation in 2009, Scottish Ministers agreed to defer any decision on extension until Parliament had completed consideration of the Amendment Bill. This is primarily an issue of expediency - I am very conscious of the time and resource implications for both the Scottish Parliament and the Scottish Government of returning to the complex issue of extension while the Bill progresses through Parliament.’

68. The CFIS stated in oral evidence to the Committee that—

“We are now forming the view that section 5 of the Act is, therefore, not fit for purpose. Despite promises that were made in 2002, that section has not been used and the consultation that is set out in section 5(5) is unbalanced because it seeks the views of the bodies that may be covered, not of people who may wish to exercise their section 1 rights.”

69. The SIC also pointed out that no Orders under section 5 of the 2002 Act have been made and argues that by “standing still and not designating additional organisations, we have effectively lost rights to information in Scotland.” The SIC states that—

“I understand the logic of clarifying the Act before extending its coverage, but I am disappointed that the opportunity has not been taken to have a discussion about how and to where we should extend it.”

70. In response to the concerns regarding the lack of extension of coverage the Cabinet Secretary stated in oral evidence to the Committee that—

“We have said that we want to defer a discussion about extension of coverage until after the Bill has completed its parliamentary process. I am happy to give the Committee a commitment and an assurance that I will come back at that time and discuss with you in broader terms how the Government might take forward that consideration.”

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46 Letter from the Cabinet Secretary for Infrastructure, Investment and Cities to the Convener of the Finance Committee, 13 October 2012. Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/52148.aspx
71. In response to questioning from the Committee the Cabinet Secretary went on to state that—

“I am happy to look at, and come back to the committee on, the timescales and processes for facilitating the debate that you are asking for.”

72. The then Minister for Parliamentary Business and Chief Whip also pointed out in his letter that the Procurement Reform Bill addresses the issue of transparency and the availability of information relating to public sector procurement.

73. In subsequent correspondence to the Committee the Cabinet Secretary stated she is ‘actively considering the options available to me’ and that she is open to engaging in the debate and will listen carefully to the views that this committee and stakeholders express.’ The Cabinet Secretary also noted that—

‘while it is correct that section 5 of the Act has yet to be used, it is a misconception that Schedule 1 of the Act is unchanged from commencement on 30 September 2002. Coverage has constantly evolved by means of other primary and secondary legislation as new bodies have been created - or been abolished.’

74. Further to this point by the Cabinet Secretary, the Committee is aware that a number of bodies have been added (and a number of bodies removed) from the Schedule to the 2002 Act and which are now covered by the Act. The Committee recognises that such changes can be made in a number of ways, for example, adding bodies placed under section 4 of the Act (which provides for the amendment of Schedule 1) or added as a result of other legislation. A list of these changes is produced regularly by the SIC.

75. In addition, the Committee notes the evidence from the Bill team about other “means” to access information—

“Extension is sometimes seen as a be-all and end-all, but there are other means of acquiring information from bodies that are not covered, and the wider transparency agenda is intended to cater for that. For example, “The Scottish Social Housing Charter” is opening up routes to information. That is not extension; it is another route through which to access information.”

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52 Letter from the Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities to the Convener of the Finance Committee, 13 October 2012. Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/52148.aspx
53 Who is covered by FOI legislation in Scotland? Scottish Information Commissioner. Available at: www.itspublicknowledge.info/uploadedfiles/ScheduleOneJune2012.pdf
76. In subsequent correspondence to the Committee the SIC proposes three suggestions for amendments to section 5 of the 2002 Act.\textsuperscript{55} A requirement—

- for a routine review of section 5;
- for wider consultation;
- to consider the public interest.

77. The Committee notes the views expressed by the Cabinet Secretary in evidence. However, the Committee notes the report from Audit Scotland which identifies around 130 major ALEOs and shares the concerns of witnesses set out above.

78. While the Committee recognises the Scottish Government’s intention to defer consideration of the extension of coverage until the Bill has been considered by Parliament, it invites the Cabinet Secretary to provide details and timings of how the Scottish Government intends to take forward this work and clarify what the options are which she is ‘actively considering’, including the possibility of Stage 2 amendments to section 5 of the 2002 Act. In the light of this response, the Committee will reconsider its position on this issue at Stage 2.

Financial Memorandum (FM)

79. The Committee would normally consider the FM for each Bill and report accordingly to the lead committee. As it is the lead committee for this Bill the Committee considered the FM as part of its Stage 1 scrutiny.

80. The Scottish Government states in its FM that the changes set out in the Bill ‘will have no financial implications’ for the Scottish Administration, local authorities or for other bodies, individuals or businesses.\textsuperscript{56}

81. The Committee noted that, generally, there are no significant concerns expressed about the financial impact of the Bill. For example, Dumfries & Galloway, East Lothian, Highland and North Lanarkshire councils indicate no concerns while the Scottish Council on Archives considers the FM ‘has taken on board concerns about financial implications’.\textsuperscript{57} The SIC considers the assessment in the FM to be ‘reasonable and proportionate’.

82. There is perhaps a slight note of caution expressed. For example UNISON Scotland states the Committee ‘should be concerned about the financial implications in reducing scrutiny of public spending – the effect of continuing to allow FoI rights to be eroded where public services are delivered by private companies and other

\textsuperscript{55} Letter from Scottish Information Commissioner to Convener of the Finance Committee, 28 September 2012. Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/52148.aspx
\textsuperscript{56} Freedom of Information (Amendment) (Scotland) Bill Financial Memorandum. Available at www.scottish.parliament.uk/S4_Bills/Freedom%20of%20Information%20(Amendment)%20(Scotland)%20Bill/b1454-introd-en.pdf
\textsuperscript{57} Scottish Council on Archives. Written submission to the Finance Committee. Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/53567.aspx
bodies not covered by FOISA’ while South Lanarkshire Council believes the Bill would not have any adverse financial effect on it ‘although this would change if the general purposes of the changes were more than a technical nature’.

83. The Committee did pursue the issue of increased costs with the Bill team and whether any increased complexity added to the FoI regime could lead to an increase in costs, for example, for a local authority. The Bill team said in response to questioning that—

“The fact that different exemptions will apply is unlikely to have a significant impact - if any - on the number of requests that come in to an organisation. The overall costs of responding to FoI requests - which would currently be absorbed in the day-to-day running costs of any public authority - are very unlikely to change.”

84. The Committee welcomes this assurance from the Scottish Government.

85. In further questioning about the potential for increased costs to the Scottish Government in dealing with requests for information the Bill team provided the following written response—

‘The information referred to is already in the public domain and can be accessed at:

FoI costs report (from which the £236 figure is drawn)
www.scotland.gov.uk/About/Information/FOI/FOICostReport

FoI Annual report for 2011 which estimates (on the basis of the figures in the costs report) the total cost to the SG of responding to FoI. In 2011, the figure was £530,253
www.scotland.gov.uk/About/Information/FOI/Reporting/AnnualReport2011

For information, we’re in the process of updating the cost report to reflect 2012 experience. We would expect to be able to publish this in advance of the Stage 1 debate.’

86. The Committee welcomes this additional information and looks forward to receiving the updated costs for 2012 ahead of the Stage 1 debate. Should there be an increase in the costs for 2012 over 2011 the Committee invites the Scottish Government to provide an explanation for this.

Policy Memorandum (PM)

87. The PM sets out the approach of the Scottish Government to consulting on the Bill and its policy intentions. The Committee, in its call for evidence, sought the views on this particular issue. A number of responses highlighted the Scottish Government’s consultation on the Bill (and its previous consultations on matters

which are not included in the Bill e.g. the issue of extension of FoI to cover arms-length organisations).

88. The Archives and Records Association ‘welcomes’ the way its concerns have been addressed. The Commission for Ethical Standards in Public Life in Scotland states it ‘is clear from the policy memorandum that our concerns were identified and considered’. Other responses appear satisfied at the consultation process, for example, GTC Scotland, Dumfries and Galloway and North Lanarkshire councils, NHS Lanarkshire, and SCVO.

89. Consumer Focus Scotland is disappointed that the Scottish Government has not progressed a wider reform agenda and sought to extend the coverage of the 2002 Act and bring more organisations within the scope of the legislation. The CFIS considers its ‘views have been mainly ignored’.

90. The PM also assesses the impact of the Bill on equal opportunities, human rights, island communities, local government, sustainable development and other relevant matters.

91. The Committee is content with the assurances given by the Scottish Government in the PM with regards the impacts which the Bill will have on each of these areas.

OVERALL CONCLUSION ON THE GENERAL PRINCIPLES OF THE BILL

92. The lead committee’s role at Stage 1 is to report to the Parliament on the general principles of the Bill. The Committee recognises that broadly there is overall support for the Bill and its intentions and is content to recommend to the Parliament that the general principles of the Bill be agreed to.

93. However, in relation to the Royal exemption the Committee invites the Scottish Government to remove the Bill’s section 1 provision at Stage 2. The Committee also invites the Cabinet Secretary to provide details and timings of how the Scottish Government intends to take forward the issue of extension of coverage and clarify what the options are which she is ‘actively considering’, including the possibility of Stage 2 amendments to section 5 of the 2002 Act. In the light of this response, the Committee will reconsider its position on this issue at Stage 2.

59 Archives and Records Association. Written submission to the Finance Committee. Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/53567.aspx
60 Commission for Ethical Standards in Public Life. Written submission to the Finance Committee. Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/53567.aspx
61 Consumer Focus. Written submission to the Finance Committee. Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/53567.aspx
63 Gavin Brown MSP dissented from this sentence.
ANNEX A: REPORTS BY OTHER COMMITTEES

The Subordinate Legislation Committee’s Report on the Bill is available at:

www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/54106.aspx

ANNEX B: EXTRACTS FROM THE MINUTES

21st Meeting, 2012 (Session 4) Wednesday 5 September 2012

Freedom of Information (Amendment) (Scotland) Bill: The Committee took evidence at Stage 1 from—

Zoe Mochrie, Head of Freedom of Information Unit and Legislation Team; Heike Stephenson, Scottish Government Legal Directorate; and Andrew Gunn, Bill Manager, Scottish Government.

22nd Meeting, 2012 (Session 4) Wednesday 12 September, 2012

Freedom of Information (Amendment) (Scotland) Bill: The Committee took evidence at Stage 1 from—

Carole Ewart, Co-Convener, Campaign for Freedom of Information; David Sillars, Senior Investigating Officer, Commission for Ethical Standards in Public Life in Scotland;

Rosemary Agnew, Scottish Information Commissioner, and Euan McCulloch, Deputy Head of Enforcement, Office of the Scottish Information Commissioner;

Nicola Sturgeon, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities, Andrew Gunn, Bill Manager, Mark Richards, Scottish Government Legal Directorate, and Zoe Mochrie, Head of Freedom of Information Unit and Legislation Team, Scottish Government.

ANNEX C: INDEX OF ORAL EVIDENCE

21st Meeting, 2012 (Session 4) Wednesday 5 September 2012
Zoe Mochrie, Head of Freedom of Information Unit and Legislation Team; Heike Stephenson, Scottish Government Legal Directorate; and Andrew Gunn, Bill Manager, Scottish Government.

22nd Meeting, 2012 (Session 4) Wednesday 12 September, 2012
Carole Ewart, Co-Convener, Campaign for Freedom of Information; David Sillars, Senior Investigating Officer, Commission for Ethical Standards in Public Life in Scotland;

Rosemary Agnew, Scottish Information Commissioner, and Euan McCulloch, Deputy Head of Enforcement, Office of the Scottish Information Commissioner;
Nicola Sturgeon, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities, Andrew Gunn, Bill Manager, Mark Richards, Scottish Government Legal Directorate, and Zoe Mochrie, Head of Freedom of Information Unit and Legislation Team, Scottish Government.

ANNEX D: INDEX OF WRITTEN EVIDENCE

Evidence received in alphabetical order

- Archives and Records Association (UK and Ireland) (39.5KB pdf)
- BEMIS (11.5KB pdf)
- Billy Briggs (6.24KB pdf)
- Campaign for Freedom of Information in Scotland (79.5KB pdf)
- Campaign for Press and Broadcasting Freedom (6.28KB pdf)
- Chief Fire Officer Association (Scotland) (9.13KB pdf)
- Commission for Ethical Standards in Public Life in Scotland (10.7KB pdf)
- Consumer Focus Scotland (22.7KB pdf)
- Jamie Donaldson (6.16KB pdf)
- Dumfries and Galloway Council (9.12KB pdf)
- East Lothian Council (8.35KB pdf)
- Dorothy Grace Elder (6.68KB pdf)
- GTC Scotland (8.77KB pdf)
- Highland Council (10.6KB pdf)
- Law Society of Scotland (9.80KB pdf)
- Lord Lyon (7.05KB pdf)
- Napier Students Association (6.94KB pdf)
- NHS Lanarkshire (7.70KB pdf)
- NHS Orkney (15.1KB pdf)
- North Ayrshire Council (7.67KB pdf)
- North Lanarkshire Council (9.08KB pdf)
- NUJ Scotland (11.5KB pdf)
- Poverty Alliance (6.82KB pdf)
- SCID (6.50KB pdf)
- Scottish Borders Council (19.9KB pdf)
- Scottish Council on Archives (39.8KB pdf)
- Scottish Information Commissioner (49.4KB pdf)
- SCVO (23.8KB pdf)
- SEPA (9.44KB pdf)
- Scottish Natural Heritage (8.85KB pdf)
- Alistair P Sloan (55.6KB pdf)
- SOLACE Scotland (6.32KB pdf)
- South Ayrshire Council (6.45KB pdf)
- South Lanarkshire Council (13.2KB pdf)
- STUC (49.4KB pdf)
- UNISON (34.4 KB pdf)
- University and College Union Scotland (12.4KB pdf)
Additional information:

- Letter from the Minister for Parliamentary Business and Chief Whip to Convener on extension of coverage (249KB pdf)
- Letter from the Scottish Information Commissioner to Convener on extension of coverage and Royal exemption (144KB pdf)
- Letter from the Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities to Convener on extension of coverage, historical records and contractual arrangements 13 October 2012 (2.35MB pdf)
- Letter from the Campaign for Freedom of Information in Scotland to Convener, 23 October 2012 (161KB pdf)
Subordinate Legislation Committee

40th Report, 2012 (Session 4)

Freedom of Information (Amendment) (Scotland) Bill
Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Chic Brodie
Nigel Don (Convener)
James Dornan (Deputy Convener)
Mike MacKenzie
Hanzala Malik
John Pentland
John Scott

Committee Clerking Team:

Clerk to the Committee
Irene Fleming

Support Manager
Daren Pratt
The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meeting on 4 September 2012, the Subordinate Legislation Committee considered the delegated power provisions in the Freedom of Information (Amendment) (Scotland) Bill (“the Bill”) at Stage 1. The Committee submits this report to the Finance Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill ("the DPM").

OVERVIEW OF THE BILL

3. The Freedom of Information (Amendment) (Scotland) Bill was introduced in the Scottish Parliament on 30 May 2012. It is a Government Bill comprising eight sections.

4. The Bill makes various amendments to the Freedom of Information (Scotland) Act 2002 ("the 2002 Act"), in line with the Scottish Government’s obligation under the Six Principles of Freedom of Information to adjust the FOI regime where it considers it necessary and sensible to do so.

5. The Bill also seeks to mirror amendments recently made to the UK Freedom of Information Act 2000 for the purpose of ensuring consistency of approach to the disclosure of information relating to communications with Her Majesty, the Royal Family and the Royal Household.

\footnote{Freedom of Information (Amendment) (Scotland) Bill. Delegated Powers Memorandum. Available at: http://www.scottish.parliament.uk/S4_Bills/Freedom%20of%20Information%20(Amendment)%20(Scotland)%20Bill/FOI(A)_DPM.pdf}
DELEGATED POWERS PROVISIONS

Section 4 – Historical periods

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Affirmative procedure

6. The 2002 Act provides that certain exemptions from disclosure are not available in relation to records which are more than 30 years old. Other exemptions are no longer available after 60 or 100 years have passed. Section 59 of the 2002 Act currently confers power on the Scottish Ministers to reduce these periods of time but does not allow Ministers to provide for different periods depending on the type of record. This power is subject to the affirmative procedure.

7. Section 4 of the Bill amends this order-making power to allow the Scottish Ministers to make different provision for records of different descriptions, or exemptions of different kinds, or different purposes in other respects. Section 4 of the Bill will allow for different provision to be made in respect of different records so that, for example, particular kinds of record may become “historical records” sooner than others. The procedure applicable to the exercise of the power is not changed.

8. The Committee is satisfied in principle with the power in section 4 of the Bill. The Committee is also satisfied that the amended power in section 59 of the 2002 Act will continue to be subject to the affirmative procedure.

Section 7 – Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Laid only

9. This section allows the Scottish Ministers to commence sections 1 to 5 of the Bill by order. (Sections 6, 7 and 8 will come into force on the day after Royal Assent.) Such an order may include transitional, transitory or savings provision.

10. Orders made under this power only require to be laid before the Parliament. There is no further form of parliamentary control over such orders.

11. The Committee is content with the power in section 7 which allows the Scottish Ministers to commence the provisions in the Bill (except for sections 6, 7 and 8, which will come into force the day after Royal Assent) and for that power to be subject to the laying requirement set out in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.
On resuming—

Freedom of Information (Amendment) (Scotland) Bill:
Stage 1

The Convener: Everybody is in position, so we will start one minute earlier than I suggested, as we still have a fairly packed agenda.

Item 4 is the first of four oral evidence sessions in the committee’s stage 1 scrutiny of the Freedom of Information (Amendment) (Scotland) Bill. Today we will take evidence from the Scottish Government bill team. I welcome to the meeting Zoe Mochrie, Heike Stephenson and Andrew Gunn, and I invite a member of the bill team to make an opening statement.

Andrew Gunn (Scottish Government): The Freedom of Information (Scotland) Act 2002 is widely regarded as an effective piece of legislation that sets rigorous standards for public authorities to follow when responding to requests for information. It was acknowledged by the first Scottish Information Commissioner as being strong and able to withstand international scrutiny. The former commissioner also considered the law to be progressive, with authorities complying with their obligations and the public making widespread use of their FOI rights.

The act has been in operation for more than seven years and, in that relatively short period, has been successfully established as being integral to the day-to-day business of public authority administration, and has resulted in more information being made public, in the interests of accountability and transparency.

However, although the act is generally considered to be effective, weaknesses have been identified—primarily around the inflexibility of the order-making power, with regard to revising the live standard exemptions, and also in the inability to bring a prosecution. Therefore, although they are generally small-scale, the key amendments in the bill will pave the way for more information to be made publicly available earlier, and for a prosecution to be brought in the event of information that has been the subject of a request being deliberately destroyed or concealed, with a view to preventing its disclosure.

Two other amendments—one that will add clarity and another that will increase protection for personal data—are taken from the special report that was presented to Parliament by the former information commissioner. We anticipate taking forward other recommendations that are contained in the report by means of guidance or the statutory code of practice.

The limited scale of the bill is in line with the second of the Scottish Government’s six principles of freedom of information that were set out in June 2007, which commits the Government to adjusting the regime where it is necessary and sensible to do so. It is perhaps also worth noting that, in its recent report following post-legislative scrutiny of the UK Freedom of Information Act 2000, the House of Commons Justice Committee made very few recommendations for revision, although several of the recommendations would bring the UK legislation more into line with the Scottish act—for example, in terms of setting statutory timescales and on treatment of research material. To some extent, that reflects the close relationship that the two pieces of legislation have always had. When the initial freedom of information bill was being debated, emphasis was put on the need for general compatibility between the separate regimes. The same arguments seem to apply today—for example, in ensuring consistency of approach to information relating to communications with Her Majesty, given the commonality of the monarch as shared head of state.

The bill specifically does not address the extension of coverage. Extension has been the subject of consultation and Scottish ministers are clear that a decision has been deferred until Parliament has considered the amendment bill. The power to extend is already in the legislation, and, as such, it would not be in the spirit of the original act to extend coverage by means of primary legislation.

Finally, the bill, as well as resulting in anticipated secondary legislation that will result in more information being made public, also forms one of the legislative strands of the Scottish Government’s developing transparency agenda. Consultation on that, in the form of initial engagement with stakeholders, is anticipated for later this year, as the Government seeks to promote greater openness and accountability across the wider public sector.

The Convener: Thank you. I have to say that it is most frustrating to realise, when one wades through such a mountain of information, that almost every question that one wanted to ask seems to have been already answered in all the documents that have been provided. It seems to be inverse—the more work one puts into reading documents, the less one has to ask, because so many questions are already answered. I will try, nonetheless, and I am sure that colleagues will do likewise.

Communication with Her Majesty is obviously a key point in the bill, and you talked about the
Scottish Government mirroring the UK Government’s position. The UK bill passed through its stages in a timescale that one would suggest would not normally provide enough scrutiny—for example, its passage through the House of Lords within three days. What is your view on that and how has it impacted on legislation that we are hoping in effect to mirror?

11:30

**Zoe Mochrie (Scottish Government):** That is a difficult question to answer, but I hope that the Scottish Parliament is given ample opportunity to scrutinise the provision, unlike your equivalents south of the border.

There was much criticism of the late introduction of the royal exemption amendment. I think that it is a reasonable amendment, and our intention is to ensure a consistent approach across the UK with regard to information of similar types. Hopefully, the committee will have sufficient time to explore quite how that will operate.

**The Convener:** Indeed. I asked the question because we are building on existing legislation.

**Andrew Gunn:** Can you talk about the flexibility in the timescale for the operation of the act? In evidence, we have heard differing views about whether the period of operation should be 30 years—as it is at the moment—or 15 years, or whether there should be flexibility.

**Mark McDonald:** As you say, the consultation responses have included varying views on the approach to exemptions. The 2009 consultation threw up the fact that a one-size-fits-all approach is problematic. At the moment, the 30-year rule covers eight exemptions. However, with regard to a desire to reduce the lifespan of those exemptions, whether there should be flexibility, we must acknowledge that there are, around certain categories and classes of information, sensitivities such as commercial sensitivity and confidentiality.

The act does not at the moment contain the power to enable an exemption-by-exemption approach to be taken. We hope to get the power to be able to do that although, obviously, the stated position of the Government is that we will reduce the majority of the exemptions to 15 years but maintain protection with regard to confidentiality and royal communications.

**The Convener:** You talked about the fact that the bill does not provide enough leeway to enable pursuit of prosecutions. Over the period since enactment, have there been many situations in which you would have liked to prosecute but have been unable to do so?

**Andrew Gunn:** The Committee might want to ask the Scottish Information Commissioner about that when you take evidence from her next week. We understand from her that there have been—I think—seven occasions on which there was potentially sufficient evidence to proceed with a prosecution but, because of the six months time bar, it was not possible to pursue those further.

**Mark McDonald:** Many of members’ questions appear to have been addressed, although I have a brief question. I understand that if the changes on restrictions that are proposed by the bill had been in place at the introduction of the Freedom of Information (Scotland) Act 2002, only one freedom of information request would have been impacted. Is that correct?

**Zoe Mochrie:** Do you mean in terms of the royal exemption?

**Mark McDonald:** Yes.

**Zoe Mochrie:** I believe that one Scottish Government request would have been impacted on, but I cannot speak for the wider range of bodies that are covered by the Freedom of Information (Scotland) Act 2002.
Mark McDonald: Okay. I thank you for that.

Elaine Murray: I want to explore the extension of coverage. I understood the panel’s argument to be that it is not necessary to look at extension in the context of the Freedom of Information (Amendment) (Scotland) Bill because secondary legislation would cover it. However, might one not make the perhaps quite controversial argument that the level of consultation is much higher for primary legislation, so there could be a case for including extension in primary legislation in order to enable that degree of consultation with the bodies that might be affected? For example, it seems strange to me that a council housing department, which is supported by tenants’ rent and the Scottish Government, is subject to FOI legislation, while a registered social landlord who may have received stock from the council—again supported by tenants’ rent and the Scottish Government—is not and tenants are aligned with what the regulator is prepared to publish about its inquiry. Is it because the issue is technical that we are not looking at extension at this point? Is it likely that there will be secondary legislation on extension?

Andrew Gunn: There has certainly been no lack of consultation on the extension of coverage—it goes back several years. Scottish ministers are anxious to take a proportionate approach. Obviously, the power to extend coverage is in the act and the provision is there in order to extend coverage. It would not be in the spirit of the original legislation to use primary legislation to put into practice a power that already exists.

Clearly, there are anomalies with the situation. However, the position of Scottish ministers is clear; we have consulted and a decision will be deferred until—this is a sequential issue—Parliament has considered the Freedom of Information (Amendment) (Scotland) Bill.

It is also important to place the matter in context. Extension is sometimes seen as a be-all and end-all, but there are other means of acquiring information from bodies that are not covered, and the wider transparency agenda is intended to cater for that. For example, “The Scottish Social Housing Charter” is opening up routes to information. That is not extension; it is another route through which to access information.

Elaine Murray: The point about primary legislation is that it is subject to a degree of parliamentary scrutiny to which secondary legislation is not subject. If organisations have concerns about extension, primary legislation provides a better opportunity for discussing their concerns. However, that may be an unfair matter to raise with you, as it is a policy issue.

Andrew Gunn: It is a policy issue, and the minister will attend the committee next week. We have been through consultation and business regulatory impact assessments have been undertaken. The position is clear—the decision will be deferred.

Paul Wheelhouse: Welcome to the committee. In his letter to the committee, the Minister for Parliamentary Business and Chief Whip mentions an issue that relates to the proposed procurement reform bill. There has been concern among the public about the lack of access to information on the same basis from private sector organisations under the freedom of information legislation and the minister states:

“I would urge the Committee to consider the very real impact that procurement reform could have on the availability, to the public as well as to the private sector, of information relating to public sector spending.”

I regard that as referring to public contracts that are given to private sector organisations, and the need to open that area up and establish greater transparency. How does the Government bill team view the interaction between that proposal and what is happening through procurement reform to open up and make more transparent the relationship between Government and the public sector and private sector organisations? There is an obvious public interest in what happens in that regard.

Andrew Gunn: At present, we are only at the consultation stage of the procurement reform bill. There will be on-going contact between officials in order to incorporate elements of transparency in the bill.

To go back to the previous answer, we view the issue as forming part of the wider transparency agenda. There are already freedom of information clauses in contractual arrangements, so it is not as if the information is not accessible. The Public Records (Scotland) Act 2011 is also putting in place structures and records management policies that increase access to private contractual information. There is a multistrand approach, of which the procurement reform bill will form one element, but there are discussions to be had.

Paul Wheelhouse: So, you are highlighting that element as part of a wider programme of transparency.

To pick up on Dr Murray’s point about consultation on primary legislation, the proposed procurement reform bill gives you an opportunity for extensive consultation and open discussion in the appropriate committee on that issue as it relates to private sector organisations that contract with the public sector. We can open that discussion out a lot more.
Andrew Gunn: That proposed bill is certainly recognised as being an opportunity within the transparency agenda on which we are committed to consulting, and we certainly envisage, and are committed to taking forward, stakeholder engagement later this year. It is one element of that agenda.

John Mason: I will start with the royal family. The point has been made elsewhere that, in other areas of legislation, the privilege—or whatever you want to call it—of the royal family is gradually being reduced. It has been said that royal privilege is a long-standing convention, but this Parliament is not afraid of changing long-standing conventions. Why do we have to be so protective in the area of freedom of information when in other areas we are becoming more relaxed about the royal family?

Zoe Mochrie: It is about equality of treatment under the two regimes that operate in the United Kingdom. As Andrew Gunn said, there has always been a degree of complementarity between Scottish and UK acts in areas of common interest. Where it is considered advisable to ensure cross-border co-operation, exemptions in Scottish legislation are intended to be compatible with the relevant provisions in the UK freedom of information legislation. Ministers believe that the same argument applies to the commonality of the shared monarch.

John Mason: Why is the monarch treated differently? We treat charities differently in Scotland to how they are treated in England, even when they are the same charities, so why is there a fear of treating the monarchy differently?

Zoe Mochrie: The monarchy occupies a unique position in British life. The monarch is appointed for life and has the right and duty to counsel her ministers and her Government, which includes the Scottish ministers and the Scottish Government as much as the UK ministers and the UK Government.

John Mason: Okay.

Secondly, the point has been made that the voluntary sector may be reluctant to use the freedom of information legislation because it might affect its relationship with those from whom it requests information. Is that just something that we cannot do anything about, because the voluntary sector might be afraid to use whatever legislation is in place?

11:45

Zoe Mochrie: The trend is worrying. We are not quite sure why voluntary organisations are so reluctant to use the legislation. It is useful that the Scottish Information Commissioner’s office has undertaken research on that and brought it to public authorities’ attention. What we should do to encourage such organisations to make better use of the 2002 act is not entirely clear.

John Mason: Perhaps we need to follow that up with organisations.

My third point follows up what Dr Murray and others talked about and concerns extending the number of bodies that the legislation includes. I take the point that the power exists, but that is a little academic, given that—as far as I am aware—it has not been used. As councils hive off parts of themselves—that has happened in Glasgow—does the amount of information that is covered by FOI legislation reduce? Big chunks of information are leaving the public sector and going into arm’s-length external organisations, trusts or whatever the bodies are called. The amount of bodies that are covered seems to be contracting, so it is—even to stand still—surely necessary to expand the number of bodies that are included.

Andrew Gunn: Ultimately, extension is a political decision. The Scottish ministers’ view on that is clear: They have consulted contractors, Glasgow Housing Association and various other bodies and the decision was made to defer the decision on extension.

I take your point about ALEOs and so on being hived off. The consultation on extension did not show significant unmet demand—indeed, it showed almost no evidence of unmet demand for information, which should still be available in the majority of cases through the commissioning public authorities. A route to information should still exist; after all, commissioning authorities are responsible for funding such organisations. Consultation has shown that most members of the public prefer to go to a commissioning public authority as a first port of call for information.

John Mason: I take the point—that is right in some cases. Glasgow City Council has instructed some of its ALEOs to adhere to the legislation, but I am not sure whether that is the case for Glasgow Housing Association, which the council does not control as much.

I am a little surprised that you say that there is no evidence of unmet demand. For example, some of us have tried to find out about Glasgow City Council’s private finance initiative contracts with the private sector. The assumption must be that the council and the private sector are both embarrassed by agreements and do not want them to be in the public domain. It is in neither side’s interests to get the information in the public domain, and we as the public have no way of accessing it. Surely that is not transparency.

Andrew Gunn: As far as I am aware, Glasgow Housing Association operates in the legislation’s
spirit. It will be interesting to see the impact on the issue of the criteria and the outcomes that are set under “The Scottish Social Housing Charter” to make more information transparent and accessible. The Scottish Housing Regulator regulates that.

**John Mason:** What about, say, a contract between a council and the private sector that neither wants to let the public see?

**Andrew Gunn:** A council will be subject to the legislation, so if it holds a contract, the standard request process can be followed. If a council invokes exemptions, that is its right. The ultimate appeal is to the Scottish Information Commissioner.

**John Mason:** If a confidentiality agreement exists, the result of all that process is that we do not get access to the information. Surely the whole point is to make everything more transparent, is it not?

**Andrew Gunn:** The Scottish ministers are certainly fully committed to transparency, but the decision on whether to extend the legislation to contractors and housing associations is ultimately political.

**John Mason:** Thank you. I will raise the points with other people.

**The Convener:** I thank committee members. I still have some questions to ask. With regard to the lifespan of certain exemptions, the Scottish Government has said that it has near-universal support for the changes to the definition of historical records. However, the Commission for Ethical Standards in Public Life in Scotland has said that it is “concerned that the level of flexibility proposed will lead to a more complex and less accessible Freedom of Information system.”

What is your response to that?

I do not see much in the financial memorandum to suggest that introducing flexibility will cost more to implement. Is your view that there will be zero cost? What is your view on the suggestion that flexibility will make the system less accessible?

**Andrew Gunn:** We are certainly aware of the comment about increased complexity. There is no denying that removing more exemptions from the blanket list of 30 exemptions—putting in more subsections to take out more records—will increase complexity. We are committed to consulting on a draft order before putting it into effect, which will give us another opportunity to tease out any issues around complexity that public authorities may envisage. However, we feel that there will not be a significant increase in the level of complexity, and that any increase will be more than counterbalanced—in fact, outweighed—by the gain in the increased amount of information that will be made public.

There is a balance to be struck, which I would anticipate being teased out during consultation on the draft order. However, allowing for a slight increase in the level of complexity, more information will be made public, which is, after all, the ultimate goal.

In terms of costs—

**The Convener:** I am sorry to interrupt, but the financial memorandum states:

“Information requests are estimated to cost the Scottish Government £236”.

Would additional complexity add to the cost of delivery?

**Andrew Gunn:** That is a slightly different issue. The calculated cost of an information request to the Scottish Government is £236. The fact that different exemptions will apply is unlikely to have a significant impact—if any—on the number of requests that come in to an organisation. The overall costs of responding to FOI requests—which would currently be absorbed in the day-to-day running costs of any public authority—are very unlikely to change.

**The Convener:** I would have thought that there would be additional costs. Even the need for someone to check which particular regime they are following would surely take time and add to the cost.

**Andrew Gunn:** I suspect that there is the potential for a minimal impact in that respect. The consultation process should tease out any relevant cost implications.

On the same point, it is important to stress that the intention to release further information is not necessarily proactive. If and when the order-making powers come in, it is not necessarily the case that all public authorities that are faced with different exemption lifespans will overnight be releasing information 15 years earlier than they would do at present; that would be entirely up to the individual public authority.

In all probability, the release will be reactive, as it has been before, so that the new lifespans will be applied when a request comes in. The changes will not necessarily create any more requests—it is just that slightly different rules and regulations will apply when an authority responds to a request. It will be entirely up to the individual public authority whether it takes a proactive or reactive approach.

**The Convener:** In my view, complexity always seems to add to costs.
You will be aware of concerns that were expressed to Universities Scotland by its members. The organisation says:

“Notwithstanding the exemption for on-going research ... any limit on a University’s ability to accept information in confidence for an extended period may prejudice its ability to secure access to such data and therefore its ability to conduct the highest quality research.”

Are you able to provide any reassurance that such FOI exemptions will not be reduced to 15 years, given the impact that that might have on flexibility?

Andrew Gunn: As I think we set out in our proposals, we are aware of concerns across the university sector, primarily with regard to research data and donations to libraries for research purposes. Largely for that reason, the Scottish Government is not proposing to change the lifespan of the section 36 exemption, which relates to confidentiality.

The Convener: Thank you for that clarification.

On the £236 figure, how much does the Scottish Government currently spend a year on responding to FOI requests?

Andrew Gunn: I think that our most recently published cost data, which I believe came out in 2010, estimated costs to the Scottish Government to be in the region of about £500,000. However, I can certainly get back to the committee on the matter.

The Convener: That means that you respond to just over 2,000 requests a year.

Andrew Gunn: The figure is just slightly under that, but I can certainly provide the committee with infinite detail on costing arrangements.

The Convener: Obviously you hope that a benefit of flexibility and people being able to get information in less than 15 or 20 years is that they will not have to make so many requests. Surely, however, most requests are fairly short term in nature; people who submit requests to the Scottish Government often want to find out information about things that happened six months or a year previously. Will there be a significant difference? After all, the financial memorandum says:

“it is premature to identify long term savings from the Scottish Government’s policy of early release of information.”

Andrew Gunn: I do not believe that the bill will make a significant difference—for exactly the reasons that you have just given. The vast majority of requests are for current information and under current Scottish Government policy information is released after 15 rather than 30 years. That is a general rule—for the past two or three years, for example, the National Archives of Scotland has been opening its files at 15 years—and I do not think that there is as yet any tangible evidence that the number of requests has come down.

The Convener: I note that the Scottish Government has tried to bring information into the public domain perhaps earlier than it needs to under legislation.

That brings this evidence session to a close. Despite fire alarms and what have you, we are actually two minutes ahead of schedule. I thank the witnesses for their attendance and contributions, and I thank colleagues for their questions.

Before I call a one-minute suspension to allow for a change of witnesses—after which we will carry on with agenda item 5—I remind everyone that the committee will continue its stage 1 scrutiny of the Freedom of Information (Amendment) (Scotland) Bill at its next meeting, when it will hear its remaining three oral evidence sessions, including the minister, Brian Adam.

11:58

Meeting suspended.
Freedom of Information (Amendment) (Scotland) Bill: Stage 1

09:31

The Convener: Item 2 is stage 1 scrutiny of the Freedom of Information (Amendment) (Scotland) Bill. We will take evidence first from Carole Ewart, from the Campaign for Freedom of Information Scotland, and David Sillars, from the Commission for Ethical Standards in Public Life. This will be the first of three evidence sessions on the bill this morning. I understand that there are no opening statements, so we will go directly to questions.

I will ask each witness a question and will then open the discussion to the rest of the committee. My first question is for Ms Ewart. In your written submission, which is one of the most detailed written submissions that we have received, you express concerns about the bill. I have some concerns about your written submission, as it talks about what should be in the bill rather than what is in the bill and we are here to take evidence on the bill. In particular, you have concerns about the extension of freedom of information to cover other areas.

The bill’s stated purpose is

"to amend provisions of the Freedom of Information (Scotland) Act 2002 relating to the effect of various exemptions and the time limit for certain proceedings."

We have received a letter from Brian Adam, which states that

"the Freedom of Information (Scotland) Act 2002 already contains order-making powers to extend coverage to bodies who appear to the Scottish Ministers to exercise functions of a public nature or are providing under a contract made with a Scottish public authority any service whose provision is a function of that authority."

We will put questions on that point to the cabinet secretary. I understand that the Scottish ministers intend to extend coverage once the problems with the 2002 act are ironed out. What is your view on the specifics of the bill? The Scottish Government has said that it

"will adjust the regime where it is necessary and sensible to do so."

As I said, we will ask questions about that. What do you feel about the royal exemption? That issue has been raised by a number of people. What is your organisation’s view on that?

Carole Ewart (Campaign for Freedom of Information): We are quite underwhelmed by the bill. We have chosen to focus our submission on what should have been in the bill, and it was reasonable to expect that there would be a broader view of reform of freedom of information in
Scotland. It is now 10 years since the legislation was passed and there have been numerous consultations. It is interesting to note what has not been consulted on but is in the bill, such as the exemption for royal correspondence. We are also conscious that the public support reform of the freedom of information legislation. The Scottish Government's six principles also back up the environment and the framework in which that more detailed reform should take place.

I will emphasise the history of the consultation, which has also been part of the stage 1 process, as it is important to revisit that. At the stage 3 debate on the Freedom of Information (Scotland) Bill in April 2002, the then Minister for Justice, Jim Wallace, promised consultation. He said that the consultation would begin very quickly after the bill had been passed and did not need to await the appointment of the first Scottish Information Commissioner.

In 2006, we had a Scottish Executive consultation, but the Executive declined to introduce reform in 2007. A discussion paper was issued in November 2008 and a consultation was run in 2010.

At each step of that process, there was broad support—even from bodies that might be covered, such as Glasgow Life—for the benefits of being covered by the Freedom of Information (Scotland) Act 2002, but the bill does not introduce reform.

That brings me back to your question. We are now forming the view that section 5 of the act is, therefore, not fit for purpose. Despite promises that were made in 2002, that section has not been used and the consultation that is set out in section 5(5) is unbalanced because it seeks the views of the bodies that may be covered, not of people who may wish to exercise their section 1 rights. We are seriously of the view that we might seek the deletion of section 5 and an amendment to section 4.

On the specifics of royal correspondence, we are hugely disappointed that the Scottish Parliament, which has full capacity on the issue—it is a devolved matter and the Parliament can do exactly what it wishes to do—has decided to copy over sections 5 and 59 of the Act.

We suggest that you consider two recent decisions by the UK information commissioner, which may guide your deliberations on the matter. Those are two occasions on which disclosure was required; the decisions operate under the previous environment, because the UK legislation was not retrospective. One decision concerns the Ministry of Transport, the Duchy of Cornwall and correspondence relating to the Marine Navigation Aids Bill. That decision was issued on 8 February 2012. The other concerns the Department for Business, Innovation and Skills, the Duchy of Cornwall and correspondence regarding the Apprenticeship, Skills, Children and Learning Bill. That decision was also issued on 8 February 2012.

You are right that it is an important area. The Campaign for Freedom of Information has always been opposed in principle to an absolute exemption. We believe that a public interest exemption should be retained, and we urge the committee not to accept the bill on that point.

The Convener: I will correct you on something: the Scottish Parliament has not taken any decision on the issue. The Scottish Government has introduced a bill, and we are here to scrutinise it and decide whether we support it before it goes to the Parliament, which will take a decision on it.

Do you not accept that the Scottish ministers, as they have said, must address anomalies in the current legislation before they think about widening it to cover other organisations? A statement to that effect was made to the Parliament, and the committee has been informed that the bill is intended to make the current legislation more effective before its coverage is extended.

Carole Ewart: We are not persuaded by that argument because we have been promised consultation and the use of section 5 since 2002, but that has not happened.

The Scottish Government's analysis of the responses that it received to the 2010 consultation concludes with this point:

"the Scottish Government also notes that the time of enactment of the Amendment Bill could provide opportunity for related Orders to come in to force, for example under Sections 5 and 59 of the Act."

The bill was published in June. That would have been the time to announce a specific timeline and a specific set of organisations to be brought within the scope of the extension.

There is also a problem with the nature of the consultation that took place in 2010. Section 5 of the 2002 act requires that the bodies to be covered are consulted. However, the only body that was included in the 2010 consultation was the Glasgow Housing Association and there are more than 50 other housing associations that could equally be brought within the scope of the legislation. That immediately creates a problem.

The Convener: Mr Sillars, your submission focuses specifically on the bill. You have two
concerns, one of which is the public interest test in relation to royal exemptions. Will you comment on that?

Secondly, you talk about “the level of flexibility proposed”, which you fear could create a far more complex system. What drawbacks do you think that might have?

David Sillars (Commission for Ethical Standards in Public Life in Scotland): The perspective that we have brought to bear is not policy driven. Rather, it is our observations of the potential for administrative difficulties a little further down the line. My comments have to be prefaced by saying that I appreciate that this is an enabling piece of legislation, which will be subject to further articulation in subordinate legislation. I understand that those issues have been thought about.

In relation to royal communications, depending on how the legislation is enforced, it may be that, further down the line, the result of the amendment bill might be to militate against the general thrust of openness—and increased openness—that underpins the legislative initiative. Again, that is not a policy-driven view or a particularly deeply-felt concern in relation to where we sit.

In relation to your point about historical records, the bill is drafted merely to allow different provision for:

“(a) records of different descriptions,
(b) exemptions of different kinds,
(c) different purposes in other respects.”

At the moment, the definition of historical records has intrinsically different periods of time. Our concern is that the application, on a less-than-well-considered approach, might result in a kind of geometric progression of different timescales, which, as we say in our original consultation response, might produce confusion. It might be difficult to justify the differences, and the legislation might end up in a less user-friendly scheme.

I fully appreciate that you have considered the point. In their reflections on that part of the bill, a number of consultees welcomed the increased flexibility and sensitivity that might be brought to bear in the legislation. However, one consultee’s increased flexibility might reflect, as it does in our case, a slight concern about increased complexity in terms of the outcome.

The Convener: Instead of a more flexible regime, what regime should be imposed by the bill?

David Sillars: In our original response, we say that there should be a set period for all the categories, which has going for it certainty and so on. However, I fully understand that that may be offset by how the legislation is used. I noted in the committee paper that thought would be given to the categories of information. I dare say that, as part of that, the most used aspects could be identified and thought could be given as to whether there could be consistency among the most used areas of inquiry.

I fully concede that our original response simply reflects a concern, principally, that at a later stage thought is given as to how different periods could be made usable and well known, and highlighted to the users, without it becoming particularly complex.

09:45

The Convener: One final thing before I open up the session to colleagues. What timescales should there be on the release of information?

Ms Ewart, that question is for you as well if you have a view on that in terms of release of documentation. Should historical records be released after five years, 10 years, 15 years, or 20 years? What is your view? The general view that has been expressed by ministers in the bill is that, where possible, records should be released earlier rather than later. Do you have concerns about flexibility? Should there be fewer categories? What timescales should we be thinking about?

David Sillars: To be honest, I do not have a strong view on that and I do not think that our organisation would have a strong view on that. Like everyone else, we certainly endorse the view that the material should be made available earlier. At the moment, in some cases we are talking about historical periods of 60 or 100 years, for example. I note the move towards release in 15 years rather than 30 years and so on—clearly, as a generality, we would welcome a move towards a shorter rather than a longer period.

This will sound like a lawyer’s answer, but it does depend very much on the kind of material that we are talking about. It may not be appropriate for personally sensitive material, for example, to have such a short period, whereas I can well understand that for the purposes of research, general knowledge and so on there would be a desire to have material released earlier rather than later.

I might defer to my more expert colleague to give a thoughtful view on that.

Carole Ewart: I echo what David Sillars said. The Campaign for Freedom of Information in Scotland supports the public’s right to know and it welcomes the initiative by the Scottish Government to be more realistic and less
dogmatic about timescales, so the earlier the better.

**Michael McMahon (Uddingston and Bellshill) (Lab):** This is a question for both witnesses—I am not sure which of you would most relate to it.

My understanding is that the exemption that is intended to cover the monarchy covers communications between ministers and the monarchy, so who would be protected by that amendment? Would it be the monarch or the ministers?

**Carole Ewart:** I will focus on the disadvantage and the impact of the amendment. The disadvantage would be that the public would never have the right to know, whereas, at the moment, if there is a public interest, the public has a right to know. The impact would also mean that whoever is writing the correspondence need never fear that it would be made public.

In principle, we are opposed to absolute exemptions. We cannot understand why that exemption has been proposed—why it has been copied. We see a hugely negative impact.

I stress that we support human rights. We support the right to privacy, so we are not looking at personal details. What we are standing up for is the public’s right to know, if there is a public interest.

**Michael McMahon:** Have you any evidence of freedom of information requests that have been made in relation to such matters? Have there been any difficulties in that respect? Have ministers or the royal household had to defend rulings by the information commissioner that they were unhappy with?

**Carole Ewart:** The two cases that I cited from February in which disclosure was required, one in full and the other in part, break new territory. In the past, it has been very difficult to get information because the public interest test has applied. That response has been quite proportionate, and I think that we can trust public authorities and the UK information commissioner to exercise powers responsibly.

**Michael McMahon:** From your experience of the use of FOI requests in relation to public bodies, have you found any particular difficulty in getting information about the monarchy?

**Carole Ewart:** To be honest, the issue has never particularly bothered me.

**John Mason (Glasgow Shettleston) (SNP):** Thank you for your answers so far.

Last week, I suggested to the bill team that a number of councils—I cited Glasgow as an example—have in effect hived parts of themselves off into separate bodies, especially on the sport and leisure side of things. As far as I see it, what used to be covered by FOI is covered no longer, which means that the amount of information is reducing. Is that your understanding of the situation?

**Carole Ewart:** Absolutely. We believe that the right in section 1 of the 2002 act to access information is much weaker in 2012 than it was in 2002, when the Freedom of Information (Scotland) Bill was passed, and on 1 January 2005, when the legislation came into force. According to the Audit Scotland report that we quote in our submission, there are now 130 arm’s-length external organisations, many of which are delivering services that used to be delivered by public bodies such as local authorities. Given the suggestion in the same report that it is likely that more services will be delivered by bodies set up by public authorities, we think that the problem is growing and, as a result, call in our submission for the bill to contain a section that makes it clear that its purpose is to entrench the public’s right to know. As we cannot anticipate how public services or services of a public nature might be delivered in future, there must be a focus on ensuring that whatever body is created for whatever public purpose should be covered by freedom of information legislation.

**John Mason:** Dr Murray and I asked the bill team about some of these issues last week. Indeed, I think that in response to one of Dr Murray’s questions the team suggested:

> “there are other means of acquiring information from bodies that are not covered, and the wider transparency agenda is intended to cater for that.”—[Official Report, Finance Committee, 5 September 2012; c 1473.]

Do you find that answer acceptable?

**Carole Ewart:** Absolutely, not, because we are talking about an enforceable right to know. It could be argued that the whole strength of freedom of information legislation is the fact that it enforces the public’s right to know. We have always had the right to ask, e-mail or phone up for information; sometimes it was given, sometimes not. What changed on 1 January 2005 was that the right could be enforced. Whether you call it a transparency agenda, an accountability agenda, a housing charter or whatever, we want a simple and accessible right that can be enforced and ensures that people know what freedom of information is. Research by the Scottish Information Commissioner shows that in Scotland there is a high degree of awareness as well as a great deal of respect and support for the right.

**John Mason:** We received a letter from Brian Adam, which I believe is on the public record. Is that correct, convener?

**The Convener:** Yes.
John Mason: Do you have any thoughts on the suggestion in the letter that the current climate might be a problem? Mr Adam says:

“In addition, the Scottish Ministers are acutely aware of the current economic climate and concerns over the impact additional regulation on hard pressed businesses could have at this time.”

Carole Ewart: I have three thoughts about that. First, when the Scottish Government first mooted freedom of information in the consultation document published in 1999, it said that there would be no extra money for its introduction. It also saw it as a way of managing records more effectively.

Secondly, the number of freedom of information requests should be minimal because there should be proactive disclosure of information. If you disclose more proactively, you have less of a reason to deal with individual requests for information under section 1 of the 2002 act.

Thirdly, the Scottish Government’s analysis of consultations raised the point that the cost factor was not hugely onerous, which was also the view of some respondents. The cost factor is a bit of a red herring. We have found out from freedom of information requests that ordinary members of the public who receive services can make FOI requests that ultimately lead to a saving of money and better concentration of scarce public resources.

John Mason: I do not know whether Mr Sillars cares to comment on any of those questions, which I have aimed more at Ms Ewart.

David Sillars: I do not have anything to add to what Carole has said.

John Mason: My final question involves another quote from Brian Adam’s letter, which states:

“Responses also showed no compelling evidence of a problem or of unmet demand for information.”

Do you agree that there is no unmet demand for information?

Carole Ewart: No. I saw the committee’s evidence session on that last week.

Section 5 of the 2002 act, which requires consultation with those bodies likely to be covered, is skewed and unbalanced. There should also be a more effective consultation with those who may wish to access information, so that the formal process is balanced. In meetings that we have attended recently on the amendment bill, people have repeated examples of information that they would like to receive but have not got.

John Mason: Can you give us an example?

Carole Ewart: Housing associations. It is interesting to note that housing associations have used FOI themselves, so they understand its benefit. To go back to the cost issue, democracy costs money. We are sitting in a building that cost money. However, the fact is that if it is a treasured right—we believe that it is a fundamental part of a democracy—then although there will be a consequential cost, it is not a burden but a benefit of democracy.

Elaine Murray (Dumfriesshire) (Lab): As the deputy convener said, he and I have been pursuing the issue of extension with the bill team, perhaps slightly unfairly because it is more of a policy issue, which we can take up with the minister later.

I am interested in what was said about the Scottish social housing charter, because it reflects the answer that I received from the Scottish Government in respect of the difference between tenants of a registered social landlord just funded by tenants’ rents, and tenants of a council housing department funded by tenants’ rents. There seems to be a bit of an imbalance there.

The bill will amend an existing act. We were advised that we did not need to bring in the extension by primary legislation because it could be done by secondary legislation. Would you have preferred the amendment bill to introduce the extension into primary legislation so that it could be consulted on? Or are you happy with it being in secondary legislation but not happy about the lack of progress?

Carole Ewart: We think that, 10 years after the original legislation was passed, section 5 of the 2002 act is not fit for purpose because it has not operated in the way that it should have.

Elaine Murray: Should the extension be in primary legislation—in the bill?

Carole Ewart: The way around that is of course to have a public interest purpose section. If the point of the bill is the public’s right to know rather than its current focus, which is what the public sector is prepared to share—both the content and at its own pace—then we think that a public interest purpose section would change the focus of how bodies are brought within the scope of freedom of information legislation. The focus would be entirely different.

Elaine Murray: Right, but would not that require consultation with all who might be interested at this stage?

Carole Ewart: In a sense, the consultation has been used as a delaying tactic, because we were promised consultation in 2002. We genuinely thought that section 5 would operate efficiently in that there would be consultation, a decision would
be taken and more bodies would be covered by freedom of information of legislation. That has not happened.

Elaine Murray: Would you be able to submit an amendment to the bill that we could consider at stage 2?

Carole Ewart: Yes. That is our intention.

Elaine Murray: I have another question on a slightly different issue. Certainly in my limited experience of freedom of information it is far from easy to get certain information, particularly when it involves details of correspondence. For example, just before the date on which I should have received a response to my FOI request, I got a letter that asked exactly what e-mails and documents I wanted, as if I would know what letters I wanted before the request had been answered. Are we missing an opportunity to make it easier for the public to get information? It seems to me that public bodies can prevaricate and put people off, so that in the end people just think, “What the heck,” and give up.

10:00

Carole Ewart: It is a good idea to have a more nuanced approach to the operation of the 2002 act. I have heard similar stories about overlegalistic replies from public bodies that really put people off. People are warned about disclosure and copyright law and might think that they should not share the information with other parties. I agree that we need a nuanced debate about how the freedom of information legislation is operating.

To return to your point about the housing charter, at present, people do not need to quote freedom of information legislation to get the information that they request. We talk about the housing charter and a transparency agenda, but we expect ordinary members of the public somehow to know where their rights are and what box they are in. Freedom of information is a simple process. Research by the Scottish Information Commissioner proves that there is a high level of public awareness of it. There should be a simple, streamlined and enforceable right.

Mark McDonald (North East Scotland) (SNP): My question follows on from the point that Ms Ewart discussed with Dr Murray. It is to do with section 5 of the 2002 act. I seek clarity on your position because, on the one hand, you appeared to suggest in your earlier answer to the convener that section 5 should be done away with, but it now seems that you might be more amenable to an amendment to section 5 to cover some of the consultation issues that you have raised. What is your organisation’s position? Is it that section 5 is a dead duck or could it be amended to deal with some of the issues that you have raised?

Carole Ewart: To be honest, we are refining our position on the issue because we have become so frustrated by the consultation process since 2002 and the more recent promises: we still have no timeline and no specific list of bodies to be covered. That has led us to a more rigorous examination of section 5 and to wonder whether it has ever operated in the way in which the Parliament intended and whether it could be fixed by an amendment. For example, the amendment could balance the consultation process so that the users of freedom of information have equal consideration in the deliberations. There could also be amendment to section 4 to take on some of the responsibilities of section 5. Our view is that the bill must include a purpose section and that the flexibility to add new bodies is actually less than what is currently in section 5.

Mark McDonald: I appreciate the frustration that you must feel given that, from 2002 until now, section 5 has not been used. Is it your belief that it will never be used or are you willing to take at face value the Government’s comments that it will consider extending the scope once it has amended the legislation to make it fit for purpose?

Carole Ewart: We are really just fed up waiting. We emphasise that it is not just the current Administration that has broken promises. We still do not understand why, when the bill was published, there could not have been a timeline and a list of specifics. However, even if specific organisations were named, that would not go far enough, because we know from the Audit Scotland report that more bodies will be created in future and that, from our reading, those might not be covered by freedom of information legislation. That is why there has to be a purpose section in the amendment bill so that new bodies are more easily covered by freedom of information legislation.

Dave Thompson: I have a simple and quick question for our two witnesses. What is your view on the retrospective aspect of the reduction in the lifespan of exemptions? Should the reduction come in only for issues post the new legislation, or should it apply to everything? Basically, should the measure be retrospective?

Carole Ewart: Does David Sillars want to go first?

David Sillars: No. [Laughter.]

Carole Ewart: In principle, I do not like to miss such an opportunity. I will consider the point in more detail and write to you.

Dave Thompson: Will we have another letter from David Sillars?
David Sillars: To be fair, our observations are on a narrow range of issues. I suppose that I have a view but, given what we have submitted, it would be wrong for me to wing it now. I would like to reflect on the point. We have not formulated a view on the issue.

The Convener: I understand that the intention is to make the provisions retrospective, but we can clarify that with the cabinet secretary. I had intended to raise the issue, so I say well done to Dave Thompson for jumping in.

As Mr Sillars said that the commission is looking at specific provisions, Ms Ewart will probably answer my next questions. What is your view on the proposed change to the time limit for proceedings? As you know, a prosecution must be brought within six months of an offence being committed. The plan is that the bill will change that to six months from the date when evidence comes to light. Is that amendment a positive step in the right direction?

Carole Ewart: Absolutely. We were intrigued to find out that a problem has arisen with time limits. It is extremely disappointing that any documents could have been destroyed. The question is: why three years?

The Convener: I think that that is one of those things—the period is perhaps arbitrary, to be honest. Perhaps three years is thought to be reasonable—we can ask about that.

Last week, I asked the bill team how many cases had not been proceeded with because of the six-month rule, but we got no information on that. I hope that we will get information from the Scottish Information Commissioner, whom the bill team suggested that we should ask.

Carole Ewart: Powerful information has been disclosed today about the Hillsborough tragedy. That reminds us that timelines can be unhelpful. The focus must be on the public’s right to know.

The Convener: Indeed.

David Sillars: For the record, we agree with the amendments on prosecutions and so on.

The Convener: Thank you for your time. We have exhausted our questions.

Carole Ewart: May I add a point? The Scottish Government’s six principles provide an interesting framework for progressive reform of freedom of information, but I draw the committee’s attention to principle 5, which is the duty to maintain

“effective relationships with the Scottish Information Commissioner and other key stakeholders”

and which mentions the Scottish public information forum. In my evidence, I have reiterated several times the need for a balanced perspective on freedom of information. We are not talking just about public authorities disclosing information, but about listening to people who want to access information.

We in the Campaign for Freedom of Information recognise that the Scottish public information forum provided a most welcome and almost revolutionary process whereby public officials met civil society—organisations such as ours. The forum met in places around Scotland and the public could attend and ask questions at its meetings. It afforded a most impressive level of scrutiny, so it is of some regret that that arrangement has not been maintained in the past couple of years. We hope that the forum will pick up again.

We emphasise that the bill should be about the public’s right to know, rather than what the public sector chooses to disclose. That has formed the basis of our evidence to the committee.

The Convener: I thank you and Mr Sillars very much.

10:09

Meeting suspended.

10:10

On resuming—

The Convener: The committee will now hear from Rosemary Agnew, the Scottish Information Commissioner, and Euan McCulloch, who is from the commissioner’s office. I invite Rosemary Agnew to make a short opening statement.

Rosemary Agnew (Scottish Information Commissioner): Thank you for giving me this opportunity to address the committee and to speak on the proposed amendments to the Freedom of Information (Scotland) Act 2002. Members will be relieved to hear that I do not intend to rehearse every single point that we put in our written submission, but there are three significant things that I believe warrant being highlighted at the outset.

The first picks up to some extent on something that Mr Gibson said earlier. In a process such as the drafting of a bill, it is sometimes too easy to focus on points of detail. It is correct that we do that, but there is a danger that, in doing so, we lose some of the big messages. My first point is to do with one of those big messages. I remind the committee that, overall, I welcome the proposed amendments to the 2002 act. On the whole, I agree that they meet the general aim of strengthening and clarifying the provisions. I have two significant areas of concern, but they should
not cloud the fact that there are many positives in the proposals.

I understand that there might be concerns about the relatively narrow scope of the amendments, but I take that narrow scope as a positive indication of the strength of the drafting of the Scottish legislation. Our act simply does not need the level of correction that the UK legislation went through because, in our original drafting, we addressed and learned from many of the issues that came out of the drafting of the UK Freedom of Information Act 2000. There are amendments to improve clarity, such as the changes to timescales and the offence in section 65, but they are about improving the 2002 act and do not represent fundamental change—with one exception, which I will come to in a moment.

The second area that I wish to comment on is the designation of new bodies. I will give a slightly different perspective on that. I appreciate that there are already powers in the 2002 act to allow for other bodies to be brought into the freedom of information net. I understand the logic of clarifying the act before extending its coverage, but I am disappointed that the opportunity has not been taken to have a discussion about how and to where we should extend it. In not doing that at the same time, we are missing some serious and significant issues, some of which have already been raised in one form or another.

It is easy to think of the designation of additional bodies as something of an expansionist approach under which we say, “Let’s make it wider and bring more bodies in,” but that misses two important issues. First, the focus should not be just on which bodies we bring in. We should also think about how we can extend designation to include information about public services, because we want to preserve and enhance people’s right to information about how our public services are delivered. We should also think about whether organisations and bodies are appropriately designated. The designation of some bodies might have been appropriate 10 years ago, but with a review we might find that that is no longer appropriate. The world is changing rapidly, so let us review how bodies are designated.

10:15

The second point about designation is the most important one and is to do with preserving existing rights. No orders have been made under section 5 of the 2002 act since it was enacted. In that time, public services have been outsourced to private finance initiatives or handed to external organisations to deliver, but the right to information about those public services has not migrated with them. By standing still and not designating additional organisations, we have effectively lost rights to information in Scotland.

There is a graphic example of that in housing. Since FOISA came into force in 2005, 15,000 households have lost FOI rights as a result of the transfer of local authority housing stock. Those are not my figures; they are Scottish Government figures. That is just one area of public service.

When we are talking about legislation remaining fit for purpose, we should use our valuable collective experience to consider whether it remains appropriate to cover organisations that are already covered and where we should extend coverage to.

To pick up on some of the earlier discussion about section 5 of the 2002 act, we have not proposed an amendment to that provision. However, one of the weaknesses of section 5 is the opening line, which reads:

“The Scottish Ministers may by order”.

The use of the word “may” makes it discretionary, not mandatory, to have the debate about, review of or consultation on designation. If we want to make an additional amendment, that might be something to think about. It is all very well giving us rights, but if they are not being exercised, there is not a lot of point in their being there.

The third and final area relates to the amendment to section 2 of the 2002 act, which impacts on section 41(a). We have all dubbed this the royal exemption, and I am sure that the committee is aware of the publicity around my concerns about the proposed amendment. I want to ensure that members properly understand where I am coming from. My concern, which has a raised a point of contention, is fundamentally about the creation of another absolute exemption. Making an exemption absolute further undermines and erodes rights to information. It removes from Scottish public authorities, including me and the Government, the flexibility needed to consider the public interest in relation to what can and cannot be disclosed.

Bearing in mind the fact that public authorities can be requesters themselves, we should note that not only does the bill introduce another absolute exemption but, unlike existing absolute exemptions—and this is a key point—the provision is very wide ranging. The proposed wording “anything which relates to” makes the scope of the provision very wide and, to a great degree, very uncertain. That is in contrast to other absolute exemptions, in which the information that is exempt is very clearly defined, with boundaries and edges. That approach would not exist under the proposed wording. The use of “relates to” makes the provision so wide that what it might cover is virtually unpredictable.
We have all heard the arguments that the existing exemption should be amended to make it consistent with UK legislation. Although I can see the point that people quite like consistency, a more important consideration is consistency with our own Scottish legislation. Making the proposed amendment to FOISA to keep it in step with the UK legislation—Ms Ewart used the word “copy”—will mean that our freedom of information legislation will be taken out of step with other Scottish legislation. For example, it will take us out of step with the Scottish environmental information regulations and with the European EIRs, because the Scottish regulations are derived from a European directive.

It is important to note that we could not automatically put that inconsistency right by amending the EIRs—we cannot simply amend them when that might lead to a restriction of rights, which is what an amendment would do. That would leave us with a somewhat ridiculous situation in which information could be withheld under FOISA but would have to be released under the EIRs, even if there was an absolute exemption under sections 2 and 41.

Such inconsistency is undesirable and is confusing for requesters and for those who have to respond to information requests—the public authorities that we have a duty to advise. The proposed change would make giving advice more difficult. We should not lose sight of that.

We should also not lose sight of the fact that the UK’s 2000 act was rushed through its late stages without full consultation. Here in Scotland, we are not rushing this amendment bill through; we are consulting widely. I strongly urge the committee to fully consider the impact of the proposal as it stands and what it will mean for us.

We also need to retain some perspective on the amendment to section 2 of the 2002 act. In reality, there are few requests or appeals to the commissioner. Although some might use that to argue that the amendment is therefore not a big deal, I argue the opposite. The fact that there are so few requests and that information has not been inappropriately disclosed indicates that the current provisions provide adequate protection and are effective. In other words, if it ain’t broke, why are we bothering to fix it?

Fire away.

The Convener: Thank you. I am sure that you have answered many of the questions that committee members wanted to ask, but I have a couple that arise from what you have said, as opposed to what we have in writing. You said that we need an appropriate method of designating additional bodies to be covered by the legislation. What criteria should be used for designation? You talked about ALEOs as a potential example. How would you define the additional bodies that should be covered?

Rosemary Agnew: I am glad that you asked that question. It is not as simple as saying that designation should follow the public pound or that it should follow a function that has been transferred to another body. To pick up on something that Carole Ewart said, it is not just about consulting people who have information rights that might be lost. There should also be a focus on the provision of public services. That is a more difficult issue. At what point does a service stop being a public service if it is being delivered by a different type of organisation?

Part of the problem with setting out criteria is that because there has been no attempt under section 4 of the 2002 act to make an order under section 5 of that act, we have never discussed how to designate or what should be designated. I would welcome such a discussion because the answer is not simple. It is not as simple as having a tick list and saying what we think designation should cover. A good starting question could be whether the body falls under public and administrative law. Is it provided for under public law and, if so, should there be a right to information?

Where the public pound goes is an important consideration, but it is not the only one. I have nothing further to say beyond that.

The Convener: Okay. Thank you.

In the final paragraph of your written submission, you state:

“I note the statement from January 2011 which set out Ministers’ belief that it would be ‘premature to extend coverage before the deficiencies in the Act could be put right’.

You also talked this morning about the Government moving swiftly. Would it be “premature to extend coverage” at this point? You said that the Scottish Government should propose further action if the bill is passed.

Rosemary Agnew: I do not think that it is ever premature to extend a right that existed back to where it was in the first place. My fundamental point about designation is about the rights that have been lost, and I cannot see that it is ever premature to re-extend rights that were there in the first place.

The Convener: So you do not accept the Scottish Government’s premise that we should resolve the flaws in the legislation before extending its coverage?

Rosemary Agnew: I understand it, but I do not totally accept it. Removing the flaws will not involve huge changes to the legislation, which, on
the whole, works well, given the intention behind it. There is logic in saying that we should clarify it, but we could put things right and extend it at the same time. We are disappointed that the Government has not at least promoted a debate about that.

To pick up on Carole Ewart’s point about timelines, I note that what we have is a provision in an act that says, “You may designate”. We have nothing more than that, despite all sorts of people—including me and the previous commissioner—making the point over and over again that there have been no orders under section 5.

The Convener: One of the Scottish Government’s six principles of freedom of information commits it to adjusting the regime where it is necessary and sensible to do so. Do you agree that the bill seeks to fulfil that principle?

Rosemary Agnew: The bill fulfils the “sensible” part, but I question the extent to which it fulfils the other aspects. The fact that lack of designation has led to an erosion of rights calls into question the extent to which the principle is being followed. Although I appreciate that some people might argue that the principle is a matter of timing, we have not had a clear statement of when that principle will be applied.

The Convener: I have two more questions before I open up the session to colleagues. Last week, I asked the bill team about the number of prosecutions that it has not been possible to proceed with. I am sure that you are well aware that this issue would be raised—the Scottish Government team suggested that we raise it with you, because it is a key issue in relation to the bill. How many prosecutions have been stymied because of the legislation?

Rosemary Agnew: We have given serious consideration to applying section 65 of the 2002 act in eight cases, and in seven of those timing was a factor. However, it does not matter whether it is one case or 1 million. The point is that the timing needs to be put right, so we welcome the amendment to section 65.

The Convener: Okay. You heard the questions that we put to Carole Ewart, who expressed concern about the three-year time bar in the bill. What is your view on that?

Rosemary Agnew: There has to be proportionality. I see the three-year period as a long stop because, in reality, it would be difficult to effect a prosecution after that time. I am fairly confident that anything that was going to emerge would emerge within 12 months of discovery. The key change here relates to discovery rather than commission, so I am not overly concerned about the three-year period.

Elaine Murray: Thank you for your evidence. You have covered many of the issues that we have been thinking about. You said that section 5 of the 2002 act could be strengthened by substituting “shall” for “may”. Over the years, I have had arguments with Government ministers about such substitutions, and there is often resistance to putting in “shall” instead of “may”.

Do you agree with Carole Ewart’s point that the consultation provision is asymmetric because it concentrates on the public bodies that are the subject of FOI and there is not enough focus on consulting those who wish to use it? If we are to strengthen section 5, should we strengthen the consultation provision?

Rosemary Agnew: I think that it should be strengthened, because the whole purpose of FOI is to do with the right to know, not the right to provide. We should be asking people what they want the right to know about and from whom, rather than asking the providers of that information whether people should have the right to know about it.

10:30

Elaine Murray: I raised with previous witnesses the difficulty that sometimes arises in getting information and the ability of public sector bodies to prevaricate and obfuscate, for example by asking for further details of the information that has been requested. One of my colleagues got a ream of paper in response to an FOI request. It could be difficult for a member of the public to sift through that to get the information that they wanted. Could the bill make it easier for a member of the public to get the information that they are asking for?

Rosemary Agnew: I think that it could, although we are not necessarily ever going to provide for that absolutely in legislation. There is a duty on all public authorities to provide advice, information and guidance. I feel strongly about equipping authorities with the right sort of advice and information, because if you give the person making the request the advice and guidance that they need when they are making the request, you have made an investment of time that makes it easier for you to answer the request and easier for the person making it to know what they are asking for and the form in which they are asking for it. We are talking about a cultural shift rather than a legislative shift.

Michael McMahon: I return to the question that I have asked other witnesses. I have been caught up in the issue about who would be protected by the absolute exemption. You seemed to indicate that it is not about whether the royal family or ministers are protected, because the system
seems to be working at the moment. Your concern is about having an absolute exemption.

Rosemary Agnew: That is right. An absolute exemption removes a right to information. It would be a retrograde step for us to remove such a right when we have no evidence that what is already provided for in the 2002 act is not doing its job well. In my view, there is already adequate provision for the royal family and for discussions that any public authority may need to have that are confidential, are covered by other rights or are a matter of national security. It is not just ministers; it is all public authorities. We already have those protections.

What the bill will do is simply take away that public consideration right. The public interest test is really valuable and powerful, and it already acts as an adequate safety net. I really have nothing more to say on absolute exemption, other than that I fundamentally disagree with it.

Michael McMahon: I do not have extensive knowledge of what the current legislation permits, but I assume from what you are saying that you think that a dangerous precedent would be set. There is no absolute exemption at the moment and therefore no evidence that it is required or would serve any purpose.

Rosemary Agnew: Absolutely. I do not think that it would serve any purpose other than to undermine the rights that already exist.

Mark McDonald: I was interested in what Dr Murray said about a response running to reams of paper. I have received such a response myself, the irony being that it was a response to a request about tree preservation orders. Dr Murray dealt with the point that I wanted to raise, which was about your concerns about section 5 of the 2002 act.

We heard evidence earlier that the weakness in section 5 is to do with who is consulted. However, your view seems to be that the weakness in section 5 is that it contains the phrase “may by order”. My understanding is that that is quite a standard phrase in legislation. What would your view be if we were to change that to “shall by order”? Would that set a precedent for other legislation?

Rosemary Agnew: I was using that as an example of why the weakness exists—the word “may” makes the provision almost discretionary. It gives ministers the power but it does not make them use it.

I would not want today to go so far as to say, “Oh, I think you should change it to this or that”. If there were to be any amendment to section 5, I would want to come back to the committee with a carefully considered suggestion for a form of words.

Mark McDonald: That deals with my supplementary, convener. I am done with my questions. [ Interruption. ]

John Mason: The convener seems to be having a conversation, so I will just carry on.

The Convener: I was actually discussing the committee’s proceedings. I call the deputy convener—at least, he is the deputy convener for the time being. [ Laughter. ]

John Mason: Thank you, convener.

Commissioner, you have touched on certain issues that I have already raised; in particular—if I have understood you correctly—you have emphasised the fact that certain bodies have actually left the public sector and now fall outwith the legislation, which used to cover them. In that regard, you mentioned housing. In his letter, Brian Adam suggests that there is “no compelling evidence of ... unmet demand for information”.

Might there be confusion among the public with regard to housing? After all, a tenant will be able to get information if their landlord is the council, but not if their landlord is a housing association. Do you find yourself having to tell a lot of people who come to you looking for information that housing associations are not covered by the legislation?

Rosemary Agnew: I am not sure that I can say that we get many such inquiries, because they are more likely to have been dealt with at the first stage—when people contact local authorities, for example.

As for any lack of evidence, if you have not looked for evidence you will not have found it. I am not sure how much work has been done to establish whether people understand that that right has been lost. Carole Ewart made the important point that, under freedom of information, people do not have to know that they have a right in order to exercise it; all that they have to do is ask for information. Because of the way in which the legislation is drafted, simply asking for information invokes their right for them.

Housing is a good area to focus on, in that there are other ways of getting information. However, all people have is a channel for information; they do not have a right to receive that information. That happens in only one area; there are all sorts of public services that are now outwith the freedom of information regime. We need only consider the number of PFI contracts in Scotland covering schools, hospitals and prisons; people who want to know information about those things do not...
have even the same rights as tenants of housing associations. I think, therefore, that the issue is much more serious and affects more than housing.

**John Mason:** I was just using housing as an example, because some landlords will be in the regime and others outwith it.

Am I right in thinking, then, that when people go to their housing association and ask for information under FOI and are told that the FOI legislation does not cover housing associations, they simply accept that and do not bother coming to you? Is that why you might not see such cases?

**Rosemary Agnew:** A few people come to us.

**Euan McCulloch (Scottish Information Commissioner):** During the time that FOISA has been in force, we have had a steady trickle of inquiries about the coverage of housing associations. As the commissioner suggested, there is also potential for inconsistency with the EIRs, which, unlike FOISA, might well cover housing associations. That, too, might lead to confusion.

**John Mason:** You said that as long as they ask for information people do not necessarily need to know that they have the right to it. I have the impression that when asked for certain information, councils might say no, but if the question is, “Can I have this information under FOI?” then they tend to provide it. Is that your experience?

**Rosemary Agnew:** I cannot say that that is my personal experience; nevertheless, it highlights the importance of our work on assessments. My remit covers not only appeals under FOI, but assessment of practice, and in the assessments that we carry out we find that most front-line staff seem to know that they must treat every request for information as a freedom of information request. However, we still find ourselves having to make recommendations about training and raising awareness of what things mean. Coverage is not 100 per cent, although I cannot say what the actual percentage is.

Our view is that, on the whole, people know about these things and do what they should do, but it all comes back to something that I feel quite strongly about, which is that local authorities and public bodies should be equipped to deal with such matters. This is not just about helping requesters but about ensuring that the culture within the organisation is that the staff know that the right exists and that they have to go some way in the direction of helping people to exercise it.

**John Mason:** In his letter, Brian Adam also says that extension will be difficult in “the current economic climate”, which suggests that there could be quite a cost to bodies that might be included. Do you share that view?

**Rosemary Agnew:** No. If you only ever look at these issues in cost terms, you will miss two things. First, as Ms Ewart said, democracy is not free. Secondly, there are benefits to be had from embracing freedom of information and understanding its value with regard to the organisation’s wider communications—after all, we should remember that this is not just about freedom of information requests but about publication schemes, proactive publication and so on. There seems to be a fear that giving out information can put reputations at risk; however, not giving out information can have the same risk. If the issue was considered holistically at a very senior level in organisations and its benefits understood, that would go some way towards assuaging that fear. I certainly think that there are benefits for organisations; I cannot put a figure on that, but I do not believe that it is all about cost.

**John Mason:** My next question is linked to that point. Last week, the bill team mentioned other means of achieving transparency. Is that close to what you are talking about? Are you suggesting that if a good organisation adhered to industry standards it would publish information and that, following that logic, we would not need to extend FOI?

**Rosemary Agnew:** Perhaps the danger with transparency is that we tend to lump everything together and say, “If we’re transparent, everybody will get what they ask for”. Transparency works on the basis of the information you give out, the assumption being that you know and understand what everyone is ever going to want to know about. Many freedom of information requests are very personal and relate to specific information, and an approach that is based on transparency would go some way towards dealing with those—but not the whole way. Transparency is an important piece of the information puzzle but it is not the only one, and freedom of information rights are fundamental to ensuring that all the information that people need and want to know can be made available.

**The Convener:** On the question whether the bill should be retrospective—which Dave Thompson seems too shy to ask, even though he asked it in the previous session—your view is that the reduction in the lifespan of exemptions should be fully retrospective. Obviously I have your written comments on that, but could you put on record why you feel that that should be the case?

**Rosemary Agnew:** Historical records already exist. If it is being argued that such an amendment should be made now, why should it not also apply to existing records? After all, those very records must have given rise to these questions and this
debate in the first place. We fully support the bill being retrospective, because we think that this is all about access to information, not the timing of when that information can become available.

The Convener: Thank you for that. Do you have any final points to make?

Rosemary Agnew: I think that I have probably covered my main points, convener.

The Convener: I think that you probably have. Thank you very much.

We are well ahead of time, so I suspend the meeting until 10.55.

10:44
Meeting suspended.

10:54
On resuming—

The Convener: I welcome to the meeting Nicola Sturgeon, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities, and her officials, Zoe Mochrie, Andrew Gunn and Mark Richards. I invite the cabinet secretary to make a short opening statement.

The Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities (Nicola Sturgeon): Thank you very much, convener. I am delighted to be here. Freedom of information was probably not the most remarked upon of my new responsibilities from last week's Cabinet reshuffle, but it is nevertheless an extremely important one that I am delighted to take over.

This is a good opportunity for me to provide evidence to the committee on the Freedom of Information (Amendment) (Scotland) Bill. I know that the committee heard earlier this morning from some stakeholders and I am happy to answer any questions later that arose from those sessions. Obviously, the Freedom of Information (Scotland) Act 2002 is a relatively new piece of legislation, but notwithstanding that, it is a positive sign that freedom of information is already embedded across our public authorities and widely recognised across Scotland as a key statutory right.

We should never be complacent, but it is good to note the former Scottish Information Commissioner's view that the freedom of information regime that we have in Scotland is widely recognised as being strong and able to withstand international scrutiny. As a Government, we are proud of our record in meeting our obligations under the 2002 act, as well as in proactively making information available wherever possible. Information is released in response to the vast majority of the requests that we receive. More than 70 per cent of decisions from the Scottish Information Commissioner have gone either wholly or partially in our favour. It is also worth noting, although it is quite a daunting statistic, that in the interests of openness the Scottish Government website contains about 600,000 pages of information.

As the committee will be aware, the bill has its origins in the desire to change what is perceived to be two weaknesses in the 2002 act. The intention is to pave the way for more information to be made public earlier and to allow the provisions for a prosecution for an offence under the 2002 act to be strengthened. Speaking more generally, the bill seeks to improve the operation of the 2002 act. For example, as I indicated a moment ago, the bill will promote further openness by allowing reduced lifespans for exemptions; it seeks to clarify some unclear drafting in the 2002 act; and it will provide some additional protection for personal data.

The most controversial element of the bill has been around the limited change to the public interest tests in respect of communications with Her Majesty. The intention of that amendment is to ensure consistency of approach across the UK in respect of both the current and the future head of state. I am sure that that is one of the issues that we will touch on later in the evidence session.

One further item that I want to touch on, because I know that the committee has discussed it and will want to discuss it further, is around the extension of coverage. As I think my officials said last week when they gave evidence to the committee, the bill is not about the extension of coverage. We are clear about that. The issue of extension has been subject to consultation, as required by the 2002 act. A decision has been deferred until the Scottish Parliament has scrutinised the amendment bill.

I reiterate—I will expand on this point later, if members wish me to—that the 2002 act already contains the power to extend coverage. Our view is therefore that primary legislation is not required to extend coverage. We should not see formal extension of coverage as the only means of ensuring access to information held by bodies that are not currently covered by the 2002 act. For example, the committee is probably aware of the recent conclusions of the House of Commons Justice Committee when it was doing post-legislative scrutiny of the United Kingdom Freedom of Information Act 2000. The committee said that contracts often provide a more practical basis for applying FOI to outsourced services than partial designation of commercial companies under the act.
I understand the desire for more access to information, but we must be mindful that primary legislation is not necessarily required for that and that there may be more than one way of achieving it. I am sure that we will discuss those issues later after we have—I hope—passed the bill.

Finally, I reaffirm the Government’s commitment to promoting transparency and operating as openly as possible. As I said, I am new to the subject and I am keen to have discussions with the committee, today and in future, and with other stakeholders, about how we continue to give life to those principles. We plan consultation with key stakeholders later this year on the development of a Scottish transparency agenda, and I hope that the committee will take an interest in that—I am sure that it will do.

I am happy to take questions.

11:00

The Convener: Thank you. As usual, I will kick off with questions before opening out the discussion to other members of the committee. It would be remiss of me not to start with what is probably one of the most contentious issues: the royal exemption. There are concerns that the exemption is more wide ranging than it requires to be, that it was not consulted on and that it is a retrograde step.

I understand from your comments and information that we have received about the bill that you want to ensure a consistent approach across the British isles, given that we have a shared monarchy. However, as Rosemary Agnew pointed out just before you arrived, the proposed approach will be out of step with Scottish legislation, particularly in relation to EIRs. How do you square the circle, so that there is a consistent approach in the UK, when there is not necessarily consistency with our legislation, because if the bill is enacted a person will be able to put in an FOI request under the EIRs but not under freedom of information legislation?

Nicola Sturgeon: On the scope of the bill and the consultation, we will listen carefully to the views that are expressed at stage 1 by stakeholders and, ultimately, the committee, which will inform our thinking for stage 2. I am very interested to hear the points that are being made.

It is important to reiterate the motivation for the amendment to which you refer: it will bring Scottish legislation into line with legislation in the rest of the UK. The Queen and her successors are head of state of Scotland as well as the rest of the UK, and there is a strong and compelling argument that the arrangements for dealing with communications between the monarch and, for example, the Prime Minister’s office, should be the same as the arrangements that pertain to communications between the Queen and the First Minister’s office. The point about consistency is important.

It is important to remember that information relating to Her Majesty, as well as to other members of the royal family or the wider royal household, is still subject to the 2002 act. There is no automatic requirement to apply exemptions to relevant information. Not too far away from here, in the Republic of Ireland, information relating to the President is simply not accessible via Irish freedom of information legislation. That point is worth making.

The exemption that we are talking about has rarely been applied—certainly by the Scottish ministers—in responding to information requests. Annual reports show just two instances of that since 2008, and all three decisions that the Scottish Information Commissioner has issued to date have upheld the application of the exemption. In one case, however, there was a ruling in favour of release, in the public interest.

On inconsistency between the FOI regime and European regulations, it is important to say that we are not dealing with a like-for-like situation. The origins of the two regimes are very different: one originated in Europe, the other is very much a devolved issue. There are already significant inconsistencies between the freedom of information and European regulations regimes. Whether we think that that is good or bad, it is a statement of fact that there are a number of inconsistencies between the two regimes. There is no easy match-up of exemptions and exceptions, and the terminology differs considerably, as does the scope of exemptions. We could eliminate inconsistency only if we combined the two regimes. What we are doing in the bill is ensuring that we do not open up inconsistency in the positions of Scotland and the rest of the UK when it comes to dealing with communications from Her Majesty.

The Convener: I have a couple of points in response. First, the Queen is also the head of state of Canada, New Zealand and Australia and I do not believe that they have consistent relations with the UK on this issue. We have a shared monarchy, but we do not necessarily have to have the same rules and regulations. I invite you to comment on that point.

Secondly, the Scottish Information Commissioner has stated clearly that absolute exemptions are not regarded as good practice and that she considers the measure to be unnecessary. Overwhelmingly, the evidence that the committee has received shows that there does not seem to be much support for such an amendment and that it is considered to be a
Nicola Sturgeon: On your point about Canada and Australia, my remit does not yet extend to speaking for their Governments, they will be relieved to hear. It is not appropriate for me to comment directly on their freedom of information regimes.

I do not want to repeat myself, because I have already set out the Government's motivation for the change in question. However, I will say that it would be strange to have a situation in which communications between the monarch and the Prime Minister were treated differently from communications between the monarch and the First Minister. That is the motivation for the change.

On your more general point, I appreciate that I am new to this responsibility and that I have some work to do to outline my approach to FOI and to persuade those who believe, rightly, that we should have openness, transparency and access regarding information wherever possible that I, too, passionately believe that; that is the spirit in which I will conduct my responsibilities. I agree with the Scottish Information Commissioner that absolute exemptions are not measures that we would want to apply lightly, or regularly and frequently. Where there is a proposal to do that, it must be well founded. The consistency argument that I have given is the foundation for that and I think that it is a strong one.

The Convener: Thank you. You said that openness should follow public money when public services are outsourced and that that can best be achieved through clear and enforceable contract provisions rather than by designating commercial companies in the bill. How does the Scottish Government encourage national health service boards and local authorities to prepare clear and enforceable contract provisions?

Nicola Sturgeon: I was looking to the future in what I said. As I said in my opening remarks, the bill is not about the extension of coverage. I am new to this brief and my position is to be open minded about extension of coverage. The Government has said clearly that, after we have had parliamentary scrutiny of the bill, we want to consider the issue of extension of coverage and have a debate and discussion about it to inform any future decisions that we might take in that regard.

The point that I made earlier was two-fold: first, the power to extend coverage is already in the Freedom of Information (Scotland) Act 2002. To those who say that we should address extension of coverage in the bill, I simply say that we do not need primary legislation to give us the ability to extend coverage, because it is already there. The fact that the provision may not have been used does not mean that the power is not there.

My second point was not that this is my settled view; it was simply that, when we have the discussion on the extension of coverage, let us ensure that we consider all the options that exist. It may be that the use of the existing power in the 2002 act to formally extend coverage is something that we should do in particular circumstances. However, it may be better to consider in future how we make contract provisions stronger around the public's right to access information where public money is in play. I am therefore simply saying that there are different options; I am not saying that I have a settled view one way or the other on what option is best at this stage.

You asked about NHS boards. Obviously, they are subject to freedom of information legislation at the moment. With regard to contracts—whether they are NHS contracts with commercial organisations, or those of local authorities or other public authorities—there is a debate to be had about how we ensure that we have the right balance between commercial confidentiality and the public's right to access appropriate information.

The Convener: I appreciate that a power to extend the number of bodies that are subject to FOI is available under the 2002 act, but there is concern that, over the past decade, that power has not been used. The issue is not directly addressed in the bill, and there is concern that there has been no statement on when there is likely to be an extension. There is also concern that a number of bodies that used to be covered by the 2002 act are no longer covered because they have been taken out of the public sector or whatever.

Many people have made those concerns clear in their submissions to the committee. Indeed, Professor Colin Reid of the University of Dundee school of law stated that designation is "the most serious issue in need of attention".

When will the Scottish Government look to increase the number of bodies? What criteria will it use to do that?

Nicola Sturgeon: On your first point, I do not dispute that, over the past decade, that provision in the 2002 act has not been used. I am simply saying that that does not mean that it is not there. My point was that we do not need new primary legislation to create such a power, because the power already exists.

We have said that we want to defer a discussion about extension of coverage until after the bill has
completed its parliamentary process. I am happy to give the committee a commitment and an assurance that I will come back at that time and discuss with you in broader terms how the Government might take forward that consideration. Given that we have taken that decision to defer, it is important that I do not get into a pre-emptive discussion about particular bodies. I know as well as you do some of the bodies that could be involved and the contracts that people want access to information about, but it is important that I do not pre-empt the discussion by starting to name individual organisations now.

There is a debate to be had about the matter. I am certainly up for that debate and I would welcome the committee’s contribution to it. If you want to invite me back to have that discussion after the bill has completed its parliamentary process, I will set out at that time a process and a timescale for the consideration that you and the stakeholders to whom you have spoken want, and which we have already said we want to have as well.

**The Convener:** I am sure that we will be more than happy to do that. I will open up the discussion to colleagues in a moment. I have just one further question. Will the reduction in the lifespan of exemptions be fully retrospective, as recommended by the Scottish Information Commissioner?

**Nicola Sturgeon:** Yes. As you know, the Scottish Government already operates to a 15-year rule rather than a 30-year rule. The reason for the amendment to the 2002 act is to ensure that other public bodies take the same approach. At present, we can apply only a blanket reduction in the lifetime of exemptions, whereas there might be some categories of information, for example around child protection, for which it would still be appropriate to have a longer period. For other categories of information, a shorter period could be appropriate. Under the 2002 act, we cannot discriminate in that way because the provision allows only a blanket reduction. The bill will allow us to look at particular categories, and when it has been enacted it will be our intention to bring forward secondary legislation to put that into practice.

**Elaine Murray:** Thank you for explaining why the matter is on your long list of tasks. You must be able at multitasking—like many women, I think.

You said that the bill is not about an extension of coverage because the act contains powers to introduce secondary legislation to extend. Why is that? Surely the bill represents an opportunity to extend coverage. I do not know whether you or your officials had an opportunity to listen to the evidence that we heard earlier, but there is clearly disappointment that successive Governments over 10 years have promised to consult and indeed have consulted, yet it has not resulted in any extension of coverage.

There has been a suggestion that amendments could be lodged to strengthen the bill. As I said earlier, I have had debates with ministers over the years about substituting “shall” for “may” in legislation. Does the bill not represent an opportunity to address some of the concerns about the lack of progress on extension?

**Nicola Sturgeon:** I will divide my answer and comment on two points—first, the demand, the call and the support for greater coverage, which I recognise, and secondly what primary legislation is required for and what the bill seeks to do.

The original act—the Freedom of Information (Scotland) Act 2002—includes a power to extend, by secondary legislation, the act’s coverage, so we do not need to enact new primary legislation to give ministers that power. I acknowledge that some people are frustrated that successive Governments have not exercised that power, and there is a debate to be had about whether and to what extent we should exercise that power in future. I am open to that debate, and I will listen carefully to the views that stakeholders are expressing. However, we do not need to address that issue in the bill, because we already have the primary legislative power.

11:15

The bill is relatively narrowly drawn, because it looks to tidy up some aspects of the original act. In one respect, at least, it tidies up the drafting of the original act to make it clearer. It also deals with two perceived weaknesses in the act, one of which—the way in which the lifetime of exemptions can be reduced—I have already spoken about. The second perceived weakness relates to prosecutions under the act. Because of the way in which our freedom of information regime works, the framing of the act rendered prosecutions virtually impossible.

I am not by any stretch of the imagination saying that I do not recognise that people want to have a debate about the extension of the act’s coverage, but that debate does not hinge on the bill, nor is it the case that we need to change primary legislation to have that debate or to make progress in that direction.

**Elaine Murray:** But there is a concern about the people who require to be consulted about such secondary legislation, which is that only the bodies that would be subject to freedom of information requests, and not those parties who might represent the interests of people who want to make such requests, require to be consulted. Is it...
not the case that that might need to be amended in primary legislation?

Nicola Sturgeon: I do not think that that is necessarily the case. In my previous ministerial portfolio, I always took an open approach to consultation. The legislative process, both for primary and secondary legislation, is laid down. That is the process that Parliament goes through. The committees have a role to play in considering secondary legislation and, in my experience, they are not shy in making their views heard on secondary as well as primary legislation.

I am strongly of the view that, notwithstanding what the strict interpretation might be of what is required as far as secondary legislation is concerned, if we are to have a debate about extending the coverage of freedom of information, we would want that debate to be as wide as possible. Again, I am happy to give a commitment that that is what we would seek to do.

Elaine Murray: I am sure that it is an issue on which we could have further discussion, because some organisations have offered to produce amendments for consideration at stage 2.

Nicola Sturgeon: A slightly different issue, on which the Scottish Information Commissioner did not think that it was necessary to legislate—although several of us have expressed concerns about it—is the way in which some sections of the public sector can prevaricate, obfuscate and make it difficult for people to get the information that they ask for. The Information Commissioner thought that that was less a matter of legislation and more one of providing guidance and so on. Will you return to that?

Nicola Sturgeon: I go back to a fairly recent experience that I had as Cabinet Secretary for Health, Wellbeing and Cities Strategy. A decision was issued by the present Information Commissioner’s predecessor to say that Ayrshire and Arran NHS Board had not applied the principles and the letter of the law on freedom of information appropriately. In my view—I made this clear publicly as health secretary at the time—that is completely unacceptable. Public bodies and agencies that are covered by the act have an obligation to live up to the principles and the letter of the act. As health secretary, I instructed Ayrshire and Arran NHS Board to get its house in order, and I ensured that the learning from what was not done properly there was applied across the wider NHS. We should always challenge any public authority that is seen or found to be not complying with the principles of freedom of information.

It is in the nature of the thing that there will be many examples of situations in which a public body will have a particular interpretation of the provisions of the act that will differ from the interpretation of the person who seeks the information. Of course, it is for the commissioner to determine what interpretation is or is not correct, or, ultimately, for the courts to do that. We in Scotland—not only the Government but other parties and Scottish society generally—are committed to the principles of openness and free access to information, and public bodies should ensure that they abide by those principles.

John Mason: I note the points that you have made—the fact that the Government does not consider that this is the opportunity to extend the coverage of the 2002 act has already been raised. However, the reality is that amending the act requires primary legislation, so there is an expectation out there and people see the opportunity to extend the act.

Do you accept that it is not just a question of extending the act? I know that you did not want to go into too many specific examples, but perhaps I can give some. In Glasgow, many things, such as housing, car parks, street wardens, leisure centres and Kelvingrove art gallery, that used to be under the control of the council and subject to freedom of information are now outwith the council and not subject to freedom of information. Therefore the amount of information that the public can access has reduced.

Nicola Sturgeon: I do not challenge that view—it is a view that I recognise for many reasons, not least as a Glasgow constituency MSP who frequently has frustrations because of the outsourcing of services by the council and the implications of that for the ability to hold people to account, access information and respond to legitimate constituent queries.

I hope that people are hearing me loud and clear when I say that, as the new minister in charge of this area of work, I am up for the debate about how we improve the public’s access to information, particularly where public money—often large amounts of public money—is being spent. In having that debate, we need to look at the extent to which improving that access to information requires formal extension of the coverage of the 2002 act. There may well be instances where that is the case, but there also may be different ways in which we improve the public’s access to that information. As I said earlier, I do not have a fixed view on which route is the best—it may be a combination of the two—but I am signalling to you clearly that I am up for having that debate, and I hope that the committee as well as the other witnesses you have heard from this morning will be a part of that.

John Mason: If you accept that what the bill is trying to do and a demand for more bodies to be
included are two separate issues that are in many ways unrelated, either they could run in parallel as of now or they could both appear in the bill. I do not necessarily have a particular preference, but could we not quickly start the consideration process?

Nicola Sturgeon: I am happy to consider that. The Government’s commitment and the decision that it took—which is the Government’s standing decision—was that we would begin that process following the legislative scrutiny of the bill. I am not averse to going away and looking at that to see whether there is work that we can do if the committee has an appetite for that. That is very much a separate issue from the slightly more technical issues that we are dealing with in the bill, and it is important that people see that the two are not one and the same.

John Mason: Following that logic, I see no particular reason why one strand of work has to wait until the other is complete because, presumably, it would not be a problem if there were an overlap between the two.

Nicola Sturgeon: The other way of looking at it is that—assuming Parliament agrees the bill—it will not be particularly long until the bill is on the statute book.

I am happy to look at, and come back to the committee on, the timescales and the processes for facilitating the debate that you are asking for. A lot of factors have to be weighed up and balanced, and it may be that, as we get into that debate, there are issues on which I will take a different view from that of the committee or some of the stakeholders but, as I said, I am coming to the matter with a perfectly open mind.

John Mason: Earlier, we mentioned that contracts are one way of getting openness, and I think that in some cases that is probably the case. My gut feeling is that Glasgow City Council paid over the odds for PFI secondary school contracts. If that was the case, neither the council nor the private sector wants that information out in the open. There you have a contract where both parties want it kept secret, yet we the public want to see it. How can we tackle that?

Nicola Sturgeon: As I said, it may well be the case that some of these issues are best tackled by formally extending the coverage of the 2002 act to include, at least partially, some of the commercial organisations that are involved in public contracts. Alternatively, it could be that, for the future, we look at making specific some of the things that we would expect to be agreed in contracts that would allow the public to get access to some of that information. There is a debate to be had about the best way of allowing the public to get access to information that is, as you are right to point out, very much in the public interest in many cases.

John Mason: Your predecessors and you have made the point that, under the 2002 act, ministers already have the power to act. The crucial point for some of the outside bodies is that they want the power to be with the public rather than with ministers. Do you see a distinction there?

Nicola Sturgeon: As you know, ultimately it has to be Parliament that approves secondary legislation so there has to be something in the legislation, as there is at the moment, that allows Government to initiate the process that would result in the formal extension of the act. I am not sure how that would work in a different way in a formal sense.

As we have the debate about the extent to which the act might or might not be extended and the other issues, such as improving the public’s access to information, I agree with you that what the public want and the public’s view are extremely important, and it is important that we garner that information as part of the process.

Mark McDonald: I thank the cabinet secretary for coming. I, too, was unaware that FOI fell within her responsibility. As I recall, it used to be the joke that John Swinney was the cabinet secretary for everything; that mantle might have been passed on.

Nicola Sturgeon: I am happy for him to keep it.

Mark McDonald: I have also made a note to ask questions before Elaine Murray does in future, because that is three times in a row that she has pre-empted most of the questions that I wanted to ask.

Following on from the discussion that you had with Elaine Murray about section 5, if I paraphrase the Scottish Information Commissioner correctly, I think that she was talking about the notion that we should look not just at the bodies that are covered but at how we designate the delivery of public services when we are considering extending the 2002 act. Do you have sympathy with that view?

Nicola Sturgeon: Although I am not articulating it in the same way or as well as the Information Commissioner will have done, that is the point that I am making. I guess that the objective that we want to achieve is improving and extending the public’s access to information. The mechanism for doing that depends to some extent on the kind of information that the public want to access. In some ways, that will be about extending the act and, in other ways, it will be about looking at different mechanisms. As the convener and John Mason have outlined, many public authorities are fundamentally changing the way in which they
deliver public services, so that has got to be part of the discussion as well.

Mark McDonald: Thank you. Given that you have put on the record your open-mindedness about many of the other issues, my other questions have been more or less addressed.

Michael McMahon: I am mindful of the Information Commissioner's guidance to us not to get hung up on an argument about what the impact would be of the absolute exemption for the royal family, but I have to say that I found your argument a bit inconsistent. When the convener asked you to look at comparisons with Canada and other Commonwealth countries and their relationship with the monarchy and freedom of information legislation, you were not prepared to comment. However, in your defence, you cited the relationship between freedom of information and the President of the Republic of Ireland. Why is a comparison allowed there but not with countries that are part of the Commonwealth?

I also want to look at what we are trying to get. The Information Commissioner was talking about getting the best legislation for Scotland and addressing any issues that might come up in relation to that. She could not provide any evidence that we have a problem that needs to be addressed. I am looking for the consistency that you have argued for in your answers. I do not see how you can argue for consistency with the rest of the UK when the change there came about in a less robust way than how we achieved our freedom of information legislation. Our freedom of information legislation has been working well, according to the evidence. Your argument is that we should follow the lead of Westminster but, in my view, that is inconsistent.

11:30

Nicola Sturgeon: I think that that is a slightly pejorative way to characterise my argument, but I will not go further down that road. I simply cited the case of Ireland as a country where the head of state is completely exempt from freedom of information legislation. That is not what we are proposing and it is a legitimate difference that should be noted.

Everyone at this meeting knows my political philosophy on Scotland's governance, but I think that it would be a somewhat strange position to hold even if Scotland was independent, as I hope that it will be in the not too distant future, if the monarch's communications with the Prime Minister—the monarch is constitutionally bound to take the advice of her Government but is able to advise and to express views privately—were treated differently from exactly the same communications between the monarch and the First Minister of Scotland. I think that that would be a very difficult and unusual position to have. This exemption is not something that is likely to have a very great impact. As I said earlier, we can find only two previous examples of the exemption for royal communications having been applied. It is fairly limited in its intent and will be very limited in its impact. It is meant to avoid the kind of situation that I have described, which would be odd, to say the least.

Michael McMahon: Will you concede that the concern is not about the monarch's relationship with the Prime Minister, the First Minister or the Prime Minister of Canada? Rather it is about the principle of not having absolute exemptions in our freedom of information legislation.

Nicola Sturgeon: I have already said that absolute exemptions should be used very rarely and should not be undertaken lightly. I take issue with you when you say that this is not about those relationships. If communications between the monarch and the Prime Minister were treated differently in freedom of information terms from communications between the monarch and the First Minister, that goes to the fundamental nature of the relationships. Consistency is important, but I am not arguing with the committee that we should get into the habit of applying absolute exemptions. By their very nature, they are instruments that should be applied only where there is good reason, and in this case I think that there is good reason. That said, I will listen very carefully to the evidence given to the committee and to the conclusions of the committee in its stage 1 report. If we consider that, in light of that report, stage 2 amendments are required or appropriate, we will be happy to consider that.

Dave Thompson: Good morning, cabinet secretary. I have a wee worry about the consistency argument, because that would lead me to think that if Westminster changed the legislation in the future to extend it beyond the heir and second in line to the third, fourth or fifth in line, we would be duty bound to change our legislation to follow that.

However, that is not what my question is about. I want to return to the issue of broadening the scope of how freedom of information is to be extended. The procurement reform bill is going through Parliament at the moment. I am not sure whether that is one of the minister's responsibilities—

Nicola Sturgeon: It is indeed.

Dave Thompson: In light of comments about contracts and freedom of information, will the opportunity be taken to build something into the procurement reform bill to ensure as much freedom of information as possible?
Nicola Sturgeon: Yes, we are looking at that aspect of the procurement reform bill. I assume that I will be back before the committee before too long to discuss the procurement reform bill and we will have that discussion then. Initiatives such as the Scottish housing charter and the Public Records (Scotland) Act 2011 also have the intention of promoting greater transparency and openness as a key objective. That is something that we will seek to do through the procurement reform bill if possible.

The Convener: I will mention one other thing about the royal exemption, which is a major issue in the feedback that we have been getting. One of the concerns was that the bill was rushed through at Westminster and that it is not necessarily a good piece of legislation. We are, in effect, just accepting the legislation without proper scrutiny. Because it went through just before the 2010 Westminster election, it was not effectively scrutinised. Is that not a concern of the Scottish Government?

Nicola Sturgeon: One of the advantages of being new to the brief is the fact that I have the chance to look at things with a fresh eye. I have given you what I think is a strong reason for the change that we propose, and I will not repeat that. As I always try to do with committees, I am keen to hear the concerns and, at later stages of the bill, seek ways in which we can address legitimate concerns that are raised. I am more than happy to reflect on the points that have been made and consider whether we could lodge amendments that would retain the objective that we are trying to achieve. Notwithstanding Dave Thompson’s point, the consistency arguments are important and we will look to see whether we can do anything to allay the concerns that have been expressed.

The Convener: Thank you. We have not really touched on a lot of the issues with other parts of the bill. Some of them have been covered in previous evidence sessions, and I do not intend to repeat the questions that have been asked of those who have given evidence already today. However, I will finish with a couple of points on which I would like your comments. The first is about flexibility, which has not come up in this evidence session. The Commission for Ethical Standards in Public Life has said that the level of flexibility proposed will lead to a more complex and less successful freedom of information system. Can you comment on that?

Nicola Sturgeon: I have not seen that particular comment, so I apologise if I am interpreting it wrongly. I do not accept that that is the case, although I will look carefully at what has been said.

One of the weaknesses of the 2002 act is its inflexibility regarding the reduction in the lifetime of the exemptions. We could apply a blanket reduction in the lifetime of an exemption, but we could not decide to apply different lifetimes for different categories of information. The bill seeks to build more flexibility for very good reasons—I have covered that point.

If your point is about something completely different, I am happy to look at it and get back to the committee in writing with an appropriate response.

The Convener: I think that the point that is being made is that, if there are different time periods for different organisations, the bill will be less user friendly. It may also make it more difficult for organisations to respond timeously to requests.

Nicola Sturgeon: We have a job of work to do in the guidance or whatever accompanies the bill to ensure that that does not happen. I will flip that on its head. Although the Government right now operates to a 15-year rule rather than a 30-year rule, if we were to insist that all other public authorities did that, we would have to insist either that all of them did it regardless of the kind of information that they hold or that none of them did it and we kept things the way they are. Some public bodies will hold information—for example—for child protection, for example—which, frankly, it is appropriate to have a longer period to which the exemption would apply. If we do not have flexibility, all that will happen is that we will not make any changes that promote the early release of information. The provision is about promoting the earlier release of information where that is appropriate. If we do not build in the flexibility that allows us to do that, apart from what the Government does, we will be stuck with a 30-year timescale for every other authority and we will potentially not get any of that information released earlier.

That is a pretty good objective. Nevertheless, I take the point that the provision must be introduced and explained in a way that the public understand and that the user-friendliness of the legislation must not be undermined.

The Convener: Just for completeness—no one has raised this in any of the evidence sessions this morning—I ask you to comment on the refusal notice. We have received conflicting evidence on the issue. For example, the refusal notice allows an authority to respond to a request by “neither confirming nor denying” whether information exists or is held if to reveal whether information exists or is held would be against the public interest. Evidence that we have received states that that is “one of the most important proposed amendments”, as “that ability is in itself a protection of that personal data.”
However, a contradictory comment is that the amendment “will adversely affect the right to access information from public authorities”.

Where do you think the balance is on that amendment? What was the thinking behind the amendment and how confident are you that it will do what it says on the tin?

Nicola Sturgeon: It is quite an important amendment that we are proposing. Over the past few days, as I have been preparing for this session, I have looked at it carefully. I understand that it was the former Scottish Information Commissioner who recommended the change in his special report.

As you know, currently, where information falls within certain exemptions the answer can be to neither confirm nor deny that the information is held, but that answer cannot be given if the exemption is because the information is personal information. It is important that that option exists. Let us say that the police were asked for information that impinged on personal data. Even for the police to say that they have information on that person—although they are applying the exemption and not releasing the information—could alert somebody to the fact that they are under surveillance, for example, in connection with a criminal investigation. I understand that elsewhere—I am not sure whether this is the case in Scotland—police authorities have been among the proponents of the proposed change. There will be other examples, as well.

The exemption is not automatic—it would have to be applicable in terms of personal information—but it is important to have that option. In the bill, we probably get the balance more right than it is in the 2002 act.

The Convener: Thank you. That has exhausted questions from committee members.

Nicola Sturgeon: It has exhausted me.

The Convener: Ach, away. You have been here only 45 minutes. Do you have any further points to make to the committee?

Nicola Sturgeon: No. I simply reiterate the point that, although the bill is quite narrow in its scope, that is not intended to suggest that there is not a broader debate out there. I am up for that debate and look forward to it. I am happy to engage on it further in due course.

The Convener: Thank you for your attendance and the attendance of your officials. That completes the committee’s oral evidence sessions on the bill today and, indeed, at stage 1. I thank all the witnesses for their contributions, which will assist us in our scrutiny of the bill.
1. Thank you for your email of 14 June, inviting the Archives and Records Association to contribute to the Finance Committee’s scrutiny of the Freedom of Information (Amendment) (Scotland) Bill.

2. The Association is the principal professional body for archivists, archive conservators and records managers in the United Kingdom and Ireland. Records managers and archivists have a significant role in delivering transparency and accountability in Scottish public authorities. The s 61 Code of Practice issued under the Freedom of Information (Scotland) Act 2002 recognises the role that records management plays in underpinning a successful implementation of freedom of information legislation. Many public sector records managers either serve as their organisation’s freedom of information officers or work alongside them. Records managers and archivists work together to ensure that the documentation of critical decisions and key moments in their organisation’s history are documented and preserved for the present and the future.

3. Your email raised several questions. I address each of them below.

   What is your general view on the purpose of the Bill and broadly, are you supportive of it?

4. The Association is highly supportive of the objectives of freedom of information legislation, and considers that the proposed legislation is an appropriate next step.

   Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?

5. The Association responded both to the 2011 consultation on the Bill and the 2009 Improving Openness consultation which preceded it. We welcome the way our concerns about the potential impact of an inflexible approach to the duration of exemptions have been addressed in this draft bill by giving the power to set different durations for different exemptions. The Association also had concerns about the resource implications for public archives, if the historical “closure period” of a large number of records were reduced at the same time. We note that the policy memorandum accompanying this Bill commits to examine in further consultations the resource implications of changes in the duration of exemptions.

   The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?

6. The Bill will support the development of a framework and culture of openness in Scotland, by permitting a sensitive and value-based approach to releasing records, rather than applying rigid closure periods across a whole
range of exemptions. In this way it will strengthen the Freedom of Information (Scotland) Act 2002.

7. The proposals to extend the period for bringing forward the prosecution of an offence under s65 of the 2002 Act will also strengthen that Act, by making this provision enforceable. Enforcement of this criminal offence will protect rights to access information, by ensuring that those who obstruct this right are prosecuted.

**Royal exemption**
8. The Archives and Records Association has no views on this exemption.

**Historical periods**
9. The Association supports the flexible approach to historical records set out in the Bill. In response to previous consultations, the Association welcomed the increased transparency involved in reducing the lifespan of all except one of the exemptions specified in the consultation. The measures contained in this Bill will give the Scottish Government the ability to implement this.

10. The Association recommends that the lifespan of the s36 exemption relating to confidentiality should not be reduced. Examples of records where it would be inappropriate to reduce the duration of the confidentiality exemption include social work, children's homes and adoption records. Reducing the duration of the confidentiality exemption could also prevent Scottish public archives from receiving records as a gift from private individuals or organisations. These records make a significant contribution to research in Scotland and to Scottish history. If donor wishes regarding confidentiality periods cannot be respected, the donors may instead destroy their records or deposit them overseas. Records that could make a significant contribution to Scottish research and Scottish history will be lost.

11. Information should be open unless there is a strong, demonstrable reason for it remaining closed (as is the case for some confidential records). The amendments proposed in this Bill will make this possible by allowing a flexible approach to the duration of exemptions for historical records.

**Financial aspects**
12. The changes proposed by this Bill have no financial implications in themselves. It is when the powers set out in s 4 of the Bill are used to reduce the duration of exemptions that financial implications may arise for public archives.

13. If the term of closure ‘historical records’ is reduced, historically significant records may need to be transferred to public archives sooner than is currently the case. This has implications for storage space, cataloguing and retrieval arrangements. Careful consideration should be given to the way such measures are introduced, as Scottish public archives would find it difficult to cope with a significant increase in workload and volume of records in a short time scale.
14. The flexible approach set out in the Bill offers the opportunity to manage this impact by targeting specific records in specific time frames. In the accompanying policy memorandum, the Scottish Government has committed that the reduction in the duration of exemptions will be subject to appropriate consultation, including an assessment of resource implications. The ARA supports this approach, in the expectation that future consultations will include consideration of the resource implications for public archives.

15. Thank you for this opportunity to contribute to the scrutiny of the Freedom of Information (Amendment) (Scotland) Bill. ARA’s membership has specialist expertise in the practical implementation of freedom of information legislation, and also on records management, and the organisation of information to facilitate public access to it. Freedom of information legislation is a key professional concern for the Association and its members. Please do not hesitate to ask if we can provide further assistance to this exercise.
1. BEMIS is the national Ethnic Minorities led umbrella body supporting the development of the Ethnic Minorities Voluntary Sector in Scotland. BEMIS was established in 2002 to promote the interest of minority ethnic voluntary organisations, develop capacity and support inclusion and integration of ethnic minorities communities. It is a member-led and managed organisation with an elected board of directors.

What is your general view on the purpose of the Bill and broadly, are you supportive of it?

2. BEMIS believes that Freedom of Information is a critical part of the delivery of transparent government and public services in a modern democracy. We fully appreciate that from time to time it will be necessary to review amend and modernize this legislation, taking account of changes in social expectation and the experience derived from the application of the legislation. Broadly speaking BEMIS is supportive of this piece of legislation and its purpose.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?

3. BEMIS considers that the proposed legislation will for the most part protect the rights to access information. However BEMIS is disappointed that the Scottish Government seems not to have provided an Equality Impact Assessment in relation to the Bill.

Historical periods
4. In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?

5. We are broadly supportive of the increased levels of transparency which should result from these changes. BEMIS primary concern in relation to the proposed changes is that there may be scope for accessing personal data not withstanding the exemption periods flexibility contained in the Bill.
I am writing to inform you that I endorse the written submission by the Campaign for Freedom of Information in Scotland with regards to the Freedom of Information (Scotland) Amendment Bill.
Executive Summary

1. The Campaign for Freedom of Information in Scotland (CFoIS) is pleased to submit evidence at Stage 1 of the Freedom of Information (Amendment) (Scotland) Bill, (the Bill) to the Finance Committee of the Scottish Parliament. We have confined our response to the principal purposes of the Bill and believe:

- Despite the inadequacy of the Bill to extend the public’s right to know to a far wider range of organisations, CFoIS can support the general principle behind the Bill – that freedom of information law in Scotland must be reformed.

- The focus of the reform should be to add organisations that are currently exempted from the scope of Freedom of Information (Scotland) Act 2002 (FoISA). As the key principles of the Scottish Parliament are to be ‘open, accessible and accountable’, progressive reform of FoISA is urgently needed and determining the extent of reform should be the focus of the Committee’s work. A purpose clause should be introduced to affirm that FoISA provisions are intended to apply to all public authorities and all other bodies providing public services, carrying out public functions and/or functions of a public nature.

- Consultation has already produced a degree of consensus that is not reflected in the Bill. We believe that the Stage 1 process will enable informed debate about what a majority of people and organisations want: the extension of FoISA to Arm Length Organisations (ALEOs), housing associations and a range of bodies such as CoSLA, the Improvement Service, Association of Chief Police Officers in Scotland, Faculty of Advocates, the Law Society of Scotland and private and voluntary sector organisations only in respect of the services they deliver of a public nature.

- The Finance Committee should consider the impact of the research published by the Office of the Scottish Information Commissioner in association with the University of Strathclyde that concludes Scotland's voluntary sector ‘remains cautious about using freedom of information rights to access information, amid continuing concerns that FOI use may harm funding or working relationships with public authorities’. The ability to exercise our human rights without a “chilling effect” is crucial in our modern democracy.

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1 Principles established by the Consultative Steering Group which was set up in November 1997 by the Secretary of State for Scotland to report on the ‘operational needs and working methods’ of the Parliament and to make proposals for its standing orders and rules of procedure. Its main report was published in December 1998 [www.scottish.parliament.uk/PublicInformationdocuments/Report_of_the_Consultative_Steering_Group.pdf](http://www.scottish.parliament.uk/PublicInformationdocuments/Report_of_the_Consultative_Steering_Group.pdf)

2 [www.itispublicknowledge.info/home/News/20120706.asp](http://www.itispublicknowledge.info/home/News/20120706.asp)
The important role of the Office of the Scottish Information Commissioner must be sustained by sufficient resources so it can effectively deliver its responsibilities e.g. on training, advice and information.

2. Reforming FoISA is a devolved matter entirely within the competence of the Scottish Government and the Scottish Parliament. We are therefore very disappointed that the reform which was promised as far back as 2002 is still not being delivered. CFoIS notes that extension of FoISA has been delayed by successive administrations e.g. the then Scottish Executive launched a consultation in 2006 but declined to introduce reform in 2007 and instead committed to further consultation and consideration.

Questions

3. CFoIS has read the seven questions published by the Finance Committee and we have decided to focus our comments on several of them in the main body of the response. In summary however our answers are:

What is your general view on the purpose of the Bill and broadly, are you supportive of it?

4. We support reform of FoISA but the content of the Bill is inadequate

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?

5. Yes, but our views have been mainly ignored.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?

6. No, especially when public services are increasingly being delivered by non-public organisations.

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?

7. The Scottish Government should not have copied the amendment that applies to reserved matters and was approved by the UK Parliament. Inconsistencies with the Environmental Information (Scotland) Regulations (EISRs) will arise – see below.

Context

8. CFoIS recognises that reform of FoISA takes place at a time of national discussion on Scotland’s constitutional future. As we are a non party political organisation, we have no view on whether Scotland should be independent. However we note that the consultation on independence stated ‘We shouldn’t have a constitution which constrains us, but one which frees us to build a better society...We must renew democracy and strike a new bond between government and the people

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4 Statement by Minister for Parliamentary Business Margaret Curran. 15th March 2007 http://www.scotland.gov.uk/About/Information/FOI/foireview2005/foireviewintro
based on trust and humility. CFoIS believes that freedom of information has to be progressive to be effective and that the public’s right to know, their capacity to make informed decisions about all aspects of their lives, will be curtailed unless the Bill is significantly amended.

9. We note that more progressive reform has already been achieved in the UK legislation which impacts on bodies delivering services in England and Wales as well as nationally. The UK Government has recently extended the FOI Act to the Association of Chief Police Officers, UCAS and the Financial Ombudsman Service. It is also consulting on the inclusion of additional bodies which appear to have public functions such as the Law Society, the Bar Council, the NHS Confederation, the Local Government Association, British Standards Institution, Advertising Standards Authority, Harbour Authorities, Examination Boards and over 150 other award giving bodies. It has also said that it will consult housing associations about bringing them under the UK Act. CFoIS requests that the Finance Committee establish why similar progress has not been achieved in Scotland. Clearly the Scottish Government is aware of the UK reform agenda as it is copying a regressive reform in the Bill - a new absolute exemption for information relating to communications with the Monarch and the next two in line to the throne. In addition to this step backwards, this creates more inconsistencies in the public’s right to know in Scotland. Should the request be for environmental information, the public interest test will still be in place under EIRs but not under FoISA.

10. The Scottish Parliament can only pass legislation that is compliant with the European Convention on Human Rights (ECHR) and Scottish Government Ministers have a positive duty to comply with the ECHR. Now that FoISA is being amended, the law must be examined through a human rights lens and in particular Article 10(1) of ECHR:

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\text{Everyone has the right to freedom of expression. This right shall include}\n\text{freedom to hold opinions and to receive and impart information and ideas}\n\text{without interference by public authority and regardless of frontiers. This Article}\n\text{shall not prevent States from requiring the licensing of broadcasting, television}\n\text{or cinema enterprises.}\n\]

11. The Scottish Government is committed to complying with human rights law and to internationally ratified treaties eg its recent work on the UN’s Universal Periodic Review (UPR) of the UK and its current consultation on a proposed Children and Young People Bill which will ‘embed the rights of children and young people across the public sector in line with the United Nations Convention on the Rights of the Child (UNCRC).’ Despite the statement that this Bill complies with the

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5 Your Scotland, Your Referendum’ published Scottish Government 2012
https://consult.scotland.gov.uk/scotreferendum Pages 2-3
6 foia.blogspot.co.uk/search?label=publicly%20owned%20companies; and
www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111108/debtext/111108-0001.htm#11110869000509
7 Sections 29 and 57 of The Scotland Act 1998
9 http://www.scotland.gov.uk/Publications/2012/07/7181
ECHRs we urge the Committee to consider this point in more detail given Scotland's wider obligations under international human rights law eg International Covenant on Civil and Political Rights.

12. It is alarming that the voluntary sector in Scotland is reluctant to use freedom of information rights. CFoIS believes the Finance Committee should consider if the Bill can be amended in any way to ensure that just as it is unacceptable for the deliberate destruction of information, so too is it unacceptable that exercising FoISA rights will have adverse consequences for the requester. We urge the Finance Committee to explore why 49% of voluntary sector organisations would be discouraged from requesting information for fear of the implications eg for future funding.11

13. By introducing a purpose clause to the Bill, the law will be updated and the importance of an open culture and good practice in delivering FoISA will be highlighted by the Scottish Parliament. The public value their right to access information and the public want to increase access to information. That requires a robust law and a culture of openness to be mainstreamed across those organisations subject to FoISA.

Consultation
14. Part of the Stage 1 process is to consider whether there has been sufficient consultation on the Bill. As far back as 2002, in addition to some housing associations, the Minister outlined the range of bodies he expected to be covered by FoI and stated it would happen soon: We recognise that companies involved in major PPP/PFI contracts are delivering important public services. I assure members that companies that are involved in contracts of that nature—whether those relate to prisons or to matters such as road maintenance—are the sort of bodies that we want to add to schedule 1 after proper consultation.12

15. It is noteworthy that there has been much consultation over the last ten years but it appears that the majority view has been repeatedly ignored. Most recently, despite a majority of people supporting progressive reform, those bodies who were supposed to be added to FoISA opposed the proposal13 and their opinion prevails. The Finance Committee should establish why the opinion of these bodies determined government policy when the Scottish Government had concluded that the cost of providing information will not be a significant ‘burden’ to them as such assumptions run contrary to the principle of transparency and openness. Given that all the bodies listed by the Scottish Government and which we have identified for inclusion (some listed on pages 1-2 of this briefing) are either delivering services of a

10 ‘Policy Memorandum’ on the Freedom of Information (Amendment) (Scotland) Bill published by Scottish Government, June 2012 Para 46
11 Imperfect Information: Experiences and Perceptions of the use of Freedom of Information in the Scottish Voluntary Sector published by Office of the Scottish Information Commissioner and University of Strathclyde, 6th July 2012.
public nature and/or are receiving public money then we believe that transparency and accountability should be the result of ‘doing business’ with the public sector.

16. Also the existing regulation of many bodies requires them to produce statistics and information. The regulation and inspection of Registered Social Landlords (RSLs) (housing associations) is undertaken by the Scottish Housing Regulator on behalf of tenants. RSLs must provide certain standard information regularly including completion of the Annual Performance and Statistical Return (APSR) and data about its private lending profile. RSLs already have to comply with legal duties on compiling information for the regulator so it is reasonable to give an enforceable right to tenants (and any individual) to access that information rather than the Regulator and RSLs deciding what and when it publishes.

17. It is useful to remember the 2010 Scottish Government consultation on extending the coverage of FoISA which identified possible additions:

- contractors who run privately managed prisons and provide prisoner escort services;
- leisure, sport and cultural trusts and bodies used by local authorities;
- the Glasgow Housing Association;
- the Association of Chief Police Officers in Scotland;
- contractors who build and maintain schools;
- contractors who build and maintain hospitals; and
- contractors who build, manage and maintain trunk roads under private finance contracts.

18. FoI is very popular in Scotland and the public acknowledge its importance in improving the design, delivery and funding of public services. The Scottish Information Commissioner commissioned research in 2011 which revealed that:

- 80% of respondents stated they were aware of the law;
- 89% of respondents agreed that it is important for the public to be able to access information held by public authorities;
- even in straitened times for the public sector, only 14% agreed with the suggestion that FOI was a waste of public money;
- there is strong public support for FOI to be extended to cover additional organisations, with 88% agreeing that trusts providing services on behalf of local authorities should be covered, 82% agreeing that housing associations should be covered, 83% agreeing that private sector companies which build and maintain local authority schools or hospitals should be covered and 73% agreeing that prisons which are run by the private sector should be covered.

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15 ‘Commissioner calls for FOI rights to be strengthened as survey reveals strong public support’ News Release Scottish Information Commissioner 16th December 2011 http://www.itstopublicknowledge.info/home/News/20111612.asp
Regressive Reform

19. The limited reform of FoISA means that as public services are provided by a wider range of organisations and private sector companies, supported by public funding, the ‘public’s right to know’ does not keep up. For example, the public currently cannot exercise FoI rights in relation to most ALEOS (companies, trusts and other bodies that are separate from the local authority but are subject to local authority control or influence) and the problem is going to get worse. According to the Chair of the Accounts Commission ‘As budget pressures rise, councils are considering alternative ways of delivering services. This may lead to further and more innovative use of ALEOs.’ Already there are 130 major ALEOs in Scotland.

20. The need for information to inform the design and delivery of public services has never been greater for the public as well as elected politicians. In May 2012, The Accounts Commission published a report Using cost information to improve performance: are you getting it right? According to its Chair John Baillie ‘It can be down to simply asking the right questions of officials and sharing information and best practice with other councils. This is a big challenge but it can deliver real dividends for councils and their communities.’ The public helps councils by asking for information and offering their own analysis. Exercising freedom of information rights therefore provides collective gain.

21. The need for the private sector to access information has also been acknowledged by the Scottish Government as part of its reform of public procurement.

22. Instead of the Scottish Government crafting transparency and information access around specific issues, it is more reasonable to mainstream the principled approach about ensuring people have the right to access information about public services and those of a public nature.

Conclusion

23. CFoIS welcomes the Scottish Government’s specific measure to disclose more information earlier. We also welcome the proposal to toughen the penalties where information is deliberately destroyed as we agree this confirms the importance of the public having the right to access ‘official’ information. CFoIS agrees with the Scottish Government that ‘The Act is widely recognised as playing a significant part in making Scotland a more open, transparent and accountable society’. However, that progress will only be sustained if the general principles of the Bill focus on the ‘public’s right to know’.

24. A principle of the Bill must be to keep up to date with public sector reform and ensure all relevant bodies comply with freedom of information requests from the public and for that right to be enforced by the Scottish Information Commissioner.

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16 ‘ALEOs: Accounts Commission highlights importance of clear governance and accountability’ Audit Scotland News Release 16th June 2011
17 http://www.audit-scotland.gov.uk/docs/local/2012/nr_120510_hcw_costs.pdf
19 Freedom of Information (Amendment) (Scotland) Bill ‘Policy Memorandum’ published by Scottish Government June 2012 para 2
25. Individuals and communities must have the right to the fullest information to allow them to form an opinion in our modern democracy. The Bill needs to be amended to reflect that principle and the Scottish Government’s stated intention that ‘freedom of information is an essential part of open democratic government and responsive public services in providing significant and important rights to access information.’\textsuperscript{20} For reasons cited in this evidence we disagree with the Scottish Government that the effect of the Bill will be “to add strength and clarity and improve”\textsuperscript{21} FoISA’s operation. However we acknowledge that the Bill will improve FOISA to some degree (eg by cutting the 30 year rule and strengthening the sanction against shredding requested records) even though it falls well short of what we believe is now required

About the Campaign for Freedom of Information in Scotland

26. The Campaign for Freedom of Information in Scotland was established in 1984, as part of the national organisation, to secure a legal right of access to information so that people could find out about how they are governed and how their services are delivered. We have been involved in all the major developments of the legislation both at UK and Scottish levels. During the passage of FoISA and subsequently we have consistently argued that the legislation should cover a much wider section of Scottish society, recognising that our public services are delivered by bodies other than public authorities, though paid for by public money.

27. We welcome opportunities to work with the Scottish public authorities to ensure that the FoISA is implemented effectively and have organised and participated in a number of activities to this effect such as training and participation in the Scottish Public Information Forum.

\textsuperscript{20} Para 3 Ibid
\textsuperscript{21} Ibid.
The Campaign for Press and Broadcasting Freedom wishes to endorse the submission made by the Campaign for Freedom of Information (Scotland) to your consultation on the Freedom of Information (Scotland) Bill.
FINANCE COMMITTEE

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

SUBMISSION FROM THE CHIEF FIRE OFFICER ASSOCIATION (SCOTLAND)

*What is your general view on the purpose of the Bill and broadly, are you supportive of it?*

1. The Scottish Fire & Rescue Services are committed to openness and transparency and generally welcomes the Amendment Bill which does not place any additional burdens, financial or otherwise, on the Service. We support the proposed changes agreeing that they aid to the slow culture change towards openness and accountability.

*Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?*

2. We did not take part in the consultation.

*The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?*

3. The Service welcomes this clarification that information available under the Publication Scheme is exempt and does not need to be provided to applicants. However the service will always consider each request individually and will provide the information where they consider circumstances warrant.

**Royal exemption**

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?

4. This has no effect on the Service and brings the Freedom of Information (Scotland) Act 2002 in line with the Freedom of Information Act 2000 and also the Constitutional Reform and Governance Act 2010.

**Historical periods**

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?

5. We agree this would enhance the public’s right to access information however would seek clarification whether the reduction of the lifespan of exemptions would be fully retrospective or whether it would only apply to records created after the Amendment Bill is introduced.

**Financial aspects**

The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?
6. We do not believe the Amendment Bill will place any additional burdens, financial or otherwise on authorities.
What is your general view on the purpose of the Bill and broadly, are you supportive of it?

1. The bill is of a technical nature and we are broadly supportive of it. We believe that Sections 1-3 and 5 will have little impact on resources. We do have some concerns about the impact of Section 4.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?

2. The Commission did respond to the Scottish Government’s consultation on the bill. It is clear from the policy memorandum that our concerns were identified and considered. We supported the introduction of a ‘Time limit for proceedings’ but were concerned that the time period of 12 months was insufficient. This has been addressed in the Bill (section 5).

Our comments in the other areas are detailed below.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002 (FOISA). Do you agree? Does the Bill protect the rights to access information?

3. We believe the Bill somewhat strengthens and clarifies FOISA. The addition of section 5 (‘Time limit for proceedings’) strengthens FOISA and sections 2 and 3 add clarity. Section1 (‘Royal exemption’), although making it easier to manage Freedom of Information across the UK, is likely to increase the period records are exempt which seems contrary to section 59 (1) of FOISA. We are concerned that the changes introduced under section 4 (‘Historical periods’) could have a negative impact on the Freedom of Information system by making it more complex to operate and maintain.

Royal exemption

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?

4. Currently, communications with Her Majesty, the heir and second-in-line to the throne are exempt for a period for 30 years but are subject to the public interest test. We note that the Bill introduces an absolute exemption in relation to the public interest test and that the Scottish Government intends to amend the historical record period to 5 years after the death of the relevant member of the Royal family or 20 years after the record is created whichever is later. This is likely to increase the period records are exempt which seems contrary to section 59 (1) of FOISA.
In our consultation response we also suggested that the historical record period be consistent with other exemptions under FOISA in order to keep the system simple.

**Historical periods**

*In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?*

5. The Bill gives the Government powers to amend historical record periods (section 4). We are concerned that the level of flexibility proposed could result in a far more complex system with different historical record periods for each exemption, for each sub-section of an exemption, for each record format (paper, audio, electronic, etc) and for other purposes not yet identified. We note that any changes must be made by affirmative order and that the Government intends to consult prior to implementing any changes in this area.

**Financial aspects**

*The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?*

6. In the main we agree with this conclusion. However, there may be resource implications for Schedule 1 bodies depending on the number of variations introduced under Section 4. This may require additional resources to ensure that records are managed and stored appropriately and staff are properly trained.

*Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?*

7. We did not comment on the financial assumptions.
Consumer Focus Scotland, and its predecessor body, the Scottish Consumer Council (SCC), has long been supportive of freedom of information (FOI). The SCC played an active role in representing the interests of consumers to policy makers in the lead up to implementation of the Freedom of Information (Scotland) Act 2002 (FOISA). In addition, Consumer Focus Scotland has previously published ‘Your Right to Know- a guide for consumers on their rights of access to information under the Freedom of Information (Scotland) Act,’¹ in conjunction with the Office of the Scottish Information Commissioner.

Consumer Focus Scotland welcomes the opportunity to provide evidence to the Finance Committee on the Freedom of Information (Amendment) (Scotland) Bill. Our evidence is limited to the provisions on historical records, and some general comments about the possible extension of FOISA.

What is your general view on the purpose of the Bill and broadly, are you supportive of it?

1. As discussed below at question 5, we are pleased that the Bill allows for amendments to be made to the lifespan of exemptions. We are also pleased that the Scottish Government has listened to feedback about provisions of FOISA that are not operating effectively and are making suggested amendments. Efforts to keep the legislation fit-for-purpose are to be welcomed. However, it is unfortunate that the Scottish Government’s reforms are so limited in scope. In our response² to the Scottish Government’s recent consultation on the Bill, we expressed disappointment that the Scottish Government has not progressed a wider reform agenda and sought to extend the coverage of FOISA and bring more organisations within the scope of the legislation.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?

2. Yes, we responded to the consultation. Our response³ was limited to the issue of historical records, and potential extension of FOISA.

3. While we are pleased that the Scottish Government remains committed to its proposals to reduce the lifespan of exemptions (as listed in the consultation) from 30 to 15 years, we remain disappointed that this will not be applied consistently across

¹ Scottish Information Commissioner, Your Right to Know, available at: www.itspublicknowledge.info/uploadedfiles/YRTK2012.pdf
² Consumer Focus Scotland (2012) Response to the consultation on proposals for a Freedom of Information (Amendment) (Scotland) Bill, Glasgow: Consumer Focus Scotland
³ Consumer Focus Scotland (2011) Consumer Focus Scotland’s response to the consultation on proposals for a Freedom of Information (Amendment) (Scotland) Bill, Glasgow: Consumer Focus Scotland
all listed exemptions. Our response to question 5 provides more detail regarding our view on this.

4. As highlighted at question 1, we remain disappointed that our views in relation to the extending the coverage of FOISA have not been taken into account. Consumers in Scotland need to have access to information to:

- find out how public authorities make decisions that affect them;
- judge how well those authorities are doing their job;
- make informed choices about the services they use; and
- exercise their consumer rights.

5. The current Scottish Government has issued two consultations on possible extension since 2008\(^4\), and this issue was also considered by the previous Scottish Executive in 2005/6.\(^5\) Responses to these consultations have indicated a considerable level of support for extending the coverage of FOISA to bring more organisations within its scope. This view is supported by both the current\(^6\) and former\(^7\) Scottish Information Commissioners and research\(^8\) has indicated a significant level of public support for further extension. We are therefore disappointed that the Scottish Government has still not taken steps to extend the range of organisations covered by FOISA.

6. The Scottish Government has previously said it thinks it is premature to extend FOISA before deficiencies with the legislation are addressed.\(^9\) The Scottish Government’s response to its most recent consultation said it would reassess arguments for extending coverage at a later stage of the Bill process, but it is extremely disappointing that no timescales for this were given.\(^10\) In our view the continued delay to extending FOISA places significant numbers of consumers at a disadvantage, as they are unable to access information from organisations providing public services. For example, if a landlord is a local authority, information can be requested. However, housing associations do not have to comply with FOISA. This means that tenants of a local authority can ask for information from that authority, whereas those who happen to be tenants of another registered social landlord cannot.


\(^6\) Freedom of Information (Amendment) (Scotland) Bill: Response to call for written evidence, Scottish Information Commissioner (July 2012)

\(^7\) Informing the future: the state of freedom of information in Scotland, Scottish Information Commissioner (January 2012)


\(^9\) See for example http://www.scotland.gov.uk/News/Releases/2011/01/26154714

7. Our general approach to freedom of information is that any organisation which carries out public functions, not just those in receipt of public funds, should be subject to FOISA. We believe this will make them more accountable and transparent. This will become even more important if public services are increasingly contracted out to, and delivered by, third sector or private sector organisations. Outsourcing is likely to raise issues of consumer protection, regulation, redress and accountability. As there is provision within the Scottish Public Services Ombudsman Act 2002 for complaints to be made to the SPSO where organisations out with the public sector exercise such public functions, we believe that the consumer interest would be best served taking a similar approach with FOISA. Specifically, we would like to see FOISA extended to cover all contractors in receipt of public funds, all housing associations, all local authority trusts and bodies, and the Law Society of Scotland. Recent research has indicated high levels of public support for extension into some of these areas.

8. We recognise that extending coverage of FOISA to organisations that provide public services, particularly third sector organisations, may place an additional burden on them. It may also require a cultural shift in many organisations which are unused to working within the parameters and spirit of the FOISA. While we do not underestimate this burden, we consider that on balance, ensuring that consumers have access to information in relation to the public services they provide must take priority. In addition, the Scottish Government’s analysis of its responses to the consultation it issued in July 2010 indicated that very few respondents provided clear evidence of significant burdens that could arise from extending the act.

9. Our response to the consultation on the Bill suggested that the Scottish Government carries out research into consumers’ experiences of using FOISA, to explore whether the legislation is operating effectively. For example, research carried out on behalf of the Scottish Information Commissioner has found that while the majority of people in Scotland have general awareness of FOI, the level of public understanding that FOI provides them with a legal right to access information is significantly lower. We believe that it would benefit both the Scottish Government and consumers if research into consumers’ views and experiences of FOISA could be undertaken, with a view to making considerable improvements to the scope of FOISA and to the accessibility of its provisions.

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11 In line with section 7(3) of FOISA, such coverage would only extend to information they hold about their specified ‘public functions’ or specified services.
14 The Scottish Public Opinion Monitor conducted by Ipsos MORI in 2011, indicated that 80% of people have general awareness of FOI. However, research published by the Scottish Information Commissioner in 2009 indicated that public understanding that FOI provides a legal right to access information dropped from 49% in 2008 to 39% in 2009 (this measure was not included in the 2011 research).
10. We would stress, however, that, given the length of time over which it has been considered, we think coverage of FOISA should be extended as soon as possible and should not be dependent on the outcome of any research.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?

11. We agree that the proposed amendments to reduce the lifespan of exemptions are a welcome addition to the strength of the legislation. However, we are concerned that if the flexibility allowed by the proposed amendments enables different approaches to be taken by different types of organisations, then this may result in a lack of clarity for consumer. We believe that the consumer interest is best served by applying lifespan reductions consistently across the listed exemptions, along with clear justifications for any variations. This would maximise the strength and clarity of the parts of the Bill relating to historical periods. As discussed above, we believe extending coverage of freedom of information would be an important way to add strength and clarity to FOISA.

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?

12. We are pleased that the Scottish Government remains committed to amending the legislation to enable it to reduce the lifespan of exemptions from 30 to 15 years. This will allow consumers in Scotland increased access to information which may be of public interest. We believe this is in keeping with the spirit of the legislation as it improves the transparency of Scottish public authorities.

13. The Freedom of Information (Amendment) (Scotland) Bill as drafted is designed to provide greater flexibility in determining the lifespan of the exemptions. Our preference would be for any lifespan reductions to be consistently applied across the listed exemptions, providing certainty to those who may wish to access the information. There should be good, justifiable reasons for any variations that allow public authorities to withhold information for longer than 15 years under a specific exemption. Should such variations apply, the reasons for these must be made clear to consumers.

14. We hope that the Scottish Government will keep the length of the lifespan of the ‘historical record’ be kept under review to ensure it continues to meet with consumers’ need to access information.

15 Consumer Focus Scotland (2009) Consumer Focus Scotland’s response to the discussion paper Freedom of Information: Improving Openness, Glasgow: Consumer Focus Scotland
I wish to add my name to the support list for this campaign.
FINANCE COMMITTEE
FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL
SUBMISSION FROM DUMFRIES AND GALLOWAY COUNCIL

General

What is your general view on the purpose of the Bill and broadly, are you supportive of it?
1. Dumfries and Galloway Council is broadly supportive of the Bill and its purpose to strengthen openness and transparency in the public sector by the disclosing of appropriate information.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?
2. The Council did take part in the consultation on the Bill and our views have been accurately reflected.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?
3. The Council is in agreement with the principle that clarity will be added with the amendments that have been proposed.

Royal exemption

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?
4. The Council is comfortable that the Royal exemption has been clarified and will still include the extended members of the Royal Family.

Historical periods

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?
5. The position requires to be determined by the type of information that is deemed historical, however in general terms the Council would support the position of the Scottish Government.

Financial aspects

The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?
6. The Council appreciates that there may be some minor extra work involved with the proposed amendments, but this should not have an adverse effect on the process which are already in place.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

7. Yes.
FINANCE COMMITTEE  
FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL  
SUBMISSION FROM EAST LOTHIAN COUNCIL

What is your general view on the purpose of the Bill and broadly, are you supportive of it?
1. East Lothian Council will not be affected by the Bill to a large extent.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?
2. No.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?
3. Yes.

Royal exemption
In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?
4. While East Lothian Council would welcome an approach which is more consistent with FOIA, a public interest test would provide a necessary and required balance.

Historical periods
In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?
5. East Lothian Council is in favour of reducing the time limit period. The majority of archival records transfers occur quicker than 30 years, so records can be deemed to be historic/accessible sooner. The current 30 years period does not reflect actual practice. Greater flexibility rewards those where the information is not needing to be protected, but still provides the requisite defence for that to which it does apply.

Financial aspects
The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?
6. East Lothian Council can see no financial implications of the technical changes brought by the Bill.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
7. N/A
I endorse all of the submission from the Campaign for Freedom of Information, Scotland, as a journalist and citizen. FOI was a hard won fight but to have proposed added legislation without the inclusion of the many firms which, increasingly, operate major public service contracts, is totally undemocratic and disturbing.

This may well be open to challenge in Europe and elsewhere and the public purse should not bear any further lengthy legal cases.

Thanks to FOI and good commissioners, matters have improved since 2005 but there is still automatic, knee jerk secrecy within Scotland over matters small as well as large. We are still a secretive society, unnecessarily in most cases. Not only the general public and journalists encounter this regularly - MSPs often have great difficulty prising out basic facts and have had to use FOI under the previous Executive and under the current Government. Thousands of Parliamentary questions, in a year, do not receive proper answers, mainly a brush off with the routine "this information not centrally held".

Pre devolution, I often encountered the ancien regime but, overall, the mind set against openness has not changed radically since devolution.
Introduction

The General Teaching Council for Scotland ("GTC Scotland") provides the following evidence to the Scottish Parliament’s Finance Committee as part of its consideration of the Freedom of Information (Amendment) (Scotland) Bill. This evidence has been provided as a set of responses to each of the questions listed by Mr Fergus Cochrane in his e-mail to GTC Scotland dated 14 June 2012.

Responses

What is your general view on the purpose of the Bill and broadly, are you supportive of it?
1. We are broadly supportive of the Bill – it appears to provide an increased level of strength and clarity to the underlying Freedom of Information legislation.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?
2. We did take part in the consultation. Our only views on the Bill were to raise concerns regarding a reduction in the life-span of the exemptions (particularly in terms of the Commercial Interests and the Economy as well as Confidentiality exemptions). Our views have been addressed by the consultation response.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?
3. Yes, we agree and consider that it does protect rights of access to information.

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?
4. We have no view on these provisions.

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?
5. We are content with the response provided and having nothing further to add.

The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?
6. We agree.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

7. We had no such comments.
What is your general view on the purpose of the Bill and broadly, are you supportive of it?

1. The Highland Council is generally very supportive of the bill’s purpose although it is concerned about the amendments re communications with her Majesty etc. and it is noteworthy that the Scottish Information Commissioner’s response to the consultation referred to those proposed amendments as “somewhat regressive”.

2. The Council agrees that the amendment bill should provide a greater flexibility in determining the lifespans of historical records. The Council understands that there is to be further consultation on the time periods and the Council consider it very important to have that consultation to promote openness and transparency on what is a very important exemption. The Council also shares the concern of many of the responses to the consultation about a possible reduction in the timespan for the s36 confidentiality exemption particularly where the exemption enables the maintenance of confidentiality over deceased(s) persons records.

3. The Council also agrees with the proposed change to the s65(1) offence to allow prosecutors more time to prosecute those who deliberately destroy records etc. in order to frustrate a freedom of legislation request.

4. The Council is of the view for example that one of the most important proposed amendments in the bill is the amendment to permit public authorities to be able to refuse to confirm or deny that they hold personal data as that ability is in itself a protection of that personal data.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?

5. The Council did not take part in the Scottish Government consultation.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?

6. The Council agrees in general that the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. However the Council are aware that the legislation is an opportunity to strengthen and clarify the Freedom of Information (Scotland) Act 2002 and only some of the recommendations of the Scottish Information Commissioner’s Special Report to the Scottish Parliament of January 2012 have been taken forward in the proposed amendments. The Council is of the view that the Act would be strengthened by more of the recommendations being implemented.

7. The Council is also concerned that the proposed amendment to section 2 of the Freedom of Information (Scotland) Act 2002 will neither strengthen or clarify, nor protect FOI rights and instead have the effect of unnecessarily restricting rights and
create an unwelcome precedent with the introduction of a wide-ranging absolute exemption which sets aside the public interest.

**Royal Exemption**

*In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?*

8. The Council note the concerns as expressed by the Scottish Government that the Scottish legislation should broadly mirror UK legislation on this matter. However the Council consider it disappointing that the Ministers have chosen to retain the amendment to section 2 of the Freedom of Information (Scotland) Act 2002, which will create a new absolute exemption for senior members of the Royal Family. The Council notes the Scottish Information Commissioner response to the Consultation on this proposed amendment and in particular the Commissioner’s view that this is a move away from good practice of having at least the public interest test.

**Historical Periods**

*In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?*

9. The Council would agree with the concerns as expressed by the Scottish Government in particular that the timespan for the s36 exemption on confidentiality should remain at 30 years.

**Financial Aspects**

*The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?*

10. The Council is of the view that these are not technical changes and that they will have cost implications but that the proposed amendments with the exception of the amendment to s2 of the Freedom of Information (Scotland) Act 2002 require to be made for the transparency, openness and accountability of the Freedom of Information process.

*Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?*

FINANCE COMMITTEE

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

1. Having responded to the Scottish Government’s initial consultation in March 2012, the Society welcomes the further opportunity to consider and provide comment on the provisions as contained within the proposed Bill, amending the Freedom of Information (Scotland) Act 2002.

2. The Society is supportive of the policy intent behind the Bill and welcomes the proposed amendments as set out in the Bill.

3. In relation to section 5 ‘Time limits for proceedings’. The Society is pleased to note that the Bill sets out a statutory limitation period, providing clarity and transparency and reflecting similar statutory provisions in separate existing criminal legislation, for example those contained within the Misuse of Drugs Act 1971.

4. The Society is of the view that the limitation periods as set out within section 5 of the Bill strike a fair balance between the public interest and the rights of any person or authority accused or suspected of an offence under section 65(1) of the Freedom of Information (Scotland) Act 2002.
With respect to the call for written evidence in your e-mail of 14th June 2012 the Lord Lyon believes that there is nothing that he can usefully add to his letter of 11th June 2012 to Andrew Gunn at the Freedom of Information Unit (below).

Andrew Gunn, Esq.,
Freedom of Information Unit,
Cabinet and Corporate Business Secretariat,
Cabinet and Strategy Directorate,
Victoria Quay,
Edinburgh,
EH6 6QQ

Dear Mr. Gunn,

Freedom of Information (Amendment) (Scotland) Bill

Thank you for your letter of 30th May. I have read your letter carefully and have also noted the comments ascribed to the Information Commissioner, Rosemary Agnew, in Scotland on Sunday. I can see where she is coming from, but I think it is desirable that the Scottish Government should mirror the related changes made by the UK Government on this occasion.

Yours sincerely,
I am writing as Vice-President of Edinburgh Napier University’s student union - Napier Students’ Association - to endorse the Campaign for Freedom of Information in Scotland’s request for an amendment to the Freedom of Information (Scotland) Amendment Bill to strongly urge you to reflect the addition of extending the legislation to cover groups such as those listed by the CFoIS which the Scottish Executive wrongfully dropped in the previous planned extension last November. The consultations and an opinion poll commissioned by the Scottish Information Commissioner showed wide public support for the extension and I would urge you to take note of this when you look to review any amendment to the FoI Act this time round because we strongly believe that to not do so would be to purposefully ignore and undermine the public’s civil rights.
FINANCE COMMITTEE

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

SUBMISSION FROM NHS LANARKSHIRE

1. I refer to your call for written evidence on the Freedom of Information (Amendment) (Scotland) Bill which was recently introduced by the Scottish Government. NHS Lanarkshire welcomes the opportunity to comment on the proposed amendments and is happy that the content of the response be made to the Finance Committee in its deliberations on the Bill.

2. NHS Lanarkshire did take part in the Scottish Government’s consultation on the Bill and feel that our views of NHS Lanarkshire have been reflected.

3. NHS Lanarkshire is generally in agreement with the purpose of the Bill. The shift in culture towards greater openness and accountability and the public’s expectations of being able to access information earlier would be enhanced by the amendments to the periods when historical records become available. We, therefore, welcome the Scottish Government proposal to amend Section 59 of the Act to provide for greater flexibility in determining the lifespans of individual exemptions. The exemptions are so diverse in nature that we feel it would be difficult to find one exemption period to fit them all.

4. Lengthening the prosecution time for offences under Section 65 is welcomed as it is currently not in line with the processing of requests for information and for this section to be workable there needs to be sufficient scope to take action against any individual found to be altering or destroying records with intent to prevent disclosure.

5. Changes to Section 25, 38 and 41 are noted.

6. These changes to the legislation will, however, have limited implications for NHS Lanarkshire. While we can see that there might be implications for other organisations that use these exemptions more regularly, NHS Lanarkshire does not have the need to routinely make use of these particular exemptions. We also do not foresee any financial implications for NHS Lanarkshire if these changes were made.
In response to your e-mail dated 14th June 2012 regarding the Freedom of Information (Amendment) (Scotland) Bill, I can advise that NHS Orkney took part in the consultation exercise and is broadly supportive of the Bill. NHS Orkney does not have any further submissions/responses to present at this time.
General Views
1. The Council welcomes the proposed changes to the Freedom of Information legislation. It recognises the purpose of the Bill is to tidy up certain details process under Freedom of Information and the Council has no general comment to make.

Previous Consultation
2. North Ayrshire Council has previously commented on this Bill

Freedom of Information (Scotland) Act 2002
3. The Bill will clarify certain grey areas. The Bill does little to affect protection of the rights of access to information as it does not amend those to whom FOI is applicable or available.

Royal Exemption
4. This proposal limits those within the Royal household to which absolute exemption applies. It is recognised that as the Constitutional Reform and Governance Act 2010 limits absolute exemption to identified members of the Royal Family then similar provisions should apply in Scotland. Given the Limited occasions when such an exemption might apply, we do not consider that amendments should affect the position of the Scottish Government. The exemptions might still apply if the public interest test found it relevant.

Historical Periods
5. The present exemption periods under Sections 57 and 58 of FOISA offer no flexibility. The reduction in time limits would, it is suggested, be appropriately applied and would in any event follow the spirit of openness and accountability by public bodies.

Financial Aspects
6. From the Council’s standpoint, it is unlikely that the changes to FOISA will result in additional costs, the changes being process related in the main.

Financial Memorandum
7. The Council agrees with the findings in the Memorandum.
FINANCE COMMITTEE

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

SUBMISSION FROM NORTH LANARKSHIRE COUNCIL

General
What is your general view on the purpose of the Bill and broadly, are you supportive of it?
1. North Lanarkshire Council does not disagree with the purpose of the Bill in seeking to make technical amendments to the Freedom of Information (Scotland) Act 2002 and is, broadly, supportive of the Bill.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?
2. North Lanarkshire Council did submit a response to the Scottish Government’s consultation on the Bill. The Council considers that the terms of that response have been fairly considered and reflected in the Bill.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?
3. The Council does not disagree that the Bill will strengthen transparency and accountability in relation to the operation of FOISA. It is considered that the Bill does protect the rights to access information and, equally, does not particularly prejudice the position of public authorities.

Royal exemption
In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill Section 1). What is your response to the position of the Scottish Government to these concerns?
4. The Council does not consider that it has any strong locus in relation to this aspect of the Bill but does not disagree with the position of the Scottish Government.

Historical periods
In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?
5. The Council considers that the terms of its response to the consultation have been fairly considered in the consideration of the responses to the consultation and does not disagree with the position of the Scottish Government.

Financial aspects
The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?
6. Whilst it is not possible to gauge, with any degree of certainty, what impact the technical changes brought by the Bill will have on either volume of requests for information received by public authorities or resources required to consider requests, including the consideration of the potential applicability or otherwise of amended statutory exemption(s) to any individual request, it is not thought at this stage that the passing of a new Act which reflects the terms of the Bill will have any particular financial implication for the Council.
Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

7. The Council does not disagree with the financial assumptions contained in the Financial Memorandum.
The National Union of Journalists Scotland wholeheartedly supports and endorses the submission by the Campaign for Freedom of Information Scotland on the Scottish Government FOI Amendment Bill.

We have major concerns at the lack of progressive reform of the bill, particularly the reluctance to extend the legislation to cover public service delivery by private companies, housing associations, trusts and other arms-length organisations such as ACPO, COSLA and Law Society of Scotland.

- This will certainly lead to a democratic deficit from the point of view of journalists seeking to carry out essential work to ensure transparency and accountability;
- restricting journalists ability to access information which can be then published in the public interest;
- undermine freedom to receive and impart information without obstruction;
- impact on freedom of expression.

At a time when Scotland is looking closely at the way forward in respect to self-government it is worrying that we could be left with FoI legislation which is deemed lesser quality to that which exists in England and Wales.
The Alliance is supporting the views expressed in the response to the consultation produced by the Campaign for Freedom of Information in Scotland. We share the concerns about the failure to extend FOI coverage to all those bodies that may be delivering public services in Scotland. The greater presence of a range of organisations to deliver public services requires that the Act be extended. We are particularly concerned that those private and voluntary sector organisations delivering parts of the welfare system should be open to proper scrutiny. We would encourage the Committee to consider the views set out in this consultation response by the Campaign for Freedom of Information in Scotland.
The Finance Committee is currently scrutinising Stage 1 of the Freedom of Information (Amendment) (Scotland) Bill has requested a response to the "general principles" of the Bill.

We wish it noted and brought to the attention of the Committee that SCID wholeheartedly endorses the evidence submitted, to the Committee, by the Campaign for Freedom of Information Scotland.
I would just like to endorse the Council's support for the response from the Campaign for Freedom of Information in Scotland.
Role of Scottish Council on Archives (SCA)
1. I write as Chair of the Scottish Council on Archives (SCA). Before proceeding to answer the questions set out on behalf of the Finance Committee, it might be useful to the Committee to have a brief description of the role of the SCA.

2. The SCA is the lead independent advocacy body for archives and records management in Scotland. It therefore has an interest in all aspects of the handling of information and in promoting standards and guidance that allow ready access to archives (‘historical records’) and records. In pursuit of that core objective, the SCA gave oral evidence to the Education and Culture Committee during its consideration of the then Public Records (Scotland) Bill.

General
What is your general view on the purpose of the Bill and broadly, are you supportive of it?
3. The SCA strongly supports the Bill.
4. The SCA regards the Bill as ensuring that those wishing access to information located in Scottish public authorities, including the National Records of Scotland, are not disadvantaged in regard to that access or when compared with other parts of the United Kingdom. In that sense, the Bill could be regarded as an equality measure focused on a vital asset – information - that not only informs academic and other research but also ensures that the everyday needs of citizens are met efficiently.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?
5. The SCA took part in the consultation. It expressed its concern about possible resource implications in reducing the closure time spans for historical records. Para. 26, Financial Memorandum, and paras 27-28, Policy Memorandum, refers to the consideration of those resource implications.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?
6. FOI legislation is an expression of the citizen’s democratic right to understand ‘the how and why’ of decision-making, especially as it affects individuals and communities. It is important that procedures are as simple and as clear as is practicable. This Bill strengthens that democratic right and provides added clarity.

7. In opening the way to reduced closure time spans while providing flexibility in regard to those time spans, the Bill opens the way (literally) to the release of more information into the public domain. Consultation on the order introducing flexibility of
time spans should ensure that information is not released at an inappropriately early time.

**Royal exemption**

*In response to the Scottish Government's consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?*

8. The SCA regards the stance of the Scottish Government as wholly appropriate.

**Historical periods**

*In response to the Scottish Government's consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?*

9. The flexibility of time spans that is central to this Bill is especially welcome. Freedom of Information must be approached within a framework easily understood by both those holding the requested information and those making the requests.

10. The SCA thinks that the Scottish Government should pay particular attention to private archives gifted to public archives services. It can do no better than reiterate the comments made at the consultation stage:

Privately created and owned archives constitute an immensely important part of the documented memory of the Scottish people. They can range from the papers of great landed estates and significant commercial and industrial enterprises, through those of a vast range of voluntary bodies, to the papers generated by ordinary individuals and families and small enterprises. Unlike public authorities’ records, private archives are often not uniform in structure and content. They are individualistic even when not dealing with individuals.

Private archives gifted to a public archives by a private owner fall within the scope of the 2002 Act. The application of an access period as short as 15 years could present particular problems. Most importantly, it has the potential to dissuade private owners from gifting their archives to public institutions since they would be denied any negotiating rights as to what might be regarded as an appropriate closure period for all or some of an archive.

Denied a say in respect of closure, private owners can simply continue to hold onto their archives (thus restricting public accessibility) or choose to realise their commercial value. To a greater or lesser degree such responses would impact negatively on public access to the documented national memory of Scotland.

To help off-set those negative possibilities the SCA suggests that careful consideration should be given to any reduction of access periods for gifted private records to as little as 15 years.

11. The SCA welcomes para.41 of the Policy Memorandum in that it recognises that there may be particular issues in regard to the variety and confidentiality of information held by different types of public authorities. However, it would hope that
these issues would be aired during the Finance Committee’s scrutiny of the Bill (and, indeed, during consultation on the order) so that there is public assurance that any flexibilities permitted are appropriate.

**Financial aspects**

The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?

12. The SCA would welcome the hearing of evidence from the range of public authorities that are covered by the Bill. It is important that there is a clear understanding of the procedures underpinning delivery of the legislation ‘on the ground’ and the resources that might be needed. This is especially important at a time when many public authorities will be considering implementation of the requirements of the Public Records (Scotland) Act 2011.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

13. Yes, the Financial Memorandum has taken on board the concern about financial implications. As this is meant to be a response that focuses on principle rather than detail, it is not the appropriate place to give instances of possible cost implications that would require consideration. The SCA is confident that these issues could be weighed up during the Finance Committee deliberations and during the consultation on the order.
General

What is your general view on the purpose of the Bill and broadly, are you supportive of it?

1. I am broadly supportive of the Bill. I recognise and welcome the positive enhancements that key elements will bring to the effective operation of freedom of information (FOI) in Scotland. However, I have some reservations in relation to one key aspect of the Bill, which is seeking to introduce an additional absolute exemption.

Did you take part in the Scottish Government’s consultation on the Bill, and how have your views been reflected?

2. A formal response to the consultation was made by Kevin Dunion, my predecessor as Scottish Information Commissioner. That response was informed by the experience of the Commissioner’s office in enforcing and promoting FOI since 2005. As the current Scottish Information Commissioner, I have considered that response carefully and share many of the same views as already submitted by my office.

3. In terms of whether the views of this office have been reflected in the Bill, I am pleased to note that generally they have: the Bill as introduced includes a number of revisions which will, in my view, further strengthen and enhance the provisions of Scotland’s FOI Act. These include:

- the decision to amend the time limit within which a prosecution under section 65 may be commenced from 12 months from the commission of the offence to 6 months from the discovery of the offence.
- the addition of section 38 to the list of exemptions to which section 18 applies, ensuring that public authorities can refuse to confirm or deny whether personal data is held in circumstances where doing so would be contrary to the public interest. This measure was proposed and discussed in Mr Dunion’s Special Report to the Scottish Parliament of January 2012. I am also aware that it has been an area of concern for a number of Scottish public authorities.
- the decision to clarify the wording of section 25(3), also proposed in the Special Report. Again, I am aware that the current wording has caused difficulties in interpretation for both public authorities and my staff, and this additional clarity is welcomed.

It is disappointing that Ministers have chosen to retain the amendment to section 2 of the FOI Act, which will create a new absolute exemption for senior members of the Royal Family.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?

4. In broad terms, and as noted above, I am of the view that, in most respects, the Bill will serve to strengthen and clarify FOI rights in Scotland. The proposed amendments to sections 18 and 25 will add clarity to key elements of the legislation, while the amendments to section 59 and section 65 will serve to strengthen rights to access information. However, the proposed amendment to section 2 of the FOI Act will neither strengthen or clarify, nor protect FOI rights. It is my considered view that it will instead have the effect of unnecessarily restricting rights and
create a worrying precedent with the introduction of a wide-ranging absolute exemption which sets aside the public interest.

**Royal exemption**

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?

5. The Scottish Government’s Policy Memorandum on the Bill notes that few respondents to the consultation commented specifically on the amendment to section 2. While this was certainly the case it should not, in my view, be interpreted as evidence that the section 2 amendment is not significant. Rather, it is more likely to be indicative of the fact that relatively few Scottish public authorities will hold information to which the Royal Family exemption under section 41(a) might be applied. My principal concern with the amendment to section 2 is that it creates an absolute exemption that sets aside the need for a public interest test for information that may be appropriate to release in the public interest. In doing so it erodes the right to information enshrined in the Act. I am also concerned about the sweeping scope of the exemption, relating as it does to communications with senior royals. It is my belief that in being so wide, this will potentially restrict access under the FOI Act to any and every subject simply because it is in correspondence, or in information which relates to correspondence. This will have a detrimental effect on FOI and FOI rights in Scotland. I will summarise my reasons for this below.

The FOI Act currently contains appropriate protections

6. Experience of this office suggests to me that the current protections for information relating to senior members of the Royal Family are adequate and appropriate. As currently worded, the FOI Act enables protection of the privacy of senior royals, particularly in relation to personal data. Under the terms of section 41(a), information is exempt if it relates to a communication with a member of the Royal Family or the Royal Household. This exemption is only set aside in circumstances where the public interest in disclosing information is outweighed by that of non-disclosure. Further protections also exist in terms of the exemptions relating to personal data (section 38(1)(b) of the FOI Act) and confidentiality (section 36(2)). Other FOI exemptions may also apply, depending on the nature and content of the relevant communications. It is also the case that the public interest in protecting the constitutional convention which underpins section 41(a) is very strong, and this has been evidenced by the decisions both from my office, and from my counterpart, the UK Information Commissioner. The combined effect of these exemptions means that information relating to the Royal Family and Royal Household is extremely well protected under Scotland’s FOI law. This amendment, if enacted, will serve only one function over and above the current provisions. It would prevent the release of information in circumstances where the public interest in the release of information is strong enough to outweigh the public interest in maintaining the aforementioned constitutional convention. The amendment is therefore in direct conflict with the public interest, and for this reason I would urge Members to consider carefully whether such an amendment is desirable and appropriate before proceeding.

The proposed exemption will be extremely wide-ranging

7. The amendment, if enacted, would have the effect of creating Scotland’s most wide-ranging absolute exemption in terms of its scope.

8. Presently, the FOI Act contains a limited number of exemptions which are absolute. As set out in the policy memorandum which accompanied the FOI Bill in 2001, these exemptions are—

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3 Freedom of Information (Scotland) Bill - Policy Memorandum (SP Bill 36-PM), paragraph 60.
“…essentially technical in nature, and support the effective operation of the Bill – for example, exempting absolutely information which is otherwise accessible – or recognise existing legal obligations and enactments – for example statutory bars on disclosure or the Data Protection Act 1998 (which deals with access to certain personal data).”

9. The exemption proposed by the section 2 amendment will mark a clear divergence from this principle. It is neither technical in nature, nor will its introduction support the effective operation of FOI in Scotland. An additional common feature shared by the current absolute exemptions is that each clearly and narrowly defines the information which will fall within its scope. Current absolute exemptions largely apply to information contained within a specific type of document (e.g. a court record), or where release would breach an existing law (e.g. section 26, section 36(2), section 38(1)(b)). The absolute exemption created by the proposed amendment will again mark a divergence from this principle. The proposed exemption will not be restricted only to information contained in communications with senior royals, but will also absolutely exempt any information which relates to those communications in any way. This will include all information detailing e.g. the number of times communications have taken place, the departments or individuals within a public authority who have been involved in communications, or details of the cost to the authority of such communications. As a result, the amendment will create a provision which requires absolute secrecy in relation to any aspect of communications with senior royals in all circumstances – regardless of how far removed the information is from the content of communications, or of the weight of the public interest in favour of release.

The amendment will create a fresh inconsistency in the handling of requests under Scottish legislation

10. The Scottish Government’s consultation report sets out that the amendment is appropriate in order to “adopt a consistent approach” with the United Kingdom Government. In creating this consistency between UK and Scottish Government legislation, however, the amendment, if enacted, will simultaneously create a greater inconsistency for Scottish public authorities in the way requests for information are handled under Scottish law. At present, there are two main routes of access to (non-personal) information in Scotland. When a requester is seeking access to environmental information, the request is made under the Environmental Information (Scotland) Regulations 2004 (the EIRs), while requests for all other information are dealt with under the FOI Act. The provisions of the EIRs, which originate from an EU Directive, contain no specific exceptions for information relating to communications with the Royal Family, and such requests are considered in terms of the existing EIR provisions. Requests for relevant environmental information must be considered in terms of e.g. regulation 10(5)(d) (which relates to confidentiality), regulation 10(5)(f) (which relates to the interests of the person providing the information) and regulation 11 (which concerns personal data). Each of the EIRs’ exceptions (apart from certain parts of regulation 11 (personal data)), will continue to be subject to the public interest test, so an assessment of where the public interest lies will be required in relation to any royal communications that contain environmental information. While the proposed amendment will make information that relates to communications with senior royals absolutely exempt from release under FOI, where those communications relate to the environment, the information may still be subject to disclosure in the public interest. This is inconsistent, could be confusing to both requesters and Scottish public authorities, and creates process inefficiencies at a time when funding to public authorities is being squeezed.

11. The amendment will, therefore, create a fresh divergence for Scottish public authorities in the way requests for relevant information must be considered under the FOI Act and the EIRs.
The amendment would be inconsistent with international good practice principles. If enacted, the amendment will also result in a departure from internationally-recognised good practice in FOI law. The Commonwealth Principles and Guidelines on the Right to Know agreed in 1999 that—

“the right of access may be subject to only such exemptions, which are narrowly drawn, permitting government to withhold information on when disclosure would harm essential interests…provided that withholding information is not against the public interest”.

More recently, the Organisation of American States (OAS), which brings together the 35 independent nation states of North and South America, agreed a model FOI law in April 2010. This model law emphasises the importance of the public interest override in relation to each of the law’s exceptions, stating, under Article 44, that authorities may not—

“refuse to disclose that record…unless the harm to the interest protected by the relevant exception outweighs the general public interest in disclosure”.

The guidance notes on the model law clarifies that—

“non-disclosure must have a direct effect on the exercise of a particular exception, be proportionate to the public or private interest protected, and interfere to the least extent possible with the effective exercise of the right of access.”

The Westminster amendment was not subject to full scrutiny

The Scottish Government has set out that the Royal Family amendment has been introduced in order to ensure consistency with the Constitutional Reform and Governance Act 2010. It is worth noting that the amendment to the Royal Family exemption was added to the Constitutional Reform and Governance Bill at a late stage – with the relevant clause being introduced at report stage on 2 March 2010, and the Bill receiving Royal Assent on 8 April 2010. As a result, these amendments were not subject to consultation and, as noted in House of Commons’ Briefing Note on the Bill, did not receive full scrutiny in the House of Lords due to the imminence of the 2010 general election. The Lords Constitution Committee went as far as expressing its concern about the inadequate scrutiny of the Bill in general, setting out that—

“It is inexcusable that the Government should have taken so long to prepare this Bill that it has effectively denied both Houses of Parliament – and especially this House – the opportunity of subjecting this important measure of constitutional reform to the full scrutiny which it deserves.”

In these circumstances, it is particularly appropriate that Parliament applies careful scrutiny to the rationale underpinning this amendment, while also examining its impact on both FOI principles in Scotland and the information rights of the Scottish public.

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5 Model Inter-American Law on Access to Information, Article 44, April 2010; Available at: www.oas.org/dil/CP-CAJP-2840-10_Corr1_eng.pdf
6 Commentary and Guide for Implementation for the Model Inter-American Law on Access to Information, Page 11, April 2010; Available at: www.oas.org/dil/CP-CAJP-2841-10_eng.pdf
7 Public records, freedom of information and the Royal Family, SN/PC/05377, March 2011; Available at: www.parliament.uk/briefing-papers/SN05377.pdf
8 Lords Constitution Committee Constitutional Reform and Governance Bill Eleventh Report HC 98 2009-10
Historical periods

In response to the Scottish Government's consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?

17. Like Mr Dunion, I am of the view that the amendment to allow greater flexibility in relation to the lifespan of exemptions is appropriate and desirable. While I note that a small number of respondents raised concerns that the proposed amendment may add to the complexity of the legislation and increase the administrative burden for authorities, it is my view that the positive impact of this amendment may also alleviate many of these concerns. A reduced time-period for an exemption will serve to reduce the administrative impact of FOI in many circumstances, as it will remove the requirement for authorities to consider the detailed application of particular exemptions once information has reached the specified age. In those circumstances the exemption can simply be set aside and, providing that no other “live” exemptions apply, the information released. I note also the Government’s commitment that any order made following the amendment of section 59 will be subject to consultation and affirmative Parliamentary procedure, and I am confident that these measures will allow any relevant concerns to be identified, considered and addressed. I would also repeat the call made in the consultation response from this office that a similar amendment to the Environmental Information (Scotland) Regulations 2004 (the EIRs) would also be desirable; in order to ensure that the public’s rights of access under these two interrelated regimes continue to be as consistent as possible.

The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?

18. The assessment set out by the Scottish Government in its Financial Memorandum appears to be reasonable and proportionate. As noted under paragraph 30 of the Memorandum, no prosecutions have yet been brought under section 65 of the Act. As such, considerations about cost can only be speculative. The costs provided by the Government for any such action represent the most accurate estimate currently available. The point should, of course, be made that these costs are avoidable. A risk-based approach to records management should seek to minimise the likelihood of records being altered or destroyed (intentionally or otherwise) and on the very rare occasions they are, that a full audit trail exists to minimise costs related to the application of section 65. It is extremely important that offences in relation to the alteration or destruction of records to prevent disclosure can be effectively prosecuted, where appropriate. Such a measure is essential in ensuring that public confidence in Scotland’s FOI regime is retained and enhanced. Again, I would repeat the call that a similar amendment to the EIRs be introduced, to ensure that the public’s rights under these two pieces of legislation are as consistent as possible.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

19. There were no relevant comments made in relation to the financial assumptions of the Bill.

Closing Comments

20. A key feature of Scotland’s FOI legislation is that the extension of the Act does not require a change to the primary legislation - section 5 of the FOI Act. The power to designate Scottish public authorities was introduced to ensure that Ministers can be flexible and
responsive in ensuring the on-going designation of bodies, as appropriate. This was clearly the original intention of Parliament, with the then Deputy First Minister informing Parliament as far back as 2002 that—

“Provisions allow providers of services to the public to be added to the bill case-by-case and I reassure Parliament that that power will be exercised.”

21. A number of respondents to the Government’s consultation set out their disappointment that Ministers had not used the opportunity presented by the FOI Amendment Bill to designate additional bodies that carry out public functions. This was a feature of the responses from UNISON, Glasgow City Council, Consumer Focus Scotland, the Campaign for Freedom of Information in Scotland and Professor Colin Reid of the University of Dundee’s School of Law who, in his response, described designation as “the most serious issue in need of attention”. It is extremely important that Scotland’s FOI Act remains vibrant, live and applicable to the public it serves, and it is in this context that I support wholeheartedly the protection of FOI rights through the designation of additional bodies. As the models for the delivery of public services evolve and change, it is vitally important that the public’s right to the information held about those services is protected. I am particularly keen to support the Scottish Government in progressing this issue and I urge Ministers to take action to ensure that FOI rights are retained and enhanced, and the principles underpinning FOI protected. I note the statement from January 2011 which set out Ministers’ belief that it would be “premature to extend coverage before the deficiencies in the Act could be put right”. Now that action has been taken on this matter - in the form of the Bill currently under consideration – I trust that the Government will move swiftly, and I look forward to the time when review of the bodies in scope of our FOI law becomes a matter of routine and our FOI legislation extends to all public functions.

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FINANCE COMMITTEE

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

SUBMISSION FROM SCVO

Summary
- The amendments in the bill which allow greater flexibility to vary the period of time before a record becomes historic, and proposals to reduce the time period for most exemptions are a positive step towards ensuring transparency in public authorities.
- While the proposed changes are welcome, a reduction in exemption time from 30 years to 15 will have limited practical application for the third sector.
- We welcome the decision to ensure any order brought forward by Scottish Ministers is subject to consultation and affirmative parliamentary procedure.
- SCVO has consistently opposed the extension of FOI legislation to individual third sector organisations but does support the extension of Freedom of Information to include the provision of all public services.
- Research carried out by the University of Strathclyde has identified that many third sector organisations are discouraged from making FOI requests because of a fear that it might harm working or funding relations with a public authority.

General
What is your general view on the purpose of the Bill and broadly, are you supportive of it?
1. SCVO is generally supportive of the purposes of the Bill. It is our view that the amendments in the bill which allow greater flexibility to vary the period of time before a record becomes historic and proposals to reduce the time period for most exemptions are a positive step towards ensuring transparency in public authorities.

2. It should be noted that while the proposed changes are welcome, a reduction in exemption time from 30 years to 15 will have limited practical application for the third sector and others. While the release of information to the public domain after 15 years will be of interest to academics, the relevance to those looking to hold authorities to account will be minimal.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?
3. SCVO participated in the consultation. Our views were generally well reflected in the consultation report.

Historical periods

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?
4. Whilst recognising the concerns raised by some responses about adding complexity to the Act, on balance we support the government’s decision to retain the amendment without change. The benefits of having earlier access to records, by removing the consolidation of exemptions, outweigh the slight additional complexity brought about by the Bill.

5. We welcome the decision to ensure any order is subject to consultation and affirmative parliamentary procedure.

Extension of coverage of the Act

6. The consultation report restates the government’s intention to defer a decision on extending coverage of the Act until after Parliament has considered the Amendment Bill.

7. SCVO supports the extension of Freedom of Information to include the provision of all public services, irrespective of whether those services are provided by public, private or third sector organisations. In our view the public have a right to know all aspects of how publicly funded services are funded and run. Our view about the best way of achieving this is to insert a freedom of information clause into all contractual relationships between government and public service providers which requires compliance.

8. SCVO has consistently opposed the extension of FOI legislation to individual third sector organisations. In our view this would represent a disproportionate burden on charities and social enterprises and would discriminate against them in respect of their non-government and non-public service work. Either all organisations, including exclusively commercial ones, are covered by FOI, or its obligations are focussed on the public sector and public services.

The use of FOI by the third sector

9. The committee should also be aware of research carried out by the University of Strathclyde which looked at experiences and perceptions of FOI in the voluntary sector.

10. This report highlighted some serious problems with how the sector uses and perceives FOI legislation. Some of the key findings from the report:

- Almost half of all respondents [49.6%] stated that they would be discouraged from making a request because of a fear that it might harm working relations or funding relations or both.
- The higher the level of funding an organisation receives from a public authority, the more likely they are to believe that using FOI could harm relations between their organisation and the public authority.
- There is a perception amongst some FOI-users that public authorities can sometimes adopt strategies to frustrate the FOI process. This might include e.g. deliberately delaying responses, inappropriately withholding information,
interpreting requests too narrowly, or exploiting ambiguities in request wording to avoid disclosure

- Larger organisations with closer ties to authorities tend to use established and informal communication routes to access information, with FOI being seen as a more "aggressive" or "confrontational" approach.

11. It is our view that as part of its enquiry, the committee should investigate these areas of concern for the third sector and particularly examine why half of respondents would be discouraged from making FOI requests for fear it may harm working or funding relationships.

About us
The Scottish Council for Voluntary Organisations (SCVO) is the national body representing the third sector. There are over 45,000 voluntary organisations in Scotland involving around 137,000 paid staff and approximately 1.2 million volunteers. The sector manages an income of £4.4 billion. SCVO works in partnership with the third sector in Scotland to advance our shared values and interests. We have over 1300 members who range from individuals and grassroots groups, to Scotland-wide organisations and intermediary bodies.

As the only inclusive representative umbrella organisation for the sector SCVO:

- has the largest Scotland-wide membership from the sector – our 1300 members include charities, community groups, social enterprises and voluntary organisations of all shapes and sizes
- our governance and membership structures are democratic and accountable - with an elected board and policy committee from the sector, we are managed by the sector, for the sector
- brings together organisations and networks connecting across the whole of Scotland

SCVO works to support people to take voluntary action to help themselves and others, and to bring about social change. Our policy is determined by a policy committee elected by our members.¹ Further details about SCVO can be found at www.scvo.org.uk.

References
Scottish Voluntary Sector Statistics 2010, SCVO

¹ SCVO’s Policy Committee has 24 members elected by SCVO’s member organisations who then co-opt up to eight more members primarily to reflect fields of interest which are not otherwise represented. It also includes two ex officio members, the SCVO Convener and Vice Convener.
What is your general view on the purpose of the Bill and broadly, are you supportive of it?

1. SEPA considers that the Bill is part of a necessary and ongoing process to ensure that the legislative basis for the FOISA regime remains relevant to the needs of requestors and public authorities.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?

2. SEPA submitted a response to the Scottish Government consultation. No specific views were expressed.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?

3. SEPA considers that the Bill is focused on technical amendments to the primary legislation. The proposed amendments to sections 18 and 25 provide clarity to the provisions. Access rights under the FOISA regime are strengthened by the proposed amendments to sections 29 and 65.

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?

4. SEPA notes the content of the proposals from Scottish Government in the Consultation Report. SEPA has not dealt with any requests under the FOISA legislation which required consideration of the exemption at section 41(a) of FOISA. By the nature of SEPA's function the majority of requests it receives are handled under the terms of the EIRs.

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?

5. SEPA is supportive of the amendment in that it would allow for greater flexibility in the relation of the time limit period for historical records. SEPA notes that the Scottish Government response indicates that any order made under the amended provision would be subject to consultation on the detail of the order. SEPA also considers that any such amendment to the time limit period should be applied to the EIRs to ensure consistency is maintained between the two interrelated regimes.

The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?

6. SEPA notes the content of the Financial Memorandum and is unable to determine whether additional costs would be applicable at this time. SEPA also notes the evidence submitted by the Scottish Information Commissioner and concurs with her comments in
relation to the management of public records and the need to consider the need for similar amendments to be made to the EIRs legislation.

_Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?_  

7. SEPA made no specific comments in relation to the Financial Memorandum.
FINANCE COMMITTEE

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

SUBMISSION FROM SCOTTISH NATURAL HERITAGE

General

What is your general view on the purpose of the Bill and broadly, are you supportive of it?
1. The Bill proposes some changes that will clarify and strengthen the existing Act. We are supportive of the Bill. We believe that any steps which are taken to improve the openness and transparency of public decision-making are helpful.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?
2. Yes, we were content with the consultation process and that our views were taken into consideration.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?
3. Yes, we agree that the Bill will add strength and clarity to aspects of the Freedom of Information (Scotland) Act 2002, in particular the proposed changes to Section 5 – Time limit for proceedings, and the proposed changes to Section 4 – Historical periods.

Royal exemption

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?
4. We accept the Scottish Government’s position.

Historical periods

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?
5. We support the Scottish Government’s position.

Financial aspects

The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?
6. We agree with this assessment.
Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

7. We are content with the Financial Memorandum.
FINANCE COMMITTEE

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

SUBMISSION FROM ALISTAIR P SLOAN

1. I am responding to this call for evidence as an individual who has made use of the Freedom of Information (Scotland) Act 2002 (FOISA) on a number of occasions when conducting research. I am a supporter of the principles behind FOISA and the general “Open Government” movement. I believe that FOISA plays a vital and essential role in our democracy.

2. FOISA has provided an unprecedented level of access to information held by a wide range of bodies that carry out public functions. It has undoubtedly contributed to creating a much more open society and enabled the Scottish people to better hold public servants to account over how they conduct their public functions and how they spend public money.

3. It is important that Freedom of Information is protected in Scotland and that changes made to the legislation are for the purpose of strengthening the Act rather than weakening it.

4. Freedom of Information benefits everyone in society. It gives members of the public, elected representatives and even other public authorities the ability to formally request information from bodies covered by the Act.

What is your general view on the purpose of the Bill and broadly, are you supportive of it?

5. I welcome any move to strengthen the information access rights provided to the people of Scotland by FOISA and this Bill broadly does that. However, there are a number of concerns with the Bill. Firstly, the wording of Section 2 of the Bill is of concern and I will expand upon this in more detail in answer to question 4. Secondly, the Bill, as currently drafted, is a missed opportunity. There are additional things which could be included which would further strengthen the Act. I have provided further information on the missed opportunity of this Bill towards the end of this document.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?

6. Unfortunately, I was unable to provide a response to the Government’s consultation in time due to other pressures.

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2 For example http://www.itspublicknowledge.info/uploadedFiles/Decision086-2012.pdf (Motherwell, Cumbernauld and South Lanarkshire Colleges)
The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?

7. There are aspects of the Bill that will strengthen the provisions within FOISA and it broadly seeks to protect the right of access to information held by public authorities in Scotland. However, I am concerned that the amendment proposed in Section 2 of the Bill will adversely affect the right to access information from public authorities in Scotland. I am also concerned that the Bill represents a missed opportunity.

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?

8. I am concerned about this aspect of the Bill as it will have an adverse effect on the rights of people to access information under FOISA.

9. Her Majesty as Head of State is in a position where information of a sensitive nature comes into Her Majesty’s possession. It is, in my view, legitimate to protect correspondence with Her Majesty. This proposed exemption goes much further than that. Information would be caught by the exemption if it were to relate to correspondence. For example, a request to the First Minister’s office for information as to the number of piece of correspondence he had sent to Her Majesty would be caught by that exemption because the information relates to correspondence with Her Majesty. To reveal the number of pieces of correspondence a particular Minister has had with Her Majesty would do nothing to prejudice the privacy of correspondence between public authorities and Her Majesty. It would be hard to argue that the public interest in releasing such information would be outweighed by the public interest in maintaining the exemption.

10. The principal idea behind the exemption is not significant; the removal of the public interest test is highly significant, especially with current wording of the amendment. The Committee would be advised to consider this carefully to ensure that unintended consequences do not occur. In other exemptions where information need only relate to a particular subject the relationship need only be a very tenuous one before the exemption can apply. It is possible for a large amount of information to be covered by this exemption when it was not intended to be covered, and because of the absolute nature of the exemption it cannot be rectified by considering the public interest.

11. Presently, under FOISA absolute exemptions are narrow in scope. It is normally absolutely clear from the exemption what is and what is not covered by the exemption. Having an absolute exemption as wide as this one appears to be would undermine the fundamental principles of FOISA.

12. The current s.41 provision appears to provide adequate protection. It is clear from the decisions of the Scottish Information Commissioner’s Office that great weight is given to protecting confidentiality and constitutional conventions. Indeed, as recently as this year, the Scottish Information Commissioner’s Office issued a decision notice upholding the Scottish Minister’s decision where the Ministers had refused to confirm or deny whether information was held on the grounds that if it were held s.41 would apply.
13. There are other exemptions which could also apply in the case of correspondence between Her Majesty and public authorities depending on the situation in which the correspondence arises. Exemptions such as the ones found at ss.28-30 would be examples of exemptions already in FOISA which can be applied to communications with Her Majesty, other members of the Royal Family and the Royal Household.

14. It could be argued that by implementing an absolute exemption where currently a qualified exemption applies is removing information from the public where the public interest is in that information being released. Such a move would be unfortunate and, I would argue, not be in the wider public interest.

15. Even if the exemption to be “tightened up” so as not to cover information not intended on being covered, I would not be in favour of this amendment to the Bill. However, if the amendment is to be included then it would be necessary to ensure, as I have already stated, that information not intended on being covered by this exemption is not in fact covered.

16. I recognise that this amendment would bring the legislation into line with the Freedom of Information Act 2000. However, I do not accept that this alone is a sufficient reason to introduce the amendment as it is currently written. The Scottish Government regularly mentions the distinct nature of Scots law, yet seems content to simply introduce an amendment to the Scottish FOI law because Westminster has. I do not believe that this amendment is needed and the current provisions in FOISA are quite sufficient.

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?

17. This amendment can only be a good thing for FOI in Scotland. By reducing the period that some information is held for before it becomes a historical record will allow for greater openness. The approach of being able to vary the period for different exemptions (and indeed different specified types of information) means that information which does not need to be held for as long before being classed as a historical record can be considered as historical earlier. This will mean that accessing information will become easier.

18. The Government’s proposal to open up such orders to consultation before they are made is entirely sensible and will permit proper consideration of the effects of a particular order before it is made.

The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?

19. There may be financial implications as a result of the amendments to s.65 of FOISA. The additional costs would primarily be those of the public authorities accused of offences rather than for the Scottish Court Service and the Crown Office and Procurator Fiscal Service. Court buildings and staff would already be in place as would prosecutors. In terms of costs to the Scottish Information Commissioner it is unlikely that there would be any additional costs to them as investigations would already be occurring in such cases.
20. Costs associated with s.65 are avoidable if public authorities subject to the Act are careful in how they manage their records and ensure that they are fully compliant with all aspects of FOISA and any other relevant legislation.

Section 65
21. The Committee has not asked any questions directly pertaining to the proposed amendment to s.65 of FOISA. I would like to express my support for this amendment. Freedom of Information is an important element of our modern democracy and should a public authority decide to wilfully destroy or otherwise prevent the disclosure of evidence in such a way that constitutes an offence under s.65 it is absolutely necessary that the Scottish Information Commissioner is able to take action.

22. The current six month time scale permitted for prosecutions for this offence is wholly inadequate and means that a public authority could, if it wished, commit an offence under s.65 in the knowledge that it is unlikely that any prosecution can be mounted.

23. I note the recent report by the Justice Committee of the United Kingdom Parliament in relation to the equivalent legislation. That report suggests raising the maximum fine available under the legislation from £5,000 as a way of sending a clear message to public authorities that such an offence will not be tolerated. The maximum fine available in Scotland is £5,000 and that is partly due to the limits on sentencing powers of a Sheriff sitting in summary cases.

24. The Committee might be minded to consider proposing an amendment similar to that proposed by the Justice Committee of the United Kingdom Parliament (in relation to s.77 of the Freedom of Information Act 2000) so that the matter can be dealt with on indictment as well as by summary complaint. This would allow more severe penalties in the, hopefully unlikely event, that a serious example of the offence came to the attention of the Commissioner and the Crown Office.

Missed Opportunity
25. I noted at the outset of my response to this call for evidence that I considered FOI to be vital and essential in our democracy. I believe that this Bill is a missed opportunity for the Scottish Government to truly show how committed to transparency they are.

26. There are a great number of organisations currently not covered by FOISA which provide significant public services, spending significant amount of public money on those services that a sizable majority in Scotland appear to believe should be covered by FOISA. A Government truly committed to the principles of FOI would, I submit, be keen to include these bodies within FOISA and this Bill presents an opportune moment to consider who else should be covered by FOISA and to include them within Schedule 1 to FOISA.

27. There are other organisations which the public would benefit from being covered by FOISA. The Law Society of Scotland and Faculty of Advocates both provide important public services through their regulation of the legal profession in Scotland. Both organisations do have a dual function which involves the representation of its members. However, both organisations could be given a
derogation for information held for the purposes of representing its members.

28. COSLA is another organisation not covered by FOISA which can play an important role in the delivery of public services at a local level. It should also be covered by the Act to ensure transparency in the decision making and delivery of services at local government level.

29. I have long been of the opinion that ACPOS should also be covered by FOISA. However, given that at the end of this financial year the eight Scottish forces currently policing Scotland are due to be merged into one it is likely that ACPOS will cease to exist. Whether the Chief Constable of the new Scottish Police Service seeks membership of ACPO is not something that can be speculated on. However, there seems to be no good reason not to cover ACPOS at this stage. It is likely that ACPOS will play a significant role in the months leading up to the merging of Scotland’s eight police forces into one single police force and as such it should be directly accountable to the people of Scotland. While ACPOS voluntarily seeks to be open it cannot be compelled to disclose information as it is not presently covered by the Act. Information held by members of ACPO within their individual forces would not presently be covered by FOISA.

30. The Government’s present position on extending coverage of the Act is unsustainable. There is no reasonable argument against extending FOISA to other bodies as part of this Bill given that the purpose of the Bill is to address weaknesses in the Act. It is important that the Scottish Government’s words in relation to its commitment to FOI are matched by its actions in this area. Sadly, to date its actions have been contradicting its words on the Government’s commitment to FOI and openness in general.

31. There is also a great deal of sections within Acts which place blanket prohibitions on disclosure by public authorities. Many of these are decades old and pre-date FOISA. The Government could use this Bill to look at some of those statutory prohibitions on disclosure and include amendments to those within this Bill. These statutory prohibitions upon disclosure do not permit the public interest in disclosure of the information to be considered. The fact that they pre-date FOISA means they also largely pre-date the “Open Government” agenda which has taken hold over the last decade and could be considered as being outdated.

Conclusion

32. Freedom of Information is important in any modern democracy. It allows the public to properly consider the decisions of public officials and to better understand how decisions are made, particularly controversial decisions. I am pleased to note that the Scottish Government are committed to Freedom of Information and I hope that in due course the Scottish Parliament will demonstrate their commitment to Freedom of Information in Scotland as they consider this Bill.

33. The Committee should propose amendments to be considered at stage 2 which would extend the coverage of FOISA to bodies such as COSLA, the Law Society of Scotland and the Faculty of Advocates.

34. I welcome this Bill to amend provisions of FOISA which will largely strengthen the Act. However, I have concerns regarding s.2 of the Bill and would strongly suggest a thorough consideration of the amendment at s.2 by the Committee. I also
have concerns about the opportunities that will be missed to further strengthen FOISA and to further demonstrate the Government’s commitment to FOI should the Bill be passed in its present form.
SOLACE welcomes the opportunity to comment on the Freedom of Information (Amendment)(Scotland) Bill. Having considered the Bill contents, we have no concerns.

We trust that this is helpful to the Finance Committee’s consideration of the Bill.
Thank you for your Freedom of Information enquiry, relating to the Freedom of Information (Amendment) (Scotland) Bill, received on 14 June 2012.

Your request is not a request for information in terms of the Act. Your request seeks the views of the Council on aspects of the Freedom of Information (Amendment) (Scotland) Bill.

The Council did not make a formal response to the consultation however are broadly supportive of it.

I trust the above will be of assistance to you.
What is your general view on the purpose of the Bill and broadly, are you supportive of it?
1. The Council strongly upholds the principles of the existing Freedom of Information legislation. It notes that the general purpose of the Bill is to adjust the regime where necessary and sensible to do so rather than propose significant change to it. All changes that can simplify and therefore enhance the regime are welcomed by the Council. It does not see any reason for any major and substantive changes to the legislation such as extending the regime to contractors or providers of PPP/PFI services. It is the Council’s experience that the existing regime can provide access to significant parts of these contracts already (as can be seen in decisions of the Scottish Information Commissioner in relation to Lothian and Borders NHS trust and this Council).

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?
2. South Lanarkshire Council, given the nature of the proposed changes in the Bill at that time, did not participate in the consultation. However, the Council is aware of the Special Report by the Scottish Information Commissioner, which has been considered in this call for evidence and this has prompted the Council to make a submission at this time.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?
3. The Bill itself as proposed protects the rights of access to information. The Council welcomes the proposed changes to the exemptions set down in section 25 and 38 of FOISA as these provide useful clarification of the exemptions concerned and, in relation to section 38 protects the rights of individuals to their privacy. However, the Council believes that there is a further opportunity to clarify the legislation, without reducing the rights of individuals to access information. This will be explained at the end of this response.

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish government to these concerns?
4. The Council does not wish to express any views in relation to this question.

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?
5. The Council notes the position of the Scottish Government but does not wish to make any strong comments except that any complication of the existing regime should be, where possible, avoided so as to avoid confusion and uncertainty.

The Scottish government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?
6. The Council is of the view that the technical changes contained within the Bill would not have any adverse effect on the Council. However, this would clearly change if the
general purposes of the changes were more than a technical nature such as the extension of the regime to contractors.

Do you believe your comments on the financial assumptions have been clearly reflected in the Financial Memorandum?

7. The Council does not wish to express any views in relation to this question.

Additional comments

8. The Council notes that the Scottish Government has taken forward two of the actions suggested by the Scottish Information Commissioner in his Special Report. The Council strongly suggests that the Scottish Government consider taking forward the comments on the overlapping of the two separate information regimes in relation to environmental information.

9. At this time requests for environmental information must be processed under the Freedom of Information (Scotland) Act 2002 (FOISA) (if even only to apply the exemption set down in section 39(2) of it, after application of the public interest test) and the Environmental Information (Scotland) Regulations 2004 (the EI(S)Rs). This results in confusion by members of the public and is an additional complexity in relation to public bodies processing these requests. For instance it is possible to have a response that applies the exemption set down in section 39(2) of FOISA i.e. amounts to a refusal to provide information but the same response provides the information under the EI(S)Rs. This is an anomaly that the Council suggests could be resolved by the current Bill without changing the general principles behind the proposals.

10. The application of the exemption in section 39(2) of FOISA is subject to the public interest test. This test usually revolves around the public interest in dealing with requests for information under appropriate legislation and, given their more proactive nature, this means that the requests for environmental information should be considered under the EI(S)Rs rather than FOISA.

11. It is therefore suggested that FOISA is an inappropriate regime to apply to environmental information in any way.

12. Consequently, the Council suggests that the Bill should remove environmental information from the definition of “information” contained in section 73 of FOISA. This would result in the public bodies only having to respond under one information regime rather than two. This would reduce the complexity of responses from public authorities and make the system clearer and less complex for both the public and the authorities.
Introduction

1. The STUC is Scotland’s Trade Union Centre. Its purpose is to coordinate, develop and articulate the views and policies of the Trade Union Movement in Scotland; reflecting the aspirations of trade unionists as workers and citizens. The STUC represents over 632,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy. Our representative structures are constructed to take account of the specific views of women members, young members, Black/minority ethnic members, LGBT members, and members with a disability, as well as retired and unemployed workers. The STUC welcomes the opportunity to contribute to this consultation on the Freedom of Information (Amendment) (Scotland) Bill.

General Comments

2. The STUC supports the general commitment to freedom of information that the Scottish Government has demonstrated and we believe that Freedom of Information legislation in Scotland provides an important way for the people of Scotland to understand the decisions of public bodies. A key tenant of good quality public services is that they are responsive to public need and that members of the public are able to access information that public bodies hold and are able to understand the decisions that public bodies take. Freedom of Information therefore plays an important role in the functioning and regulating of state power, and in our view it has, in the relatively short time it has been in force, become a core part of our democracy.

3. But while legislation has since 2005 given us an enforceable right to access information regarding the delivery of our public services in Scotland, currently our right to know is dependent on which organisation holds the information. The STUC has a general concern that provisions put in place to provide transparency and protection with regard to the running of our public services, generally break down when those services are delivered by arms length organisations. This is the case with regard to a range of pieces of legislation that are designed to improve the running of public services and protect the people of Scotland, including equality legislation and the freedom of information provisions currently being considered.

4. The STUC is keen, therefore, that the Freedom of Information Amendment Bill gets to grips with the issue of arms length delivery of public services and that organisations like housing associations that provide essential services to communities across Scotland and who benefit from high levels of funding from the public purse, are finally brought under the same scrutiny as centrally delivered services.
Six Key Asks

5. The STUC supports the Campaign for Freedom of Information in Scotland and supports the ‘six key asks’ of this campaign. Therefore, we believe that:

i. A purpose clause should be added so that the principle of the Bill is about giving the public an enforceable right to information from bodies delivering public services or services of a public nature.

ii. There should be a simple system so that people can exercise their right to receive and impart information from bodies funded by public money, rather than the current system whereby some bodies are covered and some are not.

iii. Transparency and openness should be part of doing business with the public sector so private contractors and voluntary organisations should be included in the scope of the Bill.

iv. All housing associations should be included in the scope of the Bill. The range of information proactively disclosed should be extended to include all new Scottish Government contracts and tender documents over £10,000 – featuring all performance indicators, break clauses and penalty measures – and all new local government contracts and tender documents over £500 – should be included in full.

v. Contractors responsible for contracts above certain values should be included but the thresholds must be realistic and subject to consultation.

6. The STUC is clear that if these ‘six key asks’ are met within the Freedom of Information Amendment Bill that it will improve the general functioning of this legislation and address the democratic deficit that currently exists in the delivery of public services.

Popularity of FOI

7. FOI is very popular in Scotland and the public acknowledge its importance in improving the design, delivery and funding of public services. The Scottish Information Commissioner commissioned research in 2011 which revealed that:

- 80% of respondents stated they were aware of the law
- 89% of respondents agreed that it was important for the public to be able to access information held by public authorities
- even in straitened times for the public sector, only 14% agreed with the suggestion that FOI was a waste of public money

8. There is strong public support for FOI to be extended to cover additional organisations, with:

- 88% agreeing that trusts providing services on behalf of local authorities should be covered,
- 82% agreeing that housing associations should be covered,
- 83% agreeing that private sector companies who build and maintain local authority schools or hospitals should be covered, and
• 73% agreeing that prisons which are run by the private sector should be covered.1

STUC’s experience of FOI

9. The STUC, with support from the Close the Gap project, submitted a Freedom of Information request to Scottish local authorities which contained the following questions:

i. Which services are currently contracted out to, and delivered by, arm’s length external organisations?

ii. Please provide the names of these arm’s length external organisations and the services they currently provide.

iii. Please provide the names of arm’s length external organisations that your organisation has established.

10. Local authorities were advised that for the purposes of the FOI request, the Audit Scotland definition of an arm’s length external organisation (ALEO) was being used. The definition is: “Arm’s-length external organisations as companies, trusts and other bodies that are separate from the local authority but are subject to local authority control or influence. Control or influence can be through the Council having representation on the board of the organisation, and/or through the council being a main funder or shareholder of the organisation.” From the responses received to date, a number of issues have arisen around the broadness of this definition. Some local authorities have advised that in order to obtain information that would fulfil the FOI request, each individual department would need to be contacted to ascertain what involvement local authority employees have with such external bodies. Using Audit Scotland’s definition, this would include organisations such as domestic abuse fora, community planning partnerships, licensing boards, and community health partnerships, organisations which are not considered to be ALEOs. Other issues have become evident, specifically in relation to a local authority’s understanding of what an ALEO is, and also details of which ALEOs, if any, are actually delivering services for that local authority. One local authority submitted a response from its Corporate Procurement Unit stating that it did not contract any ALEOs to deliver services. Contrary to this, one ALEO lists on its website that local authority as a customer for which it delivers services. When this was communicated to the local authority contact, an alternative response was eventually received from the Corporate Procurement Unit confirming the contract with the ALEO. This clearly raises questions about the accuracy of the information contained within local authority responses to the FOI request, and more widely, in terms of trying to obtain a complete picture of the number ALEOs currently being contracted to deliver services on behalf of public bodies.

Delivering Public Services

11. According to the Chair of the Accounts Commission “As budget pressures rise, councils are considering alternative ways of delivering services. This may lead

to further and more innovative use of ALEOs.”

There are 130 major arms length organisations in Scotland which are companies, trusts and other bodies that are separate from the local authority but are subject to local authority control or influence. With this number likely to rise in the future, it is necessary to consider how we ensure transparency and consistency of approach across these organisations.

12. Equally the private sector also need to access information, a fact acknowledged by the Scottish Government as part of its reform of public procurement. Alex Neil, the Cabinet Secretary for Infrastructure and Capital Investment, has announced his intention to introduce a Sustainable Procurement Bill which will ensure that:

- “public bodies adopt transparent, streamlined and standardised procurement processes that are friendly to Scottish businesses; and
- “that Scottish firms have the right to access information about all contract award decisions and to challenge them if they believe the decision is unfair.”

13. Instead of crafting transparency and information access around specific issues, it is more reasonable to mainstream the principled approach about ensuring people have the right to access information about public services and those of a public nature. A purpose clause contained within the Bill, therefore, seems the best and most straightforward approach.

**Human Rights**

14. The Scottish Parliament must be mindful that it can only pass legislation that is compliant with the European Convention on Human Rights (ECHR) and Scottish Government Ministers have a positive duty to comply with the ECHR. Now that Freedom of Information Scotland Act is being amended, the law must be examined through a human rights lens and in particular Article 10(1) of ECHR:

> “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”.

In the case of Társaság a Szabadságjogokért (the Hungarian Civil Liberties Union) v. Hungary (2009) the European Court of Human Rights (ECtHR) found a violation of Article 10 and concluded that obstacles to hinder access to information of public interest might discourage the media and other public interest organisations from pursuing their vital role as “public watchdogs.”

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2 Audit Scotland News release ‘ALEOs: Accounts Commission highlights importance of clear governance and accountability’ published 16th June 2011
3 ‘Public sector procurement reform’ Scottish Government News Release 06/02/2012 http://www.scotland.gov.uk/News/Releases/2012/02/procurement06022012
4 Sections 29 and 57 of The Scotland Act 1998
5 Judgment of 14 April 2009
FINANCE COMMITTEE

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

SUBMISSION FROM UNISON

Introduction

1. UNISON is Scotland’s largest public sector trade union representing more than 165,000 members delivering services across Scotland. UNISON members deliver a wide range of services in the public, community and private sector. UNISON Scotland welcomes the opportunity to respond to the Finance Committee’s call for evidence on its consideration of the Freedom of Information (Amendment) (Scotland) Bill.

Overview

2. As a longstanding supporter of strong freedom of information legislation, UNISON Scotland is disappointed that the Scottish Government is making only minor changes via this Bill. It should use section 5 of the Freedom of Information (Scotland) Act 2002 (FOISA) to extend FOISA to cover all public services. The Scottish Government says that its aim is to “add strength and clarity to the existing legislation”. However, failing to ensure that freedom of information rights ‘follow the money’ means the existing legislation is weaker and less clear than it should be for the growing number of public services delivered by private companies and other bodies not currently covered by FOISA. The public should be able to access information about the public services they use and about public and political decisions that affect them, whatever type of body holds the information or provides the service. The use of section 5 to ensure this is long overdue.

3. We strongly support the call by the Campaign for Freedom of Information in Scotland for the Scottish Parliament to amend the Bill to extend FOISA in this way¹. As the Committee knows, this (including a rolling programme of active review) was a key recommendation by Kevin Dunion, the first Scottish Information Commissioner, in a Special Report when he finished his final term of office earlier this year². His successor Rosemary Agnew has also called on the Scottish Government to act in her July 2012 response to the Finance Committee on its call for evidence³. We hope that the Finance Committee will agree that it is wrong for Ministers to proclaim their commitment to FOI and its Six Principles and to argue that this Bill tackles weaknesses, while failing to use section 5 to protect the public’s FOI rights.

What is your general view on the purpose of the Bill and broadly, are you supportive of it?

4. With the proviso above, about the need for FOISA to be extended to cover all public services, we are supportive of changes to ensure that the order-making power in

section (59 (1) is flexible and of doing this retrospectively. However, we do not support the proposal to adopt the UK Government’s position in respect of information relating to communications with Her Majesty, the Heir and second in line to the Throne. On the extension of the section 65 time limit, we welcome the revised proposal that prosecution be commenced within six months of sufficient evidence coming to the knowledge of the prosecutor, with a time limit of three years for commencing proceedings. We approve of the minor amendments (re. sections 25 and 38) added to the Bill, amendments that had been proposed by Mr Dunion in his 2012 Special Report, cited above. We note that while the section 38 amendment brings the Act in line with the Environmental Information Regulations (Scotland) 2004, the Scottish Government has not responded to proposals from Mr Dunion, which we supported, that amendments should be made to the Environmental Information (Scotland) Regulations 2004 (the EIRS) to ensure consistent FOI rights in the two interrelated regimes. We note that Ms Agnew, in her response, cited above, repeats the call for amendments to the EIRS.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?

5. We did. Our response is on our website. Ministers have effectively ignored ours and others’ calls for action on extending the Act. In one brief paragraph they state that they have deferred a decision until after Parliament has considered the Amendment Bill “and until the economic situation significantly improves.” We do not believe that the economic situation is in any way a valid reason to delay. If anything, it is more important that the public is able to scrutinise how its money is spent. To give just one example, the fiasco of G4S security staff failings at the 2012 Olympics highlights some of the dangers of allowing information rights to be eroded through outsourcing and privatisation.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?

6. It makes some limited improvements, but we reiterate that failing to extend the Act is weakening the Act considerably. The proposals about communications with Her Majesty etc. also weaken the Act. This is a wasted opportunity.

Royal exemption

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?

7. We stated in our consultation response that we agreed with Mr Dunion, then Scottish Information Commissioner, that it is wrong to copy Westminster and use an absolute exemption for this correspondence. This means that perfectly valid requests for information about any Royal attempts to influence policy would be blocked, as would requests for correspondence, for example, between governments and the monarchy about the awarding of honours. We strongly support the very critical comments made by Ms Agnew about this amendment. In particular, she states that information relating to the Royal Family and Royal Household is already “extremely well protected” under FOISA, and that this amendment, if enacted, would:

• be “in direct conflict” with the public interest
• have the effect of creating Scotland’s “most wide-ranging absolute exemption”
• create a provision which requires “absolute secrecy in relation to any aspect of communications with senior royals in all circumstances – regardless of how far removed the information is from the content of communications, or of the weight of the public interest in favour of release”
• create inconsistency on this between the FOI Act and the EIRs
• be “inconsistent with international good practice principles”

8. In addition, she points out that the Westminster amendment, which is argued as the reason for this amendment – to provide consistency with the Constitutional Reform and Governance Act 2010 – was not subject to full scrutiny. We urge the Finance Committee to agree with her comment that, in these circumstances, “it is particularly appropriate that Parliament applies careful scrutiny to the rationale underpinning this amendment, while also examining its impact on both FOI principles in Scotland and the information rights of the Scottish public.”

Historical periods

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?

9. We welcome the reduced time limit period for certain circumstances. If the Scottish Parliament agrees the proposed amendment to section 59 (1), we will respond to the consultation on the draft order about the specifics proposed. We agree it is helpful to have flexibility about different types of records, although the presumption should always be in favour of release (and early release) without compelling reasons not to release the information. We are pleased that the Bill’s Policy Memorandum states (par 27) that the key aim of the order will be “enabling as much information to be placed in the public domain as early as practicably possible.” Again, there should be a similar amendment to the EIRs.

Financial aspects

The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?

10. We do not envisage these changes having any significant financial implications. However, the Finance Committee should be concerned about the financial implications in reducing scrutiny of public spending – the effect of continuing to allow FOI rights to be eroded where public services are delivered by private companies and other bodies not covered by FOISA.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

11. N/A.
Conclusion

12. We urge the Finance Committee to back Ms Agnew’s important - and damning - criticisms of the proposal to create an absolute exemption on the Royal correspondence and to oppose this amendment. Strengthening and clarifying the 2002 Act is simple. The Scottish Government should use section 5 to ensure FOI rights follow the money and that the public can find out what they need to know about all public services, however they are delivered. The House of Commons Public Accounts Committee’s May 2012 report on ‘Equity investment in privately financed projects’ is just the latest influential report to call for action on FOI in relation to (but on a wider basis than) the controversy around PPP/PFI contracts. We urge the Finance Committee to recommend that the Scottish Government give an immediate pledge to extend the Act, or, if the Scottish Government fails to do so, to amend the Bill to make this happen. We also urge strong support for the recommendation by the Campaign for Freedom of Information in Scotland (in its briefing to MSPs) for a ‘purpose clause’ to be added to FOISA, via an amendment to this Bill. This would affirm that FOISA provisions are intended to apply to all public authorities and all other bodies providing public services, carrying out public functions and/or functions of a public nature.

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5 The Committee recommended that the “Treasury and Cabinet Office must also reconsider how private companies providing public services, whether or not in the form of PFI, can be bound by the provisions of the Freedom of Information Act.”

http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpubacc/1846/184602.htm
What is your general view on the purpose of the Bill and broadly, are you supportive of it?
1. We support the reforms included in the draft bill.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?
2. We considered responding but the consultation and draft bill were very narrow in scope and the points we considered making could not be included in the draft bill or raised in response to the specific consultation. As the committee is debating the general principals of the bill at stage one it is an opportunity to point out wider aspects that could have been considered in the draft bill.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?
3. While the proposed bill does strengthen the Act it fails to address two concerns we have about Freedom of Information, FoI. In line with many other organisations we believe the Act should be extended to cover the provision of public services rather than just public bodies. It is an anathema that a public body is covered by the Act but a private body carrying out the same duties is not. Also with increasing outsourcing and privatisation, public bodies are using commercial sensitivity to block freedom of information requests. Universities are covered by the Act even though they are not strictly public bodies but autonomous organisations. Our second point is about a threat to our members’ work as there has been a recent case where the Act has been used to obtain sensitive research data which has yet to be published. As public funded bodies, universities are rightly covered by the freedom of information Act but much of the research they undertake can be commercially and socially sensitive. Further all researchers’ academic freedom is protected in law in Scotland and this protection extends to when and how research is published. The recent example of the threat to academic freedom posed by the demand of Philip Morris International for information about the research on young people and smoking conducted by Gerard Hastings of Stirling University is a case in point. See University fights Philip Morris tobacco research bid. This sensitive information was collected on the understanding the surveys remained anonymous and the research was intended to help health outcomes. However, the company demanded this sensitive information for commercial reasons with no regard to the academic freedom of researchers to decide how and when to publish the findings. A key issue for researchers is that social studies have to get ethical approval before going ahead – and the promises of anonymity and confidentiality to respondents (in this case children) are a condition of this approval. It seems very wrong that FoI legislation should be able to supersede these ethical provisions – or to put it the other way round we would seek a provision to the legislation that FoI cannot supersede ethical approval for any academic research.
4. To protect academic freedom and sensitive research we believe that research findings should be exempt from the FoI Act.
Freedom of Information (Amendment) (Scotland) Bill

In tandem with the Committee’s consideration of the FOISA Amendment Bill, and in light of recent comment in the media and the content of some of the responses received to the call for evidence I thought it might be helpful if I provided you with some background information on the Scottish Government’s approach to extension of coverage and the wider transparency agenda.

As you may know, the Freedom of Information (Scotland) Act 2002 already contains order-making powers to extend coverage to bodies who appear to the Scottish Ministers to exercise functions of a public nature or are providing under a contract made with a Scottish public authority any service whose provision is a function of that authority. While the order-making power has not yet been used the power to extend coverage has always been in the legislation.

I would emphasise that no amendment to the existing law is needed in order to extend coverage – and none of the provisions in the Amendment Bill impact on the existing power.

The Scottish Government consulted on extending coverage of the Freedom of Information (Scotland) Act in 2010. Organisations considered for coverage included certain contractors and bodies set up by local authorities to provide leisure, cultural and sport services. In conclusion to the consultation the Scottish Government agreed to defer a decision on extension until the proposed Freedom of Information (Amendment) (Scotland) Bill had been considered by the Scottish Parliament. In addition, the Scottish Ministers are acutely aware of the current economic climate and concerns over the impact additional regulation on hard pressed businesses could have at this time.

While confirming that the Scottish Government will return to the issue of extension following completion of the FOI (Amendment) (Scotland) Bill I would also wish to draw the Committee’s attention to the Scottish Government’s commitment to consult on the far broader issue of a
Scottish transparency agenda. The Scottish Government has always considered transparency as integral to effective and efficient administration and seeks to build transparency into policy delivery. I would draw your attention to two examples of this objective in practice.

The Scottish Housing Charter

The Scottish Housing Charter came into effect in April 2012. Transparency is a key element in the Charter which sets out standards and outcomes that tenants can expect from social landlords, in terms of the quality and value for money of the services they receive, the standard of their homes, and opportunities for communication and participation in the decisions that affect them. The Charter contains specific outcomes on communication and participation as well as around obtaining information allowing informed choices about available housing options.

The charter is regulated by the Scottish Housing Regulator (SHR). It is intended to provide the basis for the SHR to assess and report on how well landlords are performing. This will enable the Regulator, tenants and other customers, and social landlords to identify areas of strong performance and areas where improvement is needed. The Regulator’s reports will also give the Scottish Government information which will help it ensure that public investment in new social housing goes only to landlords that the Regulator assesses as performing well.

In consultation with stakeholders, Scottish Ministers will review the Charter’s effect on the quality and value of social landlords’ services, and its value to tenants and other customers, social landlords and the Scottish Housing Regulator. The review will start within two years of the Charter coming into force.

Procurement Reform Bill

The Scottish Government is also committed to introducing a Procurement Reform Bill - one aspect of the continuing public procurement reform programme aimed at improving public sector procurement in Scotland. Consultation on the draft Bill commenced on 10 August and clearly identifies transparency as a key theme running through the legislation.

For example, the executive summary of the consultation paper specifically reflects the centrality of transparency to the objectives of the Bill:

> In order to realise the full potential of procurement, we need to ensure that the legal and policy frameworks for public procurement in Scotland are transparent, responsive and fit for purpose.

> The Bill will establish a national legislative framework for sustainable public procurement that supports Scotland’s economic growth by delivering economic, social and environmental benefits, supporting innovation and promoting processes and systems which are transparent, streamlined, standardised, proportionate, fair and business-friendly.

I would urge the Committee to consider the very real impact that procurement reform could have on the availability, to the public as well as to the private sector, of information relating to public sector spending.
Freedom of Information Act 2000 – post legislative scrutiny

Finally, I would also draw your attention to the recently published report by the House of Commons Justice Committee on post-legislative scrutiny of the Freedom of Information Act 2000.

In assessing the operation of the Freedom of Information Act, including questions of openness, transparency, accountability and extension, the committee concluded that, while ‘openness should follow public money when public services are outsourced...in our view this can best be achieved through clear and enforceable contract provisions rather than by designating commercial companies under the Act, which should be retained as a last resort.’

I am currently persuaded that the UK committee’s position on this issue is the right one; it is right that the public should be able to access information on how their money is spent, and I believe the most appropriate avenue to exercise that right is through the public authority spending the money, for even where services are outsourced, the public authority remains accountable for that expenditure.

Scottish Government consultation on extension of coverage

The House of Commons committee’s position would seem to reflect responses to the Scottish Government’s earlier consultation on extension of coverage which, while confirming the importance placed on understanding how public money is spent, considered the public authority to be the most appropriate – and efficient - point of contact and access route for information. Responses also showed no compelling evidence of a problem or of unmet demand for information.

It should perhaps also be noted that, while consultation responses showed near universal support for the principles of transparency, openness and accountability as a means to ensuring organisations in receipt of public funds are effectively scrutinised, there was also considerable concern about the potential resource implications and administrative burden of extension – particularly in the current economic climate. The Government is of course also committed to a programme of better regulation to ensure the obligations on business are proportionate.

A number of responses considered that alternative methods should also be explored in furthering the aims of transparency, openness and accountability. The Scottish Government agrees that a full range of initiatives should be pursued in promoting transparency across the wider public sector – both by statutory and non statutory means. For example, in addition to the two examples highlighted above, the Government has also trialled and consulted on 'DirectScot' - a prototype for a Scottish public services portal. The aim of this is to provide people and businesses with a simpler view of all services available to them.

Conclusion

I would conclude by reiterating the point that the power to extend coverage is already contained within the legislation - and that Scottish Ministers do not consider it appropriate to extend coverage at this juncture. However, I would also re-emphasise that Scottish Ministers are determined that their ongoing commitment to transparency is put into practice in as many ways as possible – as evidenced by the examples above as well as by such initiatives as DirectScot.
I hope the above information is of interest. I look forward to meeting the Finance Committee on 12 September.

BRIAN ADAM
Dear Kenneth,

_Freedom of Information (Amendment) (Scotland) Bill: Stage 1 Supplementary submission to the Scottish Parliament Finance Committee_

Thank you for the recent opportunity to appear before the Finance Committee to provide evidence on the FOI Amendment Bill during its Stage 1 considerations. I was pleased to have participated in, and contributed to, the evidence session, and it was good to meet with you and other Committee members to discuss the Bill’s proposals.

Following on from the evidence session on 12 September, I would like to take the further opportunity to raise two supplementary matters with the Committee:

1. Discussion of a possible amendment to section 5 of the Freedom of Information (Scotland) Act (2002) (FOISA), in order to support the more effective use of this provision, and

2. I believe it would be helpful to draw the Committee’s attention to a significant recent decision of the Upper Tribunal (Administrative Appeals Chamber), which, in my view, is highly relevant to the Committee’s own consideration of the proposals to create an absolute exemption in relation to section 41.

**Section 5 Amendment**

While it is acknowledged that, as currently drafted, section 5 bestows powers on Ministers to designate additional Scottish public bodies, it is of considerable concern that successive administrations have not exercised these powers to bring forward an order under section 5 of FOISA to designate additional public authorities. Assurances were provided to the Scottish Parliament in 2002 that this power would be exercised, and research by this office has shown that there is substantial public support for the protection of FOI rights through designation.

This month sees the tenth anniversary of the enactment of section 5, and the lack of action or clear, specified intention to take it, leads to a growing concern that the existing provisions may not be ‘fit for purpose’.
Against this background, I offered to make some suggestions for possible amendments to section 5 as currently drafted, in order to support its effective use in the future.

I appreciate fully the points made by Ms Sturgeon that FOISA is not the only mechanism by which access to information can be given, but to have a stronger section 5 would enhance and strengthen the suite of measures available, including provision in other legislation relating to e.g. procurement and contractual obligations.

My suggestions are as follows:

a) **A requirement for routine review**

   At present, FOISA places no obligation on the Scottish Ministers to review regularly the bodies covered, nor to actively consider whether any should be added (or removed). The legislation would be significantly enhanced by the addition of a requirement for regular review of designation under section 5 (and also under section 4).

   I suggest that a requirement for a regular (e.g. annual) review of bodies covered in relation to both sections 4 and 5 of FOISA by Ministers would be appropriate.

   While I appreciate that setting the frequency of such a review in primary legislation may be problematic, this could be addressed by amending the legislation to ensure that the frequency of review is set by order, allowing appropriate further amendments to be made through secondary legislation.

b) **A requirement for wider consultation**

   At present, section 5(5) of FOISA requires prior consultation by Scottish Ministers with those to whom any order will relate. The weakness in this is it means that the requirement applies only to those bodies that are likely to be affected by the order and brought within the scope of FOISA. It does not require consultation with those who have rights under FOISA, or other relevant third parties. It is the limited scope of such consultation that contributed to the Scottish Government’s conclusions in January 2011 that extension should not be taken forward at that time because it was "not favoured by the majority of those bodies proposed for coverage".

   As noted in the evidence to the Committee, the limited nature of such a consultation overlooks a fundamental key constituent – the users of public services who may have their information rights curtailed as a result of changes in the delivery of public services.

   As a result, I suggest that an appropriate amendment to section 5(5) would be to build in a requirement for wider consultation that goes beyond those to whom an order would relate.

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1 See: www.scotland.gov.uk/News/Releases/2011/01/26154714
c) **A requirement to consider the public interest**

Finally, I suggest that an additional appropriate amendment to section 5 would be the inclusion of a requirement for Scottish Ministers to have "regard to the public interest" when carrying out a review or considering an order under section 5(1).

Such a provision would mirror a current provision in section 23(3) of FOISA. This requires Scottish public authorities to have regard to the public interest when adopting or reviewing its publication scheme, in order to ensure that information which relates to e.g. the cost of services, the standards of services or the reasons for decisions is published.

The addition of an equivalent provision to section 5 would ensure that the public interest in access to information relating to the exercise of public functions or delivery of public services would be an essential key component to any future consideration by Ministers when assessing the need for an order under section 5.

Should the committee be minded to take any or all of these suggestions forward in its recommendations, I would be happy to either provide more information, or be consulted further on the precise wording of any provision.

**Recent Ruling of the Upper Tribunal**


I would like to bring a recent, relevant ruling of the Upper Tribunal to the attention of the Committee which may assist it in its consideration of the proposals to create a new absolute exemption.

The ruling, Evans v Information Commissioner [2012] UKUT 313 (AAC), issued on 18 September, relates to requests for correspondence between Prince Charles and several UK government departments. The case concerned requests made prior to the creation of an absolute exemption under FOIA, so the Tribunal was required to consider the public interest test.

The requested information is described by the Tribunal as "advocacy correspondence", which was "seeking to advance the work of charities, or promote views". The Tribunal drew a distinction between correspondence of this nature and e.g. personal correspondence, or communications relating to the instruction of the heir to the throne in the business of government.

The Tribunal's ruling required the disclosure of much of the withheld information, concluding that it will "generally be in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government." (Paragraph 4)
The ruling explores many areas relevant to the debate in Scotland in relation to the proposed amendment to section 2 of FOISA and the royal exemption. These areas include the need to ensure that certain information is protected, the nature and function of various constitutional conventions, and the consideration of the public interest in relation to “advocacy correspondence” of the type considered in this case.

The particular issue to which I would like to draw to the Committee’s attention is a simple one - in making its decision, the Tribunal has clearly demonstrated that there are circumstances where it will be in the public interest for relevant information to be disclosed. This was set out by the Tribunal in its ruling when it stated that, in relation to advocacy correspondence:

"...in general terms the balance is likely to be not only clearly but also strongly, and sometimes very strongly, in favour of disclosure." (Paragraph 214)

The Tribunal’s ruling strongly supports the case for the retention of a public interest test in relation to section 41. The creation of a new absolute exemption which would set aside any equivalent strong public interest in disclosure would, in my view, be unnecessary, undesirable, and in conflict with the aims of Scotland’s FOI law.

The full ruling from the Upper Tribunal is available on its website at: www.judiciary.gov.uk/media/judgments/2012/evans-v-information-commissioner.

I hope that the above information is useful to the Committee in the preparation of its Stage 1 report.

If I or my staff can be of any further assistance in relation to this or any other matter, then please do not hesitate to contact me.

Yours sincerely,

Rosemary Agnew
Scottish Information Commissioner
Dear Kenneth Gibson,

Finance Committee
Scottish Parliament
EH99 1SP

13 October 2012

Freedom of Information (Amendment) (Scotland) Bill

I am writing to you following my appearance before the Finance Committee on 12 September in order to provide additional clarification of certain points raised during the committee session.

Extending coverage of the Freedom of Information (Scotland) Act 2002 ('the Act')

A significant part of the committee session focussed on the issue of extension of coverage of the Act. The Scottish Information Commissioner's annual report, published on 17 September, has continued to keep this issue firmly in the public eye.

As the committee is aware, following consultation in 2009, Scottish Ministers agreed to defer any decision on extension until Parliament had completed consideration of the Amendment Bill. This is primarily an issue of expediency - I am very conscious of the time and resource implications for both the Scottish Parliament and the Scottish Government of returning to the complex issue of extension while the Bill progresses through Parliament.

However, extension is clearly very much on the agenda and I am actively considering the options available to me. As an ongoing part of this process I am open to engaging in the debate and will listen carefully to the views that this committee and stakeholders express.

I believe the key objective that we want to achieve is improving and extending the public's access to information. Extension of coverage is clearly one option. However, we should also seek to explore other ways of improving access, for example by other legislative routes, Codes of Practice etc.

I would though wish to note that, while it is correct that section 5 of the Act has yet to be used, it is a misconception that Schedule 1 of the Act is unchanged from commencement on 30 September 2002. Coverage has constantly evolved by means of other primary and...
secondary legislation as new bodies have been created – or been abolished. This evolutionary process will undoubtedly continue given the changing public sector landscape.

Finally, while discussing extension, I think it worth reiterating that the power to extend coverage is already contained within the legislation. As such, there would not appear to be any advantage in using primary legislation to extend coverage rather than in doing so by order. The issue of consultation has been raised in this context. However, I do not consider that the consultation that has already taken place specifically on the question of extension is in any way less valuable – or in-depth – than consultation would be were extension included as a further amendment on the face of the Bill.

Historical Records – lifespan of exemptions

The second issue on which I am happy to provide further comment to the committee is around the intention to increase the flexibility of the order-making power in respect of revising the lifespans of certain exemptions.

Specifically, the committee noted the submission of the Commission for Ethical Standards in Public Life and their concerns around increased flexibility leading to a more complex and less successful freedom of information system.

However, I consider that the concerns of the Commission are possibly misplaced. Clearly, we would wish the provision, if enacted, to be introduced and explained in a way that the public understand. To this end I would note that what we are proposing is amending the lifespans of exemptions which are already time limited, that is to say officials handling FoI requests will already be aware that certain exemptions lapse after a specified number of years. The exemptions in this category are not being changed.

Our published plans for the intended order are straightforward and, for the vast majority of ‘30-year’ exemptions, simply reduce the lifespan to 15 years. Perhaps not surprisingly, freedom of information requests are almost invariably for information of current interest – and rarely for information that would be classed as an ‘historical record’. In addition, few organisations hold significant amounts of information potentially falling within the category of ‘historical record’. The prospect therefore of information classed as an ‘historical record’ being subject to an FoI request is considered to be small.

Moreover, we should not forget that we are committed to further consultation on a draft order – to include a business regulatory impact assessment (BRIA) – and that the order will be subject to affirmative Parliamentary process. A combination of consultation and the BRIA will allow any concerns of increased complexity and significant increase in resource requirement to be identified.

While not wishing to deny that at the margins there may be rare instances of slightly increased complexity with an increased range of lifespans to consider, I believe that this will be in a few isolated cases and that any disadvantage is greatly outweighed by the potential for more information to be made publicly available significantly earlier.

Contractual arrangements with public authorities

The final issue I would like to return to is that of contractual provisions – while this was specifically referred to in the context of NHS Boards and local authorities the generality applies to any contracting public authority.
The Scottish Government fully supports clear and enforceable contract provisions in terms of making information relating to contracts and procurement processes available. I would draw the committee’s attention to the Code of Practice required to be issued by Scottish Ministers under section 60 of the Act which provides guidance to public authorities on the discharge of their functions under the Act.

A significant part of this Code is dedicated to good practice in respect of contractual and procurement-related information. While not wishing to undermine a public authority’s commercial relationships with the private sector, the relevant section of the Code emphasises the importance of transparency in the use of public funds – in particular around the full financial implications of long term and high value contracts, as well as in regard to information demonstrating diligence on the part of authorities in managing contractors to ensure best value for money. Compliance with the Code is enforceable by the Scottish Information Commissioner. In addition, contractual clauses will routinely set out a public authority’s obligations under freedom of information legislation.

Two other legislative initiatives are also of particular relevance. Firstly, the Public Records (Scotland) Act 2011. While not fully coming into force until 1 January 2013, the Act imposes duties on public authorities to produce, implement and review records management plans. Such plans must set out the arrangements for the management of records created or held by the authority and records created or held by contractors who carry out any functions of the authority.

In addition, the Procurement Reform Bill, on which consultation is underway, aims to establish a national legislative framework for sustainable public procurement that supports Scotland’s economic growth. As the consultation notes, in order to realise the full potential of procurement, we need to ensure that the legal and policy frameworks for public procurement in Scotland are transparent, responsive and fit for purpose. Transparency will be a critical element of this developing policy area.

Clearly, the issue of transparency in terms of contractual relations with public authorities is not unrelated to the question of formal designation of, for example, contractors, by means of the Freedom of Information (Scotland) Act. However, in considering the issue of accessing information relating to contracts, I think it important to note that designation is not the only route by which information can be acquired. There are many alternative ways of seeking information and I would suggest that the focus in this discussion should be on ensuring that information can be accessed rather the mechanism by which it is accessible.

Conclusion

I would like to conclude by reiterating my willingness to fully engage with the Committee on all matters in relation to freedom of information – including extension of coverage – and look forward to a productive discussion in due course.

NICOLA STURGEON
23rd October 2012.

Kenneth Gibson MSP,
The Scottish Parliament,
Edinburgh
EH99 1SP

Dear Kenneth,

**Freedom of Information (Amendment) (Scotland) Bill**

When I gave evidence to the Finance Committee on 12th September I promised to write and confirm that we support the retrospective aspect to the reduction in the lifespan of exemptions.

The Campaign for Freedom of Information in Scotland (CFoIS) appreciated the courtesy extended to us by the Committee during the evidence session. Since then, I note that the Scottish Information Commissioner has written to you as well as Nicola Sturgeon, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities.

CFoIS had hoped that as the Minister had just acquired the FoI brief prior to giving oral evidence on 12th September and was committed to listen to the range of evidence, she would accept that the Bill requires to be significantly amended by the Government and we are disappointed that has not happened. We have appreciated the considered contributions of all parties which, although we disagree with some, have nevertheless encouraged our consideration of FoISA, the Bill and how we can embed the public’s right to know in Scotland.

The Campaign for Freedom of Information in Scotland remains convinced that the Bill cannot proceed without radical amendments and we are pleased to note that the Scottish Information Commissioner also supports amendments to the Bill. The amendments that CFoIS will campaign for are:

- The introduction of a purpose clause so that however public services are delivered in the future, the public’s right to know remains.
- The introduction of a clause that has the effect of amending S5 of the Freedom of Information (Scotland) Act 2002 (FoISA) to oblige Scottish Government Ministers to consult the public on what bodies should be included and for their response to be given due consideration.
- The introduction of a clause that has the effect of amending S5 of FoISA and places a duty on Scottish Government Ministers to annually add any new bodies to coverage of FoISA. This provision would have immediate
effect and within 20 days of Royal Assent, S5 is used for the first time in ten years and the list of bodies already consulted on in 2010 are added.

- To delete S1 of the Bill and thus maintain the public interest test in respect of Royal Correspondence with Her Majesty and heirs.
- Amend S5(2) of the Bill by deleting ‘more than 3 years’ and inserting 28th May 2002 which is the date of Royal Assent so that the clause would now read ‘no such proceedings may be commenced if the offence took place after 28th May 2002’.

CFoIS hopes that the Stage 1 report concludes that the Bill should deliver progressive reform of FoISA to meet two of the Scottish Government’s freedom of information principles:

1. Principle 1 that the public’s right to know remains an essential part of an open, democratic government and responsive public services.
2. Principle 2 that FoISA will be adjusted where it is necessary and sensible to do so.

We now offer some further analysis to support our view which adds to the written and oral evidence already supplied.

CFoIS was active in the campaign for FoISA and spent time informing the Parliamentary debate. It is timely to remind the Committee of the purpose of FoISA “to make provision for the disclosure of information held by Scottish public authorities or by persons providing services for them; and for connected purposes”. It is clear that FoISA’s operation has failed to live up to expectations. CFoIS is disappointed that S4 and S5 of FoISA can no longer be construed as fit for purpose. We failed to anticipate the extent to which government and public authorities would use and construct non-public bodies that operate outwith FoISA even though they are in receipt of public money and delivering public services.

Audit Scotland has warned that ALEOs are likely to increase in the future due to financial cuts so a mechanism must be developed which applies when new bodies are created by public authorities so that the public’s right to know is maintained. CFoIS suggests that the Committee asks Audit Scotland precisely how many ALEOs there are in Scotland, how much they spend and a list of their functions. We believe this would assist understanding the extent to which the public’s right to know is being diminished. We believe that the current number and remit of ALEOs and other bodies not covered by FoISA has created a democratic deficit on scrutiny and accountability by the public in Scotland.

In addition to addressing the implications of the Bill for ALEOs and other bodies not covered by FoISA, we believe the Committee should consider whether the Bill offers an opportunity to strengthen the relationship between FoISA and other freedom of information legislation, such as the Freedom of Information (Scotland) Act 2001.

Furthermore, promises to add new names, bodies and categories, such as RSLs, given during the Parliamentary debate at Stage 3, have failed to materialise. Therefore, we suggest that the Bill must be amended to place a duty on Scottish
Government Ministers to add bodies annually. There are a lot to catch up on but in the future additions could be more manageable if they are done so annually.

CFoIS has not been persuaded by any of the arguments to copy the UK absolute exemption in relation to communications with her Majesty and heirs. We entirely reject S1 of the Bill as it contradicts Scottish Government’s Principle 1.

CFoIS has been persuaded that it is not sensible to introduce a time limit of three years for the S 65 offence. Disclosures arising in other jurisdictions such as in England over Hillsborough demonstrate the advantage of being able to act on evidence even after many years. Any destruction that took place should constitute a s.65 offence. If there is insufficient evidence, there will be no proceedings.

We are happy to answer any queries from the Committee and wish you well in your deliberations.

Yours sincerely,

Carole

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Note: (DT) signifies a decision taken at Decision Time.

**Freedom of Information (Amendment) (Scotland) Bill**: The Deputy First Minister (Government Strategy and the Constitution) and Cabinet Secretary for Infrastructure, Investment and Cities (Nicola Sturgeon) moved S4M-04791—That the Parliament agrees to the general principles of the Freedom of Information (Amendment) (Scotland) Bill.

After debate, the motion was agreed to (DT).
Freedom of Information (Amendment) (Scotland) Bill: Stage 1

The Deputy Presiding Officer (John Scott): The next item of business is a debate on motion S4M-04791, in the name of Nicola Sturgeon, on the Freedom of Information (Amendment) (Scotland) Bill.

14:52

The Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities (Nicola Sturgeon): I am pleased to open this debate on the general principles of the Freedom of Information (Amendment) (Scotland) Bill. First of all, I thank everyone who gave evidence to the Finance Committee. I am pleased to note the committee’s broad support in its stage 1 report for the bill’s general principles. I am particularly grateful to the convener and committee members for their detailed scrutiny at stage 1 and, as I have said, I welcome their recommendation. I might refer to specific points in the committee’s report in the course of my speech but, at this stage, I will say that the Government is considering the report very seriously and will respond to all its key points in due course and in light of points made in today’s debate.

As members will be aware, the amendment bill has its origins in the desire to right two weaknesses in the Freedom of Information (Scotland) Act 2002. I realise that some might have wanted more extensive reform of the 2002 act but, as the Scottish Information Commissioner stated in evidence to the committee, the Scottish legislation does not need significant correction. I believe that that is a tribute not only to those who were involved in developing the act in the first session of Parliament but to how the act has been implemented by freedom of information practitioners across our public authorities and to its effective regulation by the office of the Scottish Information Commissioner.

In his special report, which was presented to the Parliament in January, Scotland’s first Information Commissioner noted:

“Scotland’s freedom of information” legislation

“is widely recognised as being strong and withstanding international scrutiny.”

However—and this is an important point—constantly evolving issues around information rights, amid ever-increasing expectations of transparency and openness, mean that we must
ensure that our legislation remains fit for purpose as it enters its second decade.

Willie Rennie (Mid Scotland and Fife) (LD): I hear what the cabinet secretary says about the way in which the legislation was developed in the first place. She is right about that. However, it has been suggested that we should have an almost prospective approach, so that public authorities that are, for example, considering transferring responsibilities to trusts or arm’s-length external organisations should, at that point, consider whether the organisation should be subject to FOI requirements. In other words, rather than our making retrospective changes, public authorities should make that judgment at the time, so that we do not always have to play catch-up. Is that something that the cabinet secretary would consider?

Nicola Sturgeon: That is a fair point, and I will consider it. Willie Rennie might be interested in some of the things that I will say later in my speech, which will address some of the points that he is making.

I turn to the part of the bill that deals with historical records. In 2009, the Scottish Government consulted on the proposal to reduce the lifespan of those exemptions in the 2002 act that cannot be applied after a period of 30 years. Although consultation showed broad support for the principle of earlier release of information—which I am sure that all members support—concerns were raised about a blanket reduction for all the relevant exemptions, particularly those that relate to issues of confidentiality.

Exemptions are there for a purpose: to ensure reasonable and proportionate protection for certain types of information. The Scottish Government recognises that in certain cases there may be specific concerns for certain public authorities about reducing the lifespan of a particular exemption. However, it is not currently possible to vary the lifespan of individual exemptions.

The bill proposes to introduce that flexibility so that, wherever possible, the lifespan of exemptions can be reduced while retaining the protection afforded by longer time periods where that is still necessary or appropriate. In the event of Parliament granting that revised power, it is the Government’s intention to consult on an order reducing the lifespan of most of the 30-year exemptions at the earliest practical opportunity. I reaffirm that the order will be fully retrospective.

I am conscious of concerns about the potential for complexity in introducing additional lifespans, as well as concern about the impact on resources. Further stakeholder engagement will allow for those concerns to be further explored. However, I believe that the goal of getting more of the public’s information into the public domain earlier is of overriding importance.

Once revised lifespans are introduced, it will be a matter for individual public authorities to decide whether to proactively release historical information or to reactively apply the longer lifespans in response to a relevant request.

It is important to note that, in 2009, while it was not yet a matter of law, the Scottish Government took the proactive decision to routinely open Scottish Government files at 15 years rather than the traditional 30 years. That has put an additional 12,000 files into the public domain years earlier than was originally intended. Doing that has ensured that Scotland remains far ahead of the rest of the United Kingdom. The decision to take that forward-looking step was taken by Bruce Crawford, who rightly observed at the time:

“We are now moving from a period of need to know to a period of right to know.”

The information that has been released years ahead of its original opening date has revealed details about some of the key moments in recent Scottish history. Our knowledge and understanding of events such as the introduction of the poll tax, the Piper Alpha disaster and the closure of Ravenscraig have been enhanced by the policy of early release, and I look forward to files from 1997 soon becoming available, as that was the year that heralded the start of the process that led to the establishment of this Parliament.

The second area where the 2002 act has been shown to be unsatisfactory relates to the ability to bring a prosecution in the event of requested information being deliberately destroyed, amended or concealed with a view to preventing disclosure. It is clearly right that those committing an offence under the act are held to account.

At present, such an offence can be prosecuted only within six months of its being committed. Due to the potentially lengthy timescales between request and appeal, it is highly unlikely that an offence that was committed during the initial handling period would be detected and brought to prosecution within six months of its being committed—and if more than six months have passed since the offence, the offence cannot be prosecuted. Indeed, the Information Commissioner estimates that it has not been possible to pursue investigations into suspected offences on eight occasions as a result.

We therefore propose to make the provision more effective by establishing the time limit for bringing a prosecution from the discovery of the offence rather than its commission. It is clearly important that those who seek to frustrate legitimate requests for information can be properly and fully held to account.
I turn to what I suspect is the most controversial part of the bill in order to deal with it openly with the Parliament. The Finance Committee has been strongly critical of the section of the bill that, for shorthand reasons, I will refer to as the royal exemption—the section that would introduce an absolute exemption for information relating to communications with Her Majesty and the heir and the second in line to the throne. I understand those concerns and agree strongly that absolute exemptions should be used only in limited and narrowly defined circumstances, as was the original intention. It is, however, worth recapping the reasons why the amendment has been proposed.

The intention is to ensure appropriate protection for the monarchy. We live in—and, as far as the Government is concerned, when Scotland is independent we will continue to live in—a constitutional monarchy with a shared head of state. Like any head of state, the monarch is entitled to an appropriate level of protection as far as the confidentiality of information is concerned. There is a strong argument that the position of the Queen, as the head of state that we share with the rest of the United Kingdom, should not be compromised by different approaches to the handling of the same or similar information.

That said, I hear and recognise the strength of feeling that has been expressed on the issue. It is the Government’s intention to give full and serious consideration to the Finance Committee’s report before determining what amendments we will lodge at stage 2. We will look at whether the existing public interest test provides adequate protection, as some have said, or whether any absolute exemption would be better expressed more narrowly than has been the case. I will put forward the Government’s view so that the committee can consider it at stage 2.

I turn to the extension of coverage. When I appeared before the committee, there was significant and considerable discussion of the matter. It is an area that many of those who gave evidence to the committee also expressed strong views on. I note all those comments and submissions. Many of the comments that have been made have arisen from a frustration that the power in the 2002 act to extend its coverage has not yet been used by any Administration. It is not correct to say that the range of bodies covered by the act has remained completely static—it has not. The public sector landscape is fluid and on more than 60 occasions changes have been made to schedule 1 as public authorities have been created or dissolved. The power to ensure that the schedule remains current has also been used and is due to be used again next year to bring in the rules councils.

I do not believe that there is a weakness in the strength or scope of the power itself; however, I recognise the concerns that have been expressed around the use of the power. I intend to lodge amendments at stage 2 requiring regular review of the use of the order-making power as well as a widening of the scope of required consultation. Both those amendments were supported and suggested by the Scottish Information Commissioner.

I also reiterate my offer to return to the Finance Committee, at its invitation, to debate the wider issue of extension of coverage and to set out a clear timeline for that work. I am happy, in the context of that work, to give due consideration to the point that Willie Rennie made. I am also minded to produce an order, in early course, to address the fact that outsourcing by local authorities has eroded the protection of freedom of information legislation. I will say more about my intentions in that regard before the conclusion of the bill’s progress through the Parliament.

Important though freedom of information legislation is—I made this point to the Finance Committee, and it is a point that I believe in very strongly—we must remember that it is not the only legislative route available to those accessing information. The Government has a notable record of producing legislation and regulation promoting openness and transparency. For example, the Scottish housing charter requires landlords to make information available to their tenants about their decision-making processes and service provision. Those rights are regulated and are enforceable by the Scottish Housing Regulator. Increasing transparency within supply chains for major contracts and capital infrastructure programmes is also a key feature of the procurement reform bill.

Michael McMahon (Uddingston and Bellshill) (Lab): I do not think that anyone would dispute the cabinet secretary’s argument on that, but only those who are actively engaged in housing associations and in those technical areas would understand the process by which information could be drawn down via such routes. Given the greater understanding of FOI, would it not be better that the powers be available under FOI legislation?

Nicola Sturgeon: In many senses, that is the point that I am trying to make. It is important to look at the types of information that the public should have a right to access and then take a critical view on what is the best way of promoting that access. It may be better to promote and raise awareness of existing routes to provide that access, or it may be better to use freedom of information legislation. The point that I am making is that we should not necessarily always assume
that the answer is to extend the 2002 act, but, if that is the conclusion, nor should we be afraid of or hold back from doing that. It is appropriate for this Parliament and, indeed, wider Scottish society to have that debate over the next period.

I had hoped to refer to the duties imposed on public bodies under the Public Services Reform (Scotland) Act 2010 and our plans to introduce new record management duties next year under the Public Records (Scotland) Act 2011.

I believe that transparency is not an optional add-on but an integral part of policy making. As the minister responsible for this area of policy, I am committed to ensuring that we look at how we promote and increase transparency not just through freedom of information but generally through our policy-making processes.

In conclusion—I think that I am out of time—the Freedom of Information (Amendment) (Scotland) Bill is an important bill that will right a couple of weaknesses in the Freedom of Information (Scotland) Act 2002 and pave the way for that bigger discussion around the possible extension of the act that I think it is appropriate for us to have.

I am happy to move,

That the Parliament agrees to the general principles of the Freedom of Information (Amendment) (Scotland) Bill.

The Deputy Presiding Officer: We are extraordinarily tight for time today, so I ask members to confine themselves to their allocated time. Mr Gibson, you have nine minutes, including interventions.

15:06

Kenneth Gibson (Cunninghame North) (SNP): The bill amends five provisions in the Freedom of Information (Scotland) Act 2002. In my speech, I will focus on the royal exemption and the extension of FOI coverage.

The committee’s approach is set out in our report. I thank everyone who worked with us during our evidence gathering. Clearly, the evidence impacted on the committee, given the conclusions that we reached. The committee was content with sections 2, 3, 4 and 5 of the bill. Due to time restrictions, I cannot detail those provisions now, but they are addressed in our report.

A contentious section of the bill is section 1, on “Royal exemption”, which will amend section 2 of the Freedom of Information (Scotland) Act 2002. At present, if a public authority is applying the exemption for information relating to communications with Her Majesty, other members of the royal family or the royal household, the public interest in whether or not to release must be considered. The public interest test is a balance that requires the public authority to weigh arguments in favour of release against those for withholding. A limited number of exemptions—for example, for court records, national security and defence—are “absolute”, which means that the public interest need not be considered. The bill would make absolute those elements of the exemption relating to communications with Her Majesty and the heir and the second in line to the throne.

The Scottish Government has stated that its purpose is to ensure consistency of approach across the UK given the “shared monarchy” and so ensure an appropriate level of confidentiality regarding such communications. The Scottish Government considers it

“vital to ensure that the monarch, as well as the heir and second in line, can operate according to established constitutional conventions.”

The cabinet secretary elaborated on those points in her oral evidence, as she did just a few minutes ago.

However, the previous Scottish Information Commissioner held

“significant concerns in relation to the proposal to introduce an absolute exemption ... Absolute exemptions are not regarded as good practice, and I consider this measure to be unnecessary.”

The current Scottish Information Commissioner retains reservations. In her submission to the Finance Committee, she stated:

“It is disappointing that Ministers have chosen to retain the amendment”.

Unison opposes the provision and is concerned about disapplication of the public interest test. The Campaign for Freedom of Information in Scotland does not believe that the Scottish Government should copy the UK Government.

On creating an absolute exemption, the current SIC emphasised in oral evidence to the committee:

“Making an exemption absolute further undermines and erodes rights to information. It removes from Scottish public authorities, including me and the Government, the flexibility needed to consider the public interest in relation to what can and cannot be disclosed.”

She argued that an absolute exemption would be a “retrograde step”—the CFIS supports that view—and, on appropriate protections, that

“there is already adequate provision for the royal family and for discussions that any public authority may need to have that are confidential, are covered by other rights or are a matter of national security.”—[Official Report, Finance Committee, 12 September 2012; c 1510 and 1515.]

The SIC also said, in her submission, that the measure is

“in direct conflict with the public interest, and for this reason I would urge Members to consider carefully whether
such an amendment is desirable and appropriate before proceeding.”

She considered that the exemption 

“would have the effect of creating Scotland’s most wide-ranging absolute exemption in terms of its scope.”

On international good practice, the SIC stated that although the Scottish Government argues that the proposed amendment that the bill would bring in aims to create consistency with UK legislation, it will in practice lead to inconsistency in handling requests under Scots law. Requests for environmental information under the Environmental Information (Scotland) Regulations 2004 originate from a European Union directive and contain no specific exemptions for royal communications. Concerns were also raised that the amendment brought in at Westminster was not subject to full scrutiny.

The CFIS said:

“The disadvantage would be that the public would never have the right to know, whereas, at the moment, if there is a public interest, the public has a right to know. The impact would also mean that whoever is writing the correspondence need never fear that it would be made public.”—[Official Report, Finance Committee, 12 September 2012; c 1501.]

The evidence submitted against the provision carries weight and authority.

The cabinet secretary said she would

“listen very carefully to the evidence given to the committee.”—[Official Report, Finance Committee, 12 September 2012; c 1532.]

Depending on the committee’s report, she said that she would consider whether amendments may be appropriate at stage 2. The committee seeks removal of the royal exemption from the bill, and I am pleased that the cabinet secretary will give further consideration to that.

Extending FOI coverage to public contracts with arm’s-length external organisations featured prominently in a number of submissions, such as those from the CFIS, South Lanarkshire Council, Consumer Focus Scotland, the Scottish Council for Voluntary Organisations, Unison Scotland and the Scottish Trades Union Congress.

As we all know, the power to extend FOI coverage exists under section 5 of the 2002 act. That power allows Scottish ministers to designate public authorities, such as persons who provide a contracted service on a council’s behalf. The issue was the focus of consultations by both the previous Administration and the current Administration. However, even after those consultations, the bill does not address the issue and the Scottish Government has not stated in evidence to the Finance Committee whether—and if so, when and on what—it will introduce firm proposals.

Audit Scotland’s report on how councils are utilising arm’s-length external organisations identified around 130 such bodies, and it is concerned that a consequence of using more complex delivery structures involving ALEOs is that the public may be less clear about who is responsible for services and whom to complain to if they are unhappy. In its report, Audit Scotland stated:

“Maintaining transparency is a key objective in good governance.”

The then Minister for Parliamentary Business and Chief Whip wrote to the committee setting out the Scottish Government’s approach to the extension of coverage. He referred to the House of Commons Justice Committee’s post-legislative scrutiny of the UK Freedom of Information Act 2000 and stated that he was “persuaded” that the UK committee’s position is the right one. That position is that

“openness should follow public money when public services are outsourced”

and that that

“can best be achieved through clear and enforceable contract provisions rather than by designating commercial companies under the Act”.

In response to a question about how the Scottish Government encourages national health service boards and local authorities to prepare such

“clear and enforceable contract provisions”,

the cabinet secretary said:

“With regard to contracts—whether they are NHS contracts with commercial organisations, or those of local authorities or other public authorities—there is a debate to be had about how we ensure that we have the right balance between commercial confidentiality and the public’s right to access appropriate information.”—[Official Report, Finance Committee, 12 September 2012; c 1524.]

Discussing the matter with the committee, the CFIS was “not persuaded” by the Scottish Government’s arguments. When asked whether it would “take at face value” the position of the Scottish Government that it will return to the issue of extension should the bill be passed, the CFIS said:

“We are really just fed up waiting. We emphasise that it is not just the current Administration that has broken promises. We still do not understand why, when the bill was published, there could not have been a timeline and a list of specifics. However, even if specific organisations were named, that would not go far enough, because we know from the Audit Scotland report that more bodies will be created in future and that, from our reading, those might not be covered by freedom of information legislation.”—[Official Report, Finance Committee, 12 September 2012; c 1906.]

The SIC’s view is similarly clear. She stated in oral evidence:
"I understand the logic of clarifying the act before extending its coverage, but I am disappointed that the opportunity has not been taken to have a discussion about how and to where we should extend it. In not doing that at the same time, we are missing some serious and significant issues, some of which have already been raised in one form or another."

She highlighted that the focus should not be only on which bodies are brought under the 2002 act, but on extending designation

"to include information about public services ... to preserve and enhance people's right to information about how ... public services are delivered."

She also said:

"The designation of some bodies might have been appropriate 10 years ago, but with a review we might find that that is no longer appropriate. The world is changing rapidly, so let us review how bodies are designated."—[Official Report, Finance Committee, 12 September 2012; c 1509.]

In her letter the committee following her oral evidence, the SIC set out three suggestions for amendment of section 5 of the 2002 act: a requirement for routine review of section 5; wider consultation; and consideration of the public interest.

The committee’s conclusion on the issue invites the cabinet secretary to detail what action the Scottish Government will take, including stage 2 amendments. I am pleased that the cabinet secretary made it clear in her opening speech that she will reconsider the issue at stage 2.

Examination of the royal exemption provision and extension-of-coverage issues formed the bulk of our stage 1 scrutiny, given the evidence that was presented to us. Those matters go to the heart of the principles of an open freedom of information regime. The committee carefully assessed and reflected on the evidence, and I look forward to hearing members’ views.

The Finance Committee recommends that the general principles of the bill be agreed to.

15:15

Paul Martin (Glasgow Provan) (Lab): On behalf of the Scottish Labour Party, I commend the committee for its robust and constructive interrogation of the Freedom of Information (Amendment) (Scotland) Bill. The committee raised a number of important points, on which I will touch later in my speech.

We should acknowledge the history of the FOI legislation and the significant step forward that it represented in making the business of Government and the public agencies connected to it more accountable. For me, as a representative of the Scottish Labour Party, it is also important to recognise that the Labour-led coalition in the Scottish Parliament and the Labour Government at Westminster introduced the legislation in the first place.

The bill should have been an opportunity for us to reflect on how effective the FOI legislation has been and to consider what could be done to ensure that public bodies are made more accountable, transparent and open. It should have been an opportunity to ensure that the public feel confident that their requests for information are dealt with within the legal framework that was set out in the 2002 act. In reality, however, the bill is a feeble attempt to make it look like the Government is doing something. It lacks ambition.

The Labour Party shares the disappointment that was expressed by a number of those who provided written evidence to, or appeared before, the Finance Committee.

The committee has invited the cabinet secretary to remove the section that allows exemption for correspondence with members of the royal family. The Scottish Labour Party agrees with the committee on that, but the cabinet secretary argues for parity across the United Kingdom.

Bruce Crawford (Stirling) (SNP): Perhaps rightly, Paul Martin gave some credit to former Labour Administrations for introducing FOI legislation. Would he give credit to the Labour Government for introducing on 25 February 2010 an order that gave absolute exemption to Her Majesty?

Paul Martin: The absolute clarity that I would give on that point is that the Scottish Parliament considers legislation in the context of the devolved settlement, which allows us to examine how effective it can be in the Scottish context. It is interesting for a minister who promotes separation to argue for parity across the United Kingdom. The cabinet secretary may wish to elaborate on that in her closing speech.

The argument should be about whether we accept the principle of absolute exemption for the royal family. It is clear that all the evidence that the committee received on the issue points towards retaining the status quo. In the evidence that she gave on behalf of the Campaign for Freedom of Information in Scotland, Carole Ewart provided a reasonable explanation of why the existing legislation has served us well. There is no evidence to suggest that the current system has been abused. I ask the cabinet secretary to reflect on the written and oral evidence that has been given. I welcome her earlier comment that she will do that.

A number of respondents to the consultation on the bill raised concerns about what is not included in the bill. Particular concerns were raised in connection with arm's-length external
organisations and housing associations, and I would like to reflect on my experience of dealing with housing associations as a constituency MSP.

In general terms, I have found community-based housing associations to be more than willing to provide information to members of the public. In my experience, they are usually well managed by local management committees, which ensure that they are transparent and open. However, my experience in requesting information from national housing associations such as Link Housing Association has been more disappointing. Although such associations are recipients of significant sums of public money, my experience is that they operate on the basis not of the public having a right to know but of what they think that the public should know.

The 2002 act provides a legal framework for members of the public, including MSPs, to know what to expect from certain public organisations when they submit a request for information. It is clear from my experience of dealing with the Link Group that the absence of any legislative framework means that it is in control of how and when information is released to me, as the local MSP.

There are opportunities for organisations to consider how they can provide information proactively on the web, so that the public can access it rather than have to request it, but resources are a challenge in that respect. Although I am convinced that that is not the case for larger housing organisations, resources are a particular challenge for smaller housing organisations, and research must be carried out to ensure that smaller organisations are not adversely affected.

I note that the Scottish Information Commissioner suggested that the Government could legislate for a routine review of which bodies should be included within the realms of the FOI regime, and I welcome the cabinet secretary’s comments on that. We think that such an approach should be given further consideration.

**Nicola Sturgeon:** I simply remind Paul Martin of what I said in my opening remarks—that I will lodge an amendment on regular review at stage 2.

**Paul Martin:** I welcome the cabinet secretary’s constructive approach and look forward to scrutinising such an amendment at stage 2, to ensure that it will be effective.

It is disappointing that the Government has attached so little priority to openness and the provision of accessible information. For the Parliament and our democracy to be credible, we must ensure that the information that requires to be provided to us is provided on a right-to-know basis. The law must not be on the side of a secretive Government that drip-feeds information for media management purposes. That is clearly unacceptable.

We would like to lodge a number of amendments at stage 2. We will support the bill at stage 1 on the basis that significant amendments will be lodged by the Government or Opposition parties and will be accepted.

15:23

**Gavin Brown (Lothian) (Con):** I, too, thank the Finance Committee clerks and everyone who gave evidence to the committee, whether verbally or in writing.

The bill is short and—in the main—uncontentious. I think that the cabinet secretary was right to say that our freedom of information legislation does not need significant surgery. The two areas of contention have been addressed by every member who has spoken in the debate. One of them relates to something that is in the bill, while the other relates to something that is not in the bill but which some people believe ought to be.

The bill follows one of the Scottish Government’s six FOI principles, namely that it ought to adjust the regime when it is necessary and sensible to do so. On the strength of what we have seen and heard thus far, we will certainly support the general principles of the bill at decision time.

Section 1 caused the most debate in committee, and the committee’s convener was right to touch on it. That provision is dubbed the royal exemption by all. I find myself in a strange position today. I agree with the UK Labour Party on the point; I disagree with the Scottish Labour Party on the point; I agree with the Scottish Government on the point; I disagree with everybody else on the committee on the point; and I think that I disagree with our Liberal brothers and sisters on the point—I wait to hear what Willie Rennie says but, from what he has said before, I think that I disagree with him, too.

The views on section 1—the royal exemption—were mixed in the written evidence that was given to the committee. A quick tot of the submissions shows that 12 expressed no view, 11 supported the inclusion of section 1, and 14 were against its inclusion. It is fair to say that the views were mixed and were not all one-sided or significantly in favour of one side of the argument.

I was persuaded by points that the Scottish Government and the bill team made to the committee. Andrew Gunn talked about a

"consistency of approach to information relating to communications with Her Majesty, given the commonality of the monarch as shared head of state."
Zoe Mochrie said:

“I think that it is a reasonable amendment, and our intention is to ensure a consistent approach across the UK with regard to information of similar types.”—[Official Report, Finance Committee, 5 September 2012; c 1470, 1471.]

Of course, the monarch has a duty and a right to counsel, warn and advise her ministers, and the royal exemption already applies in Wales, Northern Ireland and England.

John Mason (Glasgow Shettleston) (SNP): I accept Gavin Brown’s point about consistency across the UK, but does he accept that the provision would mean inconsistency with environmental regulations, which are quite different?

Gavin Brown: John Mason is correct to point out that issue, which came up in evidence to the committee. I was left to decide whether I preferred a small inconsistency with one set of environmental regulations or a larger inconsistency on the royal exemption with the UK as a whole. I certainly come down in favour of having the royal exemption, which is the position that the Scottish Conservatives will take on the bill.

It is worth pointing out that, as the Deputy First Minister said in giving evidence, it would be unusual for correspondence from the monarch to the Prime Minister to be treated differently from correspondence from the monarch to the First Minister. On that basis, we accept section 1.

The other sections are probably less contentious. Section 2 concerns refusal notices. Section 3, “Accessible information”, says that when information is “reasonably obtainable” and publicly available it need not be provided in response to a request. That might cut duplication and cost in a small and modest way.

Section 4 relates to historical periods. There is some contention about whether a flexible approach is better or whether a rigid and consistent approach should be taken, but I favour the arguments that the Scottish Government has made. The downside is some inconsistency and perhaps an increase in complexity, but there are different types of information, and the Scottish Government is right to apply slightly different timelines to different types of information, with the overriding proviso that information that can be released earlier should be released earlier. We were given an assurance on that today.

It is clear that the idea of a six-month time limit for proceedings has not worked in practice. When a body has 20 working days to respond to a request, an applicant has 40 working days to ask for a review if they are dissatisfied and a body has 20 working days to issue a review response, it is fairly clear that six months is not long enough. That was one of the few things that the initial legislation got wrong, so I am pleased to see section 5 of the bill.

My time is running out. I repeat that, come 5 o’clock today, we will support the bill at stage 1.

The Deputy Presiding Officer: We now move to the open debate. I remind members that time is extremely tight. Members have up to six minutes.

15:29

John Mason (Glasgow Shettleston) (SNP): We are hearing from across the chamber that the starting point is that FOI legislation is a good thing and that, on the whole, openness is good and secrecy is bad. Obviously, there can be exceptions, but our starting point should be to presume that information should be in the public domain rather than to presume that it should not be.

In that regard, many good things are happening. Information is released in the vast majority of cases, and I think that more than 70 per cent of the Scottish Information Commissioner’s decisions have been in the Government’s favour. Therefore, I found slightly disappointing both Paul Martin’s tone and his suggestion that the Government is not open. The real debate today is about the fact that organisations that are covered by FOI are generally open whereas organisations that are not covered by FOI are not.

The bill seeks to strengthen FOI in a number of ways, including through a strengthening of the deterrent against the deliberate destruction of information and a reduction in the lifespans of exemptions. I think that most of us welcome those proposals, but there have been areas that have been disappointing to the Finance Committee, civic society and the public at large. We have already heard about exemptions for the royal family. I certainly endorse the recommendations in paragraph 34 of the Finance Committee’s report on the bill. It is good that the cabinet secretary said that she is giving the matter full and serious consideration—that is also mentioned in paragraph 23 of the report—although, personally, I do not get too excited about the royal family.

I want to concentrate more on other organisations, which are covered in paragraphs 57 to 78 of the report. Two main types of organisation might be considered for inclusion under FOI. First, there are bodies that were previously covered by FOI as part of an organisation that was covered by it, such as a council, but then moved out. We call them ALEOs—arms-length external organisations—and there are many in Glasgow. Glasgow Life, for example, used to be part of Glasgow City Council and would have been covered by FOI, but it moved out as a separate
legal charity. Bringing that organisation back in would be considered to be returning to the starting point rather than expanding the reach of FOI.

A number of witnesses made that point to the committee. In its submission, Unison said that freedom of information rights should

“follow the money”

and that, if they do not,

“the growing number of public services delivered by private companies and other bodies not currently covered by”

FOI will remain beyond a key tool of scrutiny and accountability. The point has also been made that it could cost more to have organisations not scrutinised than scrutinised. Unison made the point that progressively less information could be available.

Similarly, the Campaign for Freedom of Information in Scotland’s briefing states:

“CFoIS believes the public’s right to know is now far weaker than when FoISA was passed by the Scottish Parliament in 2002 and became effective in 2005. The key reason is that S5 of FoISA has never been used to add/designate more bodies.”

I accept Nicola Sturgeon’s point that there has been a bit of a changeover, but there has not been a major increase in the bodies that are covered up to now.

The campaign’s briefing also states:

“Our ‘information access right’ is strong and enforceable but the range of information we can access is getting smaller as public services are increasingly moved to other bodies and those bodies are not covered by FoISA. CFoIS wants our right to access ‘public information’ to be restored as well as extended.”

That relates to my point about the two types of organisation—restoring the coverage that existed before for some organisations and extending coverage to other organisations.

Should we expand FOI to other organisations? There is certainly an appetite for that in some circles, especially if the organisation receives public funds. For example, Paul Martin mentioned social rented housing. I think that he said that local, smaller housing associations are often quite good but national housing associations are perhaps more doubtful. I would include Glasgow Housing Association as one of the more doubtful ones in respect of how open it has been throughout its life. That seems to be something of an anomaly to me. From speaking to housing associations, it appears to me that some are very relaxed about FOI, and some—I accept—are less so.

Audit Scotland made a good point, which is included in paragraph 64 of the report and which Kenneth Gibson has already quoted, so I will not repeat it. The public are concerned about the service that is provided but less concerned—in fact, they may be confused—about the legal entity that provides it.

Cost is sometimes raised as a reason for not extending freedom of information, but that is the wrong place to start. Surely, we should first ask whether particular information should be in the public domain and then, if there is a cost, we should ask as a secondary question who should bear that cost. There is broad acceptance that costs should be shared in some way between the person who requests the information and the organisation that is asked for it. That can always be adjusted over time. However, I do not accept that cost should be the starting point in deciding whether access to information should be available.

It has been suggested that ministers already have powers to extend the list of organisations that are included under section 5. I welcome Nicola Sturgeon’s assurance that there will be regular review in future. For me, the key point is that we are looking for the right to get information, not just the possibility that information might be available. One point that came up at the briefing that Willie Rennie hosted yesterday is that there is a cultural problem of secrecy. We really want to change that culture.

15:35

Michael McMahon (Uddingston and Bellshill) (Lab): Not many members would disagree in principle with the Government’s view that there is a need to reform the Freedom of Information (Scotland) Act 2002. However, like the majority of members on the Finance Committee, many members might consider that, having decided to update the legislation, the Government has introduced a bill that is, to say the least, far from adequate.

How strange that the Government started off with consensus and ended up introducing contentious issues that broke the initial accord and went against the will of the stakeholders who supported the proposals in the initial consultation. In short, there was a general desire for FOI to be extended and there was no disposition towards the extension of exemptions, yet the reverse of those positions has been put before us. The Government seeks no extension of FOI to cover arm’s-length organisations, housing associations and a range of other bodies that provide public services, and it has bewildered us all with its aim of extending the exemption from FOI to include the royal family.

In recent weeks, Salus, which is a health board’s arm’s-length organisation, has signed a contract with Atos Healthcare, which has recently come in for a great deal of criticism. Why would
the Scottish Government not want to bring Salus into the ambit of FOI and allow us access to information that might be useful as we deal with issues in relation to the Welfare Reform Act 2012? That baffles me and many other people.

In effect, the Scottish Government has disregarded the views of stakeholders, which, regrettably, is becoming an all-too-familiar habit. For example, in response to the question “Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?”

the Campaign for Freedom of Information in Scotland responded bluntly and said:

“Yes, but our views have been mainly ignored.”

That cannot be a good situation to have when we are considering the bill.

The campaign advocates that private and voluntary organisations that receive funding from the public purse should be subject to the scrutiny of freedom of information. Surely such bodies should be subject to scrutiny by the eye of the public whom they serve. I agree with that principle, but the Government seems to have taken a different view.

The Government once advanced the concept of the arc of prosperity, but it now exhibits a predisposition towards the arc of secrecy, which extends from Victoria Quay to the High Court and which will continue to encompass far too many publicly funded bodies. For example, housing associations, which members have mentioned, benefit from high levels of funding from the Scottish Government—or, at least, they used to. If a local authority that builds council housing is subject to freedom of information laws, surely housing associations, which build social rented housing with public money, must be brought under the same scrutiny.

Equally, the basic principle of providing exemptions in a freedom of information bill is not only contradictory but incongruous. As the Scottish Information Commissioner has stated, that “erodes the right to information enshrined in the Act.”

The bill makes only limited improvements to the Freedom of Information (Scotland) Act 2002. As Unison aptly put it, to fail to extend the act is to weaken it considerably. The Scottish Government has turned what was seemingly a simple and easy job of extending the 2002 act into an overcomplex task.

The Government said in its consultation on independence, “Your Scotland, Your Referendum”:

“We shouldn’t have a constitution which constrains us, but one which frees us to build a better society ... We must renew democracy and strike a new bond between government and the people based on trust and humility.”

How can the Government renew democracy if it allows organisations that provide crucial public services to continue to remain secret?

The Government must accept the calls from various stakeholders for amendments to the bill. I am pleased that the cabinet secretary indicated a desire to engage in discussion. As the Campaign for Freedom of Information in Scotland said in its submission:

“The ability to exercise our human rights ... is crucial in our modern democracy.”

I am puzzled as to why the Scottish Government appears to be intent on pressing ahead with the bill in a way that is reminiscent of the approach that Westminster took—wrongly—in 2010. The amendments that were agreed to two years ago were not subject to full scrutiny in the House of Lords, due to the imminence of the general election. The House of Lords Select Committee on the Constitution said:

“It is inexcusable that the Government should have taken so long to prepare this Bill that it has effectively denied both Houses of Parliament ... the opportunity of subjecting this important measure of constitutional reform to the full scrutiny which it deserves.”

Why would the Scottish Government take two years to consult, only to make the same mistake that the Lords, of all people, identified at Westminster?

Unison said in its submission that it was “disappointed that the Scottish Government is making only minor changes via this Bill.”

Unison went on to say:

“the existing legislation is weaker and less clear than it should be for the growing number of public services delivered by private companies and other bodies not currently covered by FOISA.”

I could not agree more. I am not surprised that Unison thought that its views had been disregarded and said:

“Ministers have effectively ignored ours and others’ calls for action on extending the Act.”

The Deputy Presiding Officer (Elaine Smith):
The member must conclude.

Michael McMahon: The bill can be saved. We should vote for it today in the hope that the Government will listen to civic Scotland and show that the consultation was not a waste of time and that the bill can be useful.

The Deputy Presiding Officer: I remind members that they must stick to their six minutes.
Jamie Hepburn (Cumbernauld and Kilsyth) (SNP): I am a new member of the Finance Committee and I thank my new colleagues for their work at stage 1. I do not have the benefit of having heard the evidence; this is a new subject for me. I am taking part in the debate as much because I want to be better informed at stage 2 and beyond as for any other reason.

I think that most people agree that we need freedom of information legislation. The Scottish Government has six principles on freedom of information, the first of which is that the Government “Supports Freedom of Information as an essential part of open democratic government and responsive public services.”

If we want active citizens, who have the right to access information, be it information about them that an organisation holds or information on decisions that affect them and society more generally, we must have freedom of information legislation. Such matters should not be under the cloak of secrecy.

We have come some way in that regard, so the bill should not be viewed as revolutionary. The 2002 act changed things for the better and there is much better access to information than used to be the case. I understand that the Campaign for Freedom of Information in Scotland is somewhat frustrated—it will always want to go further on access to information, as is its right—but I cannot accept its conclusion that there is less access to information than there was when the 2002 act was passed, although I agree with it that transparency builds trust and that the ability to access information makes bodies more accountable. It is right to consider the freedom of information legislation.

Willie Rennie: The Deputy First Minister said that as a result of the formation of more ALEOs and trusts there has been an erosion of access to information. The campaign is right to say that less information is available than was the case when we passed the Freedom of Information (Scotland) Act 2002.

Jamie Hepburn: If time allows, I will return to the important issue of ALEOs, which the Finance Committee has been looking at.

I said that the bill is not revolutionary. One of the other principles of the Scottish Government in relation to freedom of information is to operate within the confines of the 2002 act. The bill seeks to build on that legislation.

The committee, rightly, focused on specific areas. However, the explanatory notes to the bill set out that it is intended to address “the order-making power relating to the definition of what constitutes a ‘historical record’ and the lifespans of certain exemptions” and “the ability to prosecute in the event of information not being disclosed due to, for example, alteration, destruction or concealment.”

The 2002 act sets out that a record becomes a historical record after 30 years and sets out exemptions to that. It demonstrates the Scottish Government’s commitment to provision of information that it has, since 2009, as the cabinet secretary pointed out, “been opening its archive files at 15 rather than 30 years.” That ties in with another of the six principles, which is to publish information proactively wherever possible.

According to the policy memorandum, “Some concerns have been raised in respect of the earlier release of ... social work records, adoption records and information bequeathed for research purposes.”

The Scottish Information Commissioner believes that the bill has the balance right, but there are other concerns. The cabinet secretary has written to the committee about this matter: there is a commitment that if the Government seeks to take forward the flexible powers—which I think the cabinet secretary has indicated it will do—they will be subject to consultation. I am sure that that will help to ease concerns.

I agree entirely that a time limit for proceedings should form part of any legislation. As it stands, the legislation is probably somewhat restrictive. It cannot be right that if a person seeks information after a six-month period in which that information might have been destroyed, the perpetrator of that crime would escape justice because no one had noticed that the information had been destroyed. It is absolutely right that we examine that.

Another issue that has attracted a fair amount of attention is the royal exemption. Although I have not heard the evidence, I heard the cabinet secretary say that she is not disposed towards absolute exemptions. I agree with that position and welcome the fact that it will be looked at again.

I will try to respond to the point that Willie Rennie made about ALEOs. I accept that there are concerns. The committee has heard those concerns and committee members have such concerns. Indeed in my area, the local authority is seeking to create a new ALEO on cultural issues. It is right that we look again at the provision; I hear that the Government will do that. I look forward to seeing where that takes us and to the bill progressing to stage 2.
15:48

Iain Gray (East Lothian) (Lab): It is 10 years since we passed the Freedom of Information (Scotland) Act 2002. That hardly made us trailblazers. After all, in the United States, Lyndon Johnson signed freedom of information into law as long ago as 1966. For us, though, it was the right act at the right time.

As many members have said, 10 years on, expectations have grown, the public service landscape has changed and it is right to review the legislation and to strengthen it. The legislation was always a work in progress. Indeed, in 2002, Michael Matheson quoted the Information Commissioner of Canada’s having said that in Canada it took 10 to 15 years to break down the culture of secrecy.

Mr Matheson said:

“I believe that such a culture is probably even more deep-rooted in Scotland.”—[Official Report, 24 April 2002; c 8216.]

We did not realise at the time that that was really a statement of profound self-criticism. The Scottish National Party Government, of which Michael Matheson is a member, has been as guilty as any Administration of resisting the spirit and the letter of the FOI legislation.

Sometimes it has done so spectacularly, for example in court, most recently over legal advice on EU membership, and most gratuitously, in the middle of an election, over local income tax. Sometimes it has done it routinely, such as it did last week, when it refused to tell us whether or when ministers had met the big six energy companies, because they could not find the information in their filing system. Sometimes the Government has done it pretty sneakily, as when e-mails with referendum expert Professor Qvortrup were released, but missing the two key ones, which then slipped out two months later. I say to John Mason that the Scottish Government has also done it pretty systematically, which is why the Scottish Information Commissioner reported that only 50 per cent of requests to the Scottish Government received a full response. That is less than any local authority, some of which respond to 90 per cent of requests.

John Mason: I thank Iain Gray for giving way. He almost seems to be arguing against the 2002 act if he is saying that it is not operating properly as regards the bodies that it covers at the moment. Is that what he is saying?

Iain Gray: No. I am saying that we need the legislation and the culture of openness and transparency, because one will not work without the other.

Of course, when it was in opposition the SNP argued exactly that—that FOI was too restricted. Roseanna Cunningham, for example, railed against class exemptions in 2002, saying that

“exemptions should depend entirely on the content of the information ... being sought, rather than its broad type”.—[Official Report, 17 January 2002; c 5460.]

Yet here we have the Scottish Government proposing to exempt, as a class, all communications with the royal household. The Finance Committee is right—that provision will weaken the legislation and it should be dropped.

I say to Bruce Crawford that when we brought in the act in 2002, we said that it was stronger than Labour’s act in Westminster and we were proud of that. We should still be proud of its being stronger than the UK legislation. I am glad that Mr Crawford has returned to the chamber because I want to agree with him too now, because in 2002 he was very concerned about private finance initiative contracts. He said:

“we cannot see the names of the bidders, the full tender documents or the outline business case in which alternatives were discussed. That is not good enough.”—[Official Report, 17 January 2002; c 5486.]

One of my constituents recently asked under FOI for an outline business case for the new sick kids hospital in Edinburgh—a non-profit distributing PFI project. I will show members what he received. The crucial financial information—page after page of tables—is simply blacked out. My constituent is an expert in such projects and he is clear that this is not only less information than used to be available in Scotland, but less than he can get out of George Osborne’s Treasury regarding contracts in England. The balance between transparency and commercial confidentiality that the Deputy First Minister referred to has shifted, but in the wrong direction. The bill presents the opportunity to change that and to extend FOI to those who provide public services and public contracts, whether they are ALEOs, third sector organisations or private companies.

The month before last, the First Minister said that he would be

"extremely sympathetic”

to such extensions

"once we get the ... Bill through"—[Official Report, 20 September 2012; c 11704.]

That sounds a bit like, “Grant me openness and transparency, but not yet,” as St Augustine might have prayed.

The Deputy Presiding Officer: You have one minute left.

Iain Gray: I sincerely welcome the Deputy First Minister’s far more positive assurances today—
she seems to have much more sympathy for making that extension quickly.

This is our chance to strengthen FOI in Scotland and to extend its reach. Ministers should drop the royal household exemption and at the very least section 5 should be amended to place an obligation on ministers to review the act. I welcome the commitment to do something like that, but would it not be better still to use this opportunity to do so now? That would be the strongest indication that we could give that 10 years on, the culture of secrecy in Scotland is beginning to be definitively uprooted forever, which we could all welcome.

15:54

Bruce Crawford (Stirling) (SNP): I will try to do three things as part of my contribution to the stage 1 debate on the Freedom of Information (Amendment) (Scotland) Bill. I apologise to Michael McMahon and to Jamie Hepburn because I had to leave the chamber for a short time during their speeches. Forgive me.

First, I want to comment on the need to get the legislation in good order before we make any more substantial changes with regard to FOI.

Secondly, I was on the Finance Committee—albeit that it was for only a short time. I can tell the convener of that committee that it was an enjoyable time. I attended only one meeting in private in which the report was being discussed. Had I continued to serve on the committee, I am not sure that I would have wholly agreed with its recommendations and conclusions at paragraph 34 in the report, with regard to section 1. It is much more likely that I would have taken the position that Gavin Brown adopted. I will come back to that later and explain why.

Thirdly, I will discuss when it will be appropriate to consider extending coverage of the FOI regime.

I will start with the issue of getting the legislation in good order, particularly with regard to section 5 and the time limit for proceedings. It is correct that the bill will make the legislation stronger by making more effective the ability to bring prosecution in cases where requested information is deliberately altered, destroyed or concealed. I am glad that the bill proposes that a prosecution be commenced within six months of sufficient evidence to justify proceedings coming to the prosecutor’s knowledge, but with the backstop of no proceedings being able to be commenced more than three years after the commission of any such offence. The provisions will update and strengthen the current law and bring the statute book into good order.

Moving on to section 1 on “the royal exemption”, as other members have called it, I am not sure—as I said earlier—whether I would have wholly agreed with the committee’s conclusions. The matter is quite straightforward, in my view. It is self-evident, from the media coverage and the particular scrutiny to which the monarch, the heir and the second in line to the throne are subjected, that they cannot be treated just like any other public body and that special provisions are required. While the monarchy exists as part of the constitution of this country, it is essential that its political impartiality not be undermined.

Michael McMahon: Will Bruce Crawford take an intervention?

Bruce Crawford: I hope that all members in the chamber would agree with that, including Michael.

Michael McMahon: I thank Bruce Crawford for giving me the time to say that I do not agree. Why would it be right for the royal family in the United Kingdom to be exempted by devolved Assemblies and the Government of the United Kingdom, while in other countries—such as Australia and Canada—where the monarch is also the head of state, she would still be subject to FOI legislation?

Bruce Crawford: We can all look at comparisons outwith these shores and islands. For example, the President of the Republic of Ireland is included in the FOI regime there for exactly the reasons that I am arguing with regard to Scotland.

There must be a space for the monarchy to be able to provide views candidly to any Government, without the prospect that those views will be put into the public domain, in which case its political allegiances might well be exposed. I welcome what the Deputy First Minister said in that regard.

Iain Gray: I want to return to our own shores. Does Mr Crawford think that the recent court ruling that overturns the exemption for the heir to the throne, and which is still being fought through the courts, rather indicates that exemption on a UK basis may not survive, in any case?

Bruce Crawford: That process is hardly exhausted yet, and the issue is on-going.

On extension of coverage of the 2002 act, the Scottish Government rightly argues that that should be considered only after the legislation has been strengthened by dealing with matters, as the Government plans to do in section 5. As Kenneth Gibson noted, even the Scottish Information Commissioner has said in evidence that she understands the logic of clarifying the act before extending coverage. As members are fully aware, the power to extend coverage of FOI already exists under section 5. That is the correct place in legislative terms for any Government to make that
particular extension. That is why section 5 was drafted in the way that it was when the Parliament passed the bill and it became law. However, I welcome the Deputy First Minister’s announcement today with regard to section 5, to the effect that she will lodge amendments at stage 2.

The main point is that we should at present be very careful indeed about considering extension. I support the principle of extending coverage to bodies such as arm’s-length organisations that have been created by local authorities—John Mason made a good point about that. There are also strong arguments for extending coverage to public-private partnership and PFI contracts and to some registered social landlords.

However, I question whether, at this time of significant economic uncertainty and pressures on public service budgets, we should add to the burdens on those who are already trying to balance their books in very difficult circumstances. In both the private and public sectors, people are having to take tough decisions day in, day out on where best to apply reducing resources in order to ensure that their businesses can remain trading or that they can continue to deliver their high-value public services.

We can see that there are difficulties in the world economy, including the continuing problems in the eurozone, the problems that the re-elected President Obama is facing with the fiscal cliff and the problems that have emerged this week in the world’s third biggest economy, Japan, which is slipping deeper into recession. Those are worrying developments for everyone. Everyone saw the Bank of England’s report this week on the state of the economy. We have heard enough in the chamber about the challenges that hard-pressed public service organisations are facing without, at this time, making their lives even more difficult by placing more burdens on them. I therefore ask Parliament to give the Scottish Government a bit of breathing space on the matter of extension of coverage. Now is not the time to add to the burden of either the public or private sector in that way.

The Deputy Presiding Officer: I remind members to use full names.

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): I start by thanking and congratulating the Finance Committee. The stage 1 reports of committees have always been one of the strengths of the Scottish Parliament compared with other Parliaments, and the report that we are considering shows the committee system operating at its best. I congratulate everyone on that committee.

Various speakers, including Paul Martin and Iain Gray, mentioned the history of the freedom of information legislation. The Freedom of Information (Scotland) Act 2002 is one of several acts that those of us who were in government at the time can rightly be proud of. That does not include only Labour members; we should also pay tribute to the Liberal Democrats, who pushed for the legislation. It was Jim Wallace who took the bill through Parliament, and he famously said during the stage 3 debate:

“Provisions allow providers of services to the public to be added to the bill case by case, and I reassure the Parliament that that power will be exercised.”—[Official Report, 24 April 2002; c 8111-2.]

That has been much quoted in recent debates.

In a sense, the main issue that is before Parliament today is what is not contained in the bill. Hitherto, the Scottish Government’s view has been that any additions to the bodies that are covered by the freedom of information rules should be dealt with after the bill is passed. I welcome the change of position that the Deputy First Minister announced in her opening speech.

I think that we all know what the problem is. Many bodies have been created over the past few years, particularly by local authorities. For example, Audit Scotland has identified 130 ALEOs, although it has said that it is not sure how many there are overall and there are probably quite a lot that it does not know about. That points to the wisdom of Willie Rennie’s suggestion that when a new body is created there be consideration of whether it should be covered by freedom of information legislation.

Various people who have given evidence on the bill have pointed out the failure of section 5 of the 2002 act. That is why amending that section must be a key part of what the Parliament does at stages 2 and 3. As I said, until today, the Government was saying that it was not going to deal with the issue in the bill, but today the cabinet secretary mentioned two proposals that are based on regular review and widening the scope of the required consultation. Perhaps an oddity and a weakness of section 5 of the 2002 act is that, in the case of a new body, consultation is required only of that body, which clearly has a particular interest in the matter. The wider public are excluded.

I welcome the proposals as far as they go, but I wonder whether they go far enough. We are all familiar with the defence that is used in various situations when someone says, “I have reviewed the situation,” and the next statement is, “and I have decided that I will make no changes.” We need to go further than just reviewing the position. I would like to see a purpose section in the bill.
That suggestion has come from the Campaign for Freedom of Information in Scotland, which stated:

“A purpose clause should be introduced to affirm that FoISA provisions are intended to apply to all public authorities and all other bodies providing public services, carrying out public functions and/or functions of a public nature.”

That wording might have to be looked at, but it is important that the principle be enshrined.

Here, of course, I disagree with Bruce Crawford, because I believe that there is an urgent need to get many of the bodies that are not presently covered covered as quickly as possible. The simple principle is that, if a body takes taxpayers’ money, it ought to follow the freedom of information rules. As I said, that is the most important issue that is before us. Hitherto, the Government has said that it was not to be considered as part of the bill, but now, fortunately, it will be considered at stage 2 and possibly stage 3.

The only other substantial controversial issue is the royal exemption. I support what my colleagues said about that and I disagree with what the Government has said, although I do not regard the issue as being as important as the previous one that I discussed.

I will not list all the members of the astonishing royal coalition that Gavin Brown referred to, but it has been a matter of slight amusement that the Scottish Government in particular is so anxious to have common arrangements across the UK. As I think Iain Gray reminded us, when we passed our legislation we were quite proud of the fact that it was stronger than the legislation that was passed by the UK Labour Government at the time. If I had been responding to Bruce Crawford’s intervention about the action of the UK Labour Government in February 2010, I would have said, “So what?” After all, in a devolved Parliament, we are not bound by the decisions that our party might make in London. I believe that the royal family already has adequate protection and that there is flexibility in the current arrangements for considering the public interest, and sticking with that position will pose absolutely no threat to the royal family.

I can cover the rest of the bill in the 30 seconds I have left, as it contains nothing controversial. The amendment to section 18 of the existing legislation on refusal notices and the amendment to section 25 on accessible information are both without controversy. I support the flexibility that will be given to section 59 of the 2002 act with regard to use of historical information—I am pleased by the cabinet secretary’s announcement that she will consult on the matter quickly—and I support the amendment to section 65 on the ability to bring prosecutions if material is destroyed. To be able to bring such a prosecution within six months of the discovery of evidence is a sensible proposal, but I am not so sure that we need the backstop of three years since commission of an offence.

16:06

Roderick Campbell (North East Fife) (SNP): Information is power—or, as Sir Francis Bacon said, “Knowledge is power”. I am reminded of that and the Scottish Information Commissioner’s important role every time I visit the north-east corner of my constituency. The commissioner is, of course, based in the impressive Kinburn castle in St Andrews and employs 21 members of staff, and all of them are very welcome in the community.

First of all, on the royal exemption, the bill’s policy memorandum makes it clear that the rationale for introducing an absolute exemption amendment to section 41 of the 2002 act is that in respect of communications with the royal family there should be

“a common approach throughout the UK to the treatment of information relating to Her Majesty.”

At first glance, the proposition seems sensible, particularly bearing it in mind that the absolute exemption applies south of the border as a result—as Gavin Brown’s tortured explanation tried to make clear—of the coalition of Labour legislation being brought into force by a Conservative minister.

Nevertheless, responses to the consultation have expressed serious reservations about the necessity for such an exemption. The Scottish Information Commissioner of the time, Kevin Dunion, said earlier this year that he regards the proposal as unnecessary, given the existing provisions in the 2002 act, and sees the amendments as

“somewhat regressive, creating a wide-ranging absolute exemption, which will, in certain circumstances, only be set aside after a period longer than the exemption’s current 30-year lifespan, regardless of either the nature of the information, or the strength of the public interest arguments in favour of its release.”

Unison also suggested that the amendments might be contrary to the overall general direction of FOI legislation and, of course, to the objectives of the bill, the principles of which seek to ameliorate the existing legislation. It is worth considering the wide variety of respondents who do not consider the amendments to be necessary.

That said, as was indicated in evidence to the Finance Committee, in practice the existing legislation has had very limited impact in relation to the public interest test. Nevertheless, there is an important principle to be observed, and I am pleased to note the cabinet secretary’s indication that the Scottish Government will carefully
consider the Finance Committee's stage 1 report and provide a view in time for stage 2.

With regard to the time limits for proceedings in section 65 of the 2002 act, I agree with the proposal to allow a prosecution to begin six months from the moment that sufficient evidence of an offence is available, with a long stop on commencement of proceedings of three years from the date of the offence. However, it is worth noting that the Finance Committee's stage 1 report states that, in her submission, the Scottish Information Commissioner did not believe that the three-year long stop would be effective because the possibility of commencing proceedings after such a long gap was very remote, especially as evidence of wrongdoing more often than not became evident within 12 months of the commission of the offence.

The Campaign for Freedom of Information took the opposite view on the three-year limit, citing the evidence about Hillsborough that came to light after several decades as a good reason not to impose any backstop. However, I feel that it is in danger of confusing the wider issues with more important issues around criminal and civil liability generally.

On the extension of coverage to ALEOs, the increasing outsourcing of public service provision in Scotland over the past decade, which many members have referred to, has raised some pertinent questions about accountability. In its submission to the consultation on the bill, the monitoring body for services, Consumer Focus Scotland, said that continued delay to extending the 2002 act

"places significant numbers of consumers at a disadvantage."

I agree.

On the question of exercising the powers that Scottish ministers have under section 5 of the 2002 act to add to the scheme bodies and private companies that undertake services for public authorities, I agree with the SCVO for the very good reason that the third sector organisations that provide formal services such as care or maintenance of community spaces should not be included in the extension. However, I agree that an extension of coverage is necessary to reflect the growing use of ALEOs in public service provision. I therefore support calls from local authorities, trade unions and ombudsmen for that extension to be introduced.

Although I am aware of the cabinet secretary's evidence to the Finance Committee that there would not appear to be any advantage in using primary legislation to extend coverage, rather than doing so by order, I hope that, in any event and come what may, early progress is made. I welcome the cabinet secretary's commitment to regular reviews in that respect.

The bill seeks to amend provisions in the 2002 act for authorities to issue "neither confirm nor deny" refusal notices in relation to requests for personal information. That was, of course, recommended by Kevin Dunion, and I believe that it is a commonsense suggestion.

I welcome the thrust of the bill and look forward to its progress through Parliament.

16:11

Willie Rennie (Mid Scotland and Fife) (LD): I want to make an admission: I am not a royal watcher, and I want to join Gavin Brown's royal coalition. I do not think that the royal exemption is one of the major issues in the bill. I am much more concerned about the other issues, such as the extension, and I think that we should focus on the main thrust of what we are trying to achieve with freedom of information.

We have a serious problem in the public sector, as a culture of secrecy and a kind of game playing are developing in many organisations, from the police to the NHS to central Government. We need to address that because, if we do not, it will undermine the whole FOI regime.

In recent months, we saw how Rab Wilson did great work in using information gained through FOI to expose a major flaw in Ayrshire and Arran about learning lessons from deaths. There could not be a better example of the use of the FOI regime. It is not just for journalists and politicians who want to get one over on someone; it makes a real difference to people's lives. That is why it is important that we address the erosion that the Deputy First Minister spoke about.

John Mason: Does the member think that legislation will be sufficient to change the culture, or do we need to do something else?

Willie Rennie: Both things are necessary. We need to send a clear signal that we are not suspicious of or cautious about freedom of information and that we welcome and embrace it. The bill gives us an opportunity to do that. However, we have to ensure that management understands the position. I have heard lots of different examples of people trying to play games and withhold information. We need to encourage people to be much more open so that we can learn lessons from our mistakes.

We need to address that issue because, as the Deputy First Minister has said, there has been an erosion. Lots of public money is now no longer under public scrutiny. The public can access information about Barlinnie, but not about Kilmarnock prison. Tenants in South Lanarkshire
can get information about their landlord, but Glasgow tenants cannot, because their landlord is a housing association. In East Lothian, responsibility for leisure facilities was transferred to an arm’s-length organisation, which meant, again, that the information was not available. Those are examples of the issues that we need to address.

I was pleased with the tone of the Deputy First Minister’s comments. I welcome what she said about there being an annual review. I hope that that is followed through quickly so that there can be a regular review and we can deal with the many organisations that have now fallen out with public scrutiny.

However, I disagreed whole-heartedly with Bruce Crawford’s remarks about the economy. It was an argument almost against freedom of information. I know that he endorses FOI, but to argue that there are certain circumstances—including those that involve the economy—in which it should be suspended is not worthy. We need to embrace it. It is an issue that helps us to learn how to govern properly and no excuses, including the economy, should be used. FOI should be seen not as a burden, but as an opportunity.

There is an opportunity in the bill to make the necessary changes. I have suggested that there should be an opportunity for public authorities to make a designation at the time of the creation of new bodies, when they could consider whether they should be included in the FOI regime. That would mean that we would not have to play catch-up on an annual basis or even more frequently. We need to create the opportunity for that to be done at the time, which will require both an amendment to the bill and the annual review that the Deputy First Minister talked about.

The Deputy First Minister also mentioned the need to consider other avenues for public access to information. Kevin Dunion has commented on that. He said:

“My second concern is the view being expressed that other initiatives can improve access to information held by those bodies, so that designation is not necessary. However welcome efforts at greater transparency may be, none can provide the benefits of FOISA, namely a statutory right to information and in particular the right for a dissatisfied requester to appeal to the Commissioner.”

That process is well known, well tried and well tested. People know that they can use freedom of information legislation to get access to information. Other members, including Michael McMahon, have commented that the other mechanisms are not as tried and tested and that people are not as familiar with them.

I think that we should stick with what works. We should extend the coverage so that we make steps back to the ground that we have lost in recent months. Iain Gray is right when he says that there has been a loss of confidence in the Government on freedom of information because of numerous episodes, many of which he referred to. The one thing that the Government could do to dispel that perception is change the bill in the way that I have described and extend the coverage so that we can get the principle of following the money. If public money is involved, people have a right to know.

16:17

George Adam (Paisley) (SNP): I, too, thank the Finance Committee for all the work that it has done. In particular, I thank the convener, Mr Gibson—and not just because he is sitting beside me. Although I am not on the committee, I have followed its proceedings with interest. The cabinet secretary said in her opening remarks that there is the potential to take on board some of the committee’s concerns, and I welcome that.

As the debate has shown, there is no quick fix to what is quite a complex situation. Various examples have been cited. For example, Prime Minister Blair was a keen advocate of freedom of information when he was the leader of the Opposition, but in his memoirs he described the 2000 act as an act of stupidity “undermining ... serious government”. I am not saying that Tony Blair is a perfect human being and a perfect example of someone using FOI—we are aware of his faults—but I understand that FOI is an extremely complex issue to discuss and enforce.

The bill amends the provisions of the Freedom of Information (Scotland) Act 2002 relating to various exemptions. The debate has concentrated on the royal exemption, which is probably one of the most contentious issues. As Kenny Gibson mentioned, Kevin Dunion, the previous Scottish Information Commissioner, said:

“Absolute exemptions are not regarded as good practice, and I consider this measure to be unnecessary”.

Although my gut instinct is to go with the idea, I understand that, as the head of state, the Queen is probably—as Bruce Crawford said—in a similar situation to the President of the Republic of Ireland, who is not subject to the FOI regime over there. It is not quite as black and white as it is for everyone else.

Kenneth Gibson: The exemption applies not just to the monarch but to the heir to the throne and the second in line to the throne, so I do not think that there is an Irish equivalent.

George Adam: That is a whole different debate. Having said that, I agree that the situation is complex and that there are things that we need to look at. I welcome the flexibility that the cabinet
secretary offered in her opening remarks. The Government has taken very seriously the committee’s report, as today’s debate shows.

I agree with the cabinet secretary that the reduction in the lifespan for historical records needs to be a lot better, but I can understand how difficulties can arise.

From my working life—my time as a local authority councillor—I would say that an extension to coverage is required to include some of the public organisations that have been mentioned, such as various ALEOs. My council did not have an ALEO, but I am only too aware that, where an agency has opted out of council control, in effect it may be required to give information under FOI one day but not the next. Obviously, that causes problems with regard to transparency. I also have concerns about housing associations, which I think should be covered by the legislation. We need clarity in all forms of public life.

A particular worry for me relates to PPP/PFI contracts, which were mentioned by Mr Gray and others. There are situations in which we should have an opportunity to see exactly what has happened, but we have to balance that against the need to ensure commercial confidentiality. As someone who was a councillor member of various boards, I am only too aware how situations could arise in which the information that could be given on a procurement contract related only to the alleged points system; that was quite confusing, so people could not understand how it happened that someone was given the contract. That can cause difficulties.

Iain Gray: Does Mr Adam support my view that the outline business case for the sick kids hospital in Edinburgh should be released so that we can see the affordability and the basis of that project?

George Adam: As I said earlier, there needs to be a balance in everything. I do not know all the information on that project, and I would need to know more about what has happened there before I committed myself on the record.

On the issue of other organisations that could perhaps be brought under the bill, my council was a constituent member of Strathclyde Partnership for Transport, but as a councillor I could not get information on how much we got for our £3 million—money that was top-sliced and taken away every single year—even when the issue was brought before Renfrewshire Council’s scrutiny board.

I welcome today’s debate and the generally positive way in which it has been conducted. This is a serious and complex issue and, as such, there are no easy fixes. We need only remember that Tony Blair believed in FOI in opposition but then believed that it was an act of complete stupidity that undermined serious government. Such serious and complex issues need to be debated in an open and transparent manner. I look forward to stage 2 and to seeing how the bill develops.

The Deputy Presiding Officer: I am afraid that, from now on, I can give members only four minutes.

16:23

Alison Johnstone (Lothian) (Green): It has been 10 years since the Parliament passed our freedom of information laws, and the world in which Government and local authorities could withhold information at will is long gone. It is important that we acknowledge our significant progress on openness, but FOI also has its limitations. As others have said, in some places there is still an unnecessary culture of secrecy, even when there is nothing to hide.

The bill will make some welcome changes to the law, such as the ability to vary the lifespan of historical records and the changes to timescales for prosecution, which also make sense given that the crimes might go unknown for a significant time. Less welcome is the inclusion of an absolute exemption for royalty. I agree with the Finance Committee that that proposal should be removed at stage 2 and I support its invitation to the Government to do that. The current set-up, in which the information can be released if it is in the public’s interest, seems to me to be the correct way to have the law structured in a modern democracy.

The Information Commissioner has argued strongly against the practice of absolute exemption under FOI, and others have made the point that even if the legislation goes through as introduced, it will not cover environmental information—if the letter to the Queen is about the environment, it will not be exempt; if it is about anything else it will be—and that is inconsistent. As Gavin Brown acknowledged, that does not assist public understanding.

The fact that section 5 powers to safeguard people’s right to know by designating new public bodies have not been used as we might have expected them to be has also dominated discussions. Some new bodies have been covered, such as the Scottish Human Rights Commission, which has FOI in its primary legislation, but in many cases the creation of new bodies, such as arm’s-length organisations, and the privatisation of public services have led to an erosion of people’s right to know.

The Information Commissioner stated:

“Since FOISA came into force in 2005, 15,000 households have lost FOI rights as a result of the transfer
of local authority housing stock.”—[Official Report, Finance Committee, 12 September 2012; c 1510.]

That sort of change is quite natural over 10 years, but section 5 designations are designed to address that. As discussed, the Campaign for Freedom of Information in Scotland is calling for an amendment at stage 2 to require ministers to have regard to public views when consulting on new section 5 designations, and not just the views of those organisations affected. It is also seeking an amendment to create a recurring requirement for Parliament to consider any new bodies that are created, every year or two years, to ensure that we do not see another decade of little action.

I welcome the cabinet secretary’s commitment to introduce regular review at stage 2, and to address the issue of public consultation. Willie Rennie’s comments about automatic application are certainly worthy of consideration.

It feels as though now is the time to extend FOI’s coverage. The public desire is there: more than 80 per cent of people surveyed want FOI to be extended to cover new public services, and a vast 91 per cent value the right to know.

I welcome the SCVO’s clear statement this week that it supports the extension of FOI to include all public services, whether they are delivered by public, private or third sector organisations, and its views that the public have a right to know all aspects of how public services are funded and run. Like Willie Rennie—and contrary to Bruce Crawford’s view—I do not believe that economic circumstances should curtail access to, and the safeguarding of, the right to know. We should have the right to information from a company that is building a local school or about a regional hospital that is being built under PPP; we should be able to scrutinise the Convention of Scottish Local Authorities; and we should be able to FOI the companies that are running Scotland’s privately managed prisons, Serco and Sodexo. Of late, we have even privatised the maintenance of our nuclear weapons at Faslane and Coulport—such contracts should remain transparent.

16:27

Chic Brodie (South Scotland) (SNP): I planned to support the motion with one caveat, but the cabinet secretary’s opening speech has removed it. Freedom of information legislation—or amendments to it—works only if it faithfully confers on the public the right to ask for and receive, timeously, data held by public bodies.

Evolution in the political practice and landscape, in our media and, indeed, in technology, demand that our information laws and amendments thereto secure the right of access by our citizens to relevant public information. Important selective exemptions—but not too many—from disclosure should, of course, protect only essential Government functions, including international diplomacy, defence, personal information or specific confidential advice. I support Bruce Crawford’s earlier comments about commercial information, which would require a much longer and detailed debate.

In subscribing to the principles of the bill, it is important that we note that only a small percentage of Scots filed FOI requests last year. Notwithstanding that, it is pertinent that we review and amend an act that is now in its 10th year. It is appropriate to consider changes to the terms of the longevity of a particular historical record, as it is to pursue those who do not provide data by destroying or concealing it; that practice is unacceptable.

I had been motivated to support the general argument and thrust of the Finance Committee’s observations about creating too many exemptions, even—and particularly—in the case of the Queen and heirs to the throne, but that might defeat the general principles inherent in the original act.

I refer again to the scope and range of FOI requests, which I mentioned earlier. In particular, that applies to royal communications, which have been barely requested, notwithstanding the current request regarding the heir to the throne. Therefore, I welcome the cabinet secretary’s commitment to consider the matter appropriately and the fact that the Government will try to seek convergence with the Westminster Government on it for reasons that other members have covered.

Having recently made an FOI request for data that is some 30 years old and not yet having succeeded in getting it, my initial reaction to the amendment to the power to vary periods for historical records under section 57 of the 2002 act was to oppose the change. However, I endorse the Government’s intention to amend the lifespan of time-limited exemptions but secure flexibility in certain cases—including, I hope, mine.

I also support the Government’s position on the time limit for proceedings that are brought in cases in which the destruction of data thwarts the seeking of information or the disclosure of data. We need a change in our culture and in our approach to information.

Given all the above, the amendments to the legislation that are proposed in the bill take us even closer to the objective that we all seek: a much more open society.

16:31

Jean Urquhart (Highlands and Islands) (Ind): As a member of the Finance Committee, I am
pleased to have the opportunity to comment on the bill at stage 1. I echo the comments of my fellow Finance Committee members in agreeing with the general principles of the bill but with caveats.

The two provisions that have gained the most attention and that the Finance Committee’s report is most vocal in questioning are the absolute exemption that is proposed for communication with some members of the royal family and the extension of coverage to organisations that receive public money.

Currently, a public interest case must be made for the disclosure of communication between certain members of the royal household and the Government, and I cannot see how removing a public interest test is itself in the public interest. In addition, the committee heard during its evidence taking that the absolute exemption would, in fact, create a new anomaly, due to the fact that the EU directive on environmental information contains no specific exemptions for communications with the royal family.

As the equivalent measure that was introduced at Westminster was rushed through that Parliament in 2010 with little scrutiny, perhaps the rest of the UK should bring its legislation into line with Scotland’s, rather than Scotland regressing to come into line with the rest of the UK.

An equally pressing concern relates to how the public are able to scrutinise private companies that are awarded public contracts. It is vital that the public be able to find out how and where their money is being spent. Otherwise, we risk FOI avoidance sitting alongside tax avoidance in being a legal, yet ethically wrong, practice.

I acknowledge that the Government has said that it intends to examine extending coverage at some point, but I consider it a matter of urgency that arm’s-length external organisations—of which there are roughly 130—be designated under the existing FOI legislation. I agree with Willie Rennie’s suggestion that we are worse off than we were 10 years ago as a result of the creation of the ALEOs removing an enormous amount of public expenditure into organisations that are exempt.

The public have a right to be able to follow the public pound, and I suggest that, at some point, somewhere, there should be a recommendation that any organisation that picks up public money should offer up the information at its own hand. Because we have to challenge and go through the freedom of information legislation to get information, there is an assumption that something dodgy is going on and that the companies have something to hide. However, if the information was put on websites or made available to the public more easily and, I hesitate to say, at less cost to everybody concerned, there would be less need for the legislation.

I back the general principles of the bill but, once again, state my preference for changes to be made when it returns to the Parliament for its second stage.

The Deputy Presiding Officer (John Scott): We move to the closing speeches.

16:35

Gavin Brown: We have had a pretty good debate, which has focused mainly on the royal exemption and the extension of coverage. There has been a lighter-touch examination of sections 2 to 5, but that was to be expected, and it reflects the Finance Committee’s report to the Parliament.

As far as the royal exemption is concerned, although the bill will be agreed to at stage 1 unanimously, or almost unanimously, it would be interesting to know which way a vote on section 1 alone would go. I have tried to do a quick calculation based on the views of the members who are present, but I simply do not know which way such a vote would go, were it to be held today.

It is worth reiterating that there were mixed views on section 1 in the written evidence that the committee received. The position was not as one sided as it might appear. Although absolute exemptions are not the norm, as the cabinet secretary said, if they are to be provided, they ought to be limited and narrowly defined. One could argue that section 1 is pretty limited and exceptionally narrowly defined.

I acknowledge, in particular, Bruce Crawford’s contribution. I fear that he left the Finance Committee far too soon; he certainly left it a week too soon for my liking.

Jamie Hepburn: Could the member explain what he means by that?

Gavin Brown: We had cotton replaced by silk.

A point that was made on the royal exemption is that it was rushed through at Westminster in 2010 because of the impending general election. There is a degree of truth in that—from the point of view of timelines, the progress of the relevant legislation was faster than one would normally expect.

However, it is worth reflecting on the fact that the amendments that brought in the royal exemption were lodged by Jack Straw, who was the minister who brought through the original freedom of information legislation not long after Tony Blair became Prime Minister. During
consideration of the Constitutional Reform and Governance Bill, Mr Straw said:

“There were lacunae—I confess that I am the Minister responsible—not in the intention of the Freedom of Information Act, but in its drafting that have raised some uncertainties about the protection of the monarchy in relation to national records.”—[Official Report, House of Commons, 2 March 2010; Vol 506, c 830.]

The fact that there were gaps in the original legislation probably led to some of the court cases that Iain Gray talked about. The purpose of the bill—as with the Constitutional Reform and Governance Act 2010—is to ensure that there are no gaps and that the law is absolutely clear.

The other big issue that has been discussed is the extension of the coverage of freedom of information. It has rightly been pointed out that the power to extend coverage already exists under section 5 of the 2002 act—the current Government has it at its disposal, just as the previous Executive did. The fact that it has not been used does not mean that it is not fit for purpose or that it does not exist, as some have argued; it is simply the case that it has not been used since it became available.

I would be slightly uncomfortable about having a list of bodies to which coverage should be extended on the face of the bill; I am not sure that that would be a good way to proceed. As far as I am aware, that is not something that has happened with freedom of information legislation in this country or anywhere else. I think that the right approach is to get the bill through Parliament and then, quite quickly, to look carefully at who ought to be covered and who ought not to be covered.

Willie Rennie: I am not sure that anybody suggests that the bill should contain a list of organisations. I talked about a purpose and about public authorities being able, when creating a new piece of legislation, to determine that it should be included in the regime. I did not suggest including a list in the bill.

Gavin Brown: My remarks were not specifically addressed to Mr Rennie. However, from the written and oral evidence to the committee, I thought that some people felt that a list of bodies should be in the bill. In any event, I do not think that the bill should contain a list.

I strongly welcome the Deputy First Minister’s comments. She did not say just that amendments might be lodged; she positively indicated that amendments would be lodged on who should be consulted about the bodies that should be covered and on having a regular review, so that the power, which has existed for some time, is used continuously. The more specific we can be about the timeline, the better it will be for the passage of the bill at stages 2 and 3.

I am happy to leave it at that. I repeat that we will support the bill at stage 1.

16:41

James Kelly (Rutherglen) (Lab): I welcome the opportunity to close the debate on behalf of the Scottish Labour Party, which will at 5 o’clock support the bill’s general principles at stage 1.

I thank the Finance Committee for its detailed work in considering the bill. There is no doubt that there has been criticism recently of how some committees have gone about their work, but none of that criticism could be levelled at the Finance Committee for its work on the bill. It is clear not only from the report but from the thoughtful speeches that many committee members have made that they took their job seriously and interrogated the bill robustly.

As Michael McMahon said, there is no doubt that the bill makes some pretty minor technical changes. With the exception of the royal exemption, the basic points of the bill are the subject of broad agreement. Nobody will disagree with proposals to tidy provisions on historical records and the lifespan of exemptions. As Jamie Hepburn pointed out, it is logical for the six-month period in relation to offences to start when evidence is amassed rather than when an offence was committed. Such changes are logical and I do not think that people will disagree with them.

Willie Rennie and Iain Gray pointed out an issue with the current legislation. There is no doubt that some organisations and public bodies are getting expert at dealing with FOI requests and can release the minimum amount into the public domain. A great concern is the example that Iain Gray gave of a contract document in which the financial information was redacted. That does not represent the intention of the original legislation.

A number of members, including Paul Martin, have argued that the bill is at this stage a missed opportunity. We should look at extending the legislation to other organisations and to ALEOs. As Jean Urquhart said, there are now 130 ALEOs. As John Mason demonstrated, the nature of the public sector has changed quite a bit in recent years, and the FOI legislation must change to keep up with that.

Such points are important, and I note that the Deputy First Minister gave a commitment to look at them at stage 2 and said that she would want to see whether amendments would make the bill more fit for purpose.

The issue that has caused most discussion in the debate has been the royal exemption. I suppose that we must wonder why the Government adopted a royal exemption at stage
1. I think that it has viewed the matter through the prism of the independence referendum. From what the SNP has done over the past year, it is quite clear that it has tried to adopt a more cautious approach in order not to scare the voters. It has told them that Scotland would keep the pound and would still be wedded to the Bank of England. Alex Neil even said that we would still be British even if we voted to be independent.

The SNP has adopted this proposal. Who would ever have thought it? The Deputy First Minister is cuddling up to the British establishment. The SNP thought that adopting a more cautious approach might appeal more to the voters, but it is clear from the speeches by some of its back benchers that that is not a uniform view in the SNP. As Jean Urquhart pointed out, the public interest test will remain in the legislation, and I think that that will give adequate protection to the royal family.

**Jamie Hepburn:** When Gordon Brown instituted his absolute exemption for the royal family, did he do so for electoral gain?

**James Kelly:** It is good to see that Mr Hepburn has joined the Finance Committee. It is clear that he has been put on that committee to join forces with some of the other members of the awkward squad on it and to give some difficulty to the SNP.

As Iain Gray pointed out, one of the fundamental problems that undermine the SNP’s credibility over the bill is the clandestine approach that it has recently adopted. Some £100,000 has been wasted in challenging the release under FOI of information relating to plans for getting rid of the council tax and replacing it with a local income tax. That was a waste of public money. In recent weeks, there has been the controversy over the challenge to the release of EU legal advice. That advice was non-existent, but the Government went to court and wasted £12,000 of taxpayers’ money on that challenge. There was no need for that. That undermines the Government’s credibility. We saw the same again today with the First Minister— I see that he has come to the chamber—not being accurate with his figures.

Questions remain for the Government about its approach to transparency and openness that need to be addressed if it is going to retain the trust of the public.

16:48

**Nicola Sturgeon:** I was going to say that the debate has been good, but it was good until about the previous two minutes. Paul Martin made a good speech, and there were excellent speeches by Kenny Gibson, Gavin Brown, Jamie Hepburn, Bruce Crawford, Malcolm Chisholm, Rod Campbell, Chic Brodie, George Adam and other members.

Michael McMahon made some good points, but he probably got his tone a bit wrong. If he had listened to my opening remarks, he might have found that I was more in agreement with him than he might have suggested in his speech, and he might have decided that the angry tone was not the correct one. There was something quite ironic in listening to him lambasting the Government because ALEOs are not under the ambit of freedom of information. I recall that it was Labour-controlled Glasgow City Council that was the pioneer in setting up those arm’s-length organisations in the first place.

Likewise, Iain Gray made some good points, but at times he was at serious risk of losing those points among the usual overblown spleen venting about the SNP that has become the hallmark of those on the Labour benches.

**Iain Gray:** Will the cabinet secretary give way?

**Nicola Sturgeon:** For some more spleen venting, yes.

**Iain Gray:** As I said to John Mason, it is a simple fact that only 50 per cent of FOI requests to the Scottish Government are responded to in full, whereas some local authorities achieve 92 per cent. Surely that simple fact must say something about the culture in the Scottish Government.

**Nicola Sturgeon:** It is also a fact that a significant proportion of all freedom of information requests that come to the Scottish Government come from Labour members or those who are associated with them.

I turn to a serious point. Willie Rennie said that the public sector in general in Scotland is developing a culture of secrecy. I do not agree. One can believe, as I do, that freedom of information has been eroded to an extent because of the change of structure through organisations such as ALEOs without coming to the conclusion that that is somehow part of a culture of secrecy. However, if Willie Rennie is right, it is incumbent on us all as politicians in the Parliament to consider our role in that and in the solution. Increasingly, on all sides, freedom of information is being used not as a legitimate attempt to get information but as a weapon in the broader political war. We must all reflect on that if we want to change the culture to which Willie Rennie referred.

I will address the two key themes of the debate. One has been the royal exemption. Access to information laws, whether ours or those elsewhere, commonly contain protection for a head of state, whether by exclusion or exemption, although I accept that not all countries do that. I have listened carefully to the comments and, as I said earlier, I will carefully consider the Finance Committee’s report. First and foremost, freedom of
information is devolved legislative policy that lies solely in the hands of the Parliament, so our FOI law should reflect our needs and requirements. Kenny Gibson listed many of those who think that the proposed amendment to the legislation is too broad in scope. I am sympathetic to them, and I will give serious consideration to the committee’s report and to the comments that have been made in the debate, with a view to lodging amendments at stage 2.

Interestingly, a couple of members referred to the fact that section 1, if it was agreed to, would create an anomaly with environmental regulations. I accept that, but, as things stand, there are many anomalies between freedom of information law and environmental regulations. It is perhaps ironic, given that we are talking about a proposed absolute exemption, that one way of dealing with the anomalies would be to have an absolute exemption under freedom of information legislation for requests for environmental information, thereby ensuring that such requests were always dealt with under environmental regulations. Who knows? Perhaps there is a back bencher will want to lodge an amendment to that effect at stage 2 to deal with the anomalies between the two regimes.

The extension of coverage has been central to the debate. It is incorrect to state that coverage remains as it was when the 2002 act came into force, and I am sympathetic to those who are concerned about the lack of use of the order-making powers in section 5 of the act. I do not believe that the power is unfit for purpose, but I am persuaded that there is not enough obligation on ministers to regularly assess its use or to ensure that sufficient breadth of opinion is taken into consideration when consulting on that. As I said earlier, we will introduce amendments to section 5 of the act before stage 2. We will build in a regular review, as the Scottish Information Commissioner has proposed.

As I have repeated on several occasions, we will return to the issue of extension once the bill has completed its parliamentary stages. I look forward to engaging further with the Finance Committee in setting out a timeline for that work. John Mason was absolutely correct when he said that there are two categories. First, there are functions that were previously subject to FOI but, because of outsourcing, are no longer within its ambit. Secondly, there are organisations that would come within the scope for the first time. I believe that, for some organisations—culture and sport ALEOs being the obvious example—the argument in favour of inclusion is clear cut, but other cases are more open to debate. We should have a debate and a staged approach that ensures that we do not hold up action where it is necessary and required while we consider our approach in other areas.

**Willie Rennie:** The cabinet secretary implied that she is not in favour of considering an approach whereby there is a pre-ruling on FOI by public authorities in relation to new organisations that are being considered or created. Is she ruling that approach out or will she consider it in future?

**Nicola Sturgeon:** I thought that I made it clear when I responded to Willie Rennie’s intervention during my opening speech that I am happy to consider the approach, either in the context of the bill or, if that cannot or should not be done, in further work that we take forward. I am more than happy to give open consideration to the matter.

This has been a good debate. There has been a considerable degree of interest and important issues have been raised. I look forward to continuing to engage with members of all parties and with the committee as we go through the further stages of the bill.
Dear Kenny

Freedom of Information (Amendment) (Scotland) Bill – Stage 1 Report

I am writing in response to the Finance Committee’s Stage 1 Report on the Freedom of Information (Amendment) (Scotland) Bill – and in light of the Scottish Parliament’s stage 1 debate. As I said at the time, I felt the debate raised important issues and I look forward to continuing to engage with members as we go through the further stages of the Bill.

I would like to thank the Committee for its careful consideration of the Bill. I was very pleased that the Committee recognised the broad overall support for the Bill and its intentions and recommended to the Parliament that the general principles of the Bill be agreed to.

The Committee’s report (as did the debate) focused on two key issues, one directly related to the contents of the Bill - the ‘royal’ exemption, the other not covered by the Bill but of more far reaching significance - extension of coverage. I would like to respond in detail to both these specific issues. I will also provide some more detail concerning the recently published updated cost report – the issue of costs having arisen in the stage 1 committee sessions.

Finally, as indicated in the debate, I will provide further information on some of the government amendments I intend to lodge at stage 2.

Section 1 (royal exemption)

I note that the Committee has recommended that section 1 of the Bill be removed.

Before setting out my intentions regarding this provision I think it is important to make clear why we have proposed this amendment. Whatever the future constitutional arrangements of Scotland, it is the view of the Scottish Government that we will continue to live in a...
constitutional monarchy with a shared head of state. Relations with the Monarch - as with any head of state - will continue to be critical.

I also consider it essential in Scotland’s interests to ensure the political neutrality of the monarchy by safeguarding the confidentiality of communications between Her Majesty and Scottish public authorities. Indeed, many access to information regimes around the world contain specific provision for the Head of State.

However, having considered the evidence put forward during consultation and in committee, and having assessed the use of the section 41(a) exemption in Scotland, I intend to bring forward an amendment at Stage 2 to remove section 1 of the Bill.

In reaching this conclusion I have considered the experience to date of the application of the section 41(a) exemption, noting both that it has been applied in a very limited number of instances and is generally fully upheld (including in terms of the public interest) in appeals to the Scottish Information Commissioner.

I would emphasise that my decision to bring forward an amendment to remove this provision from the Bill in no way indicates a change in policy to the handling of requests for information falling within the scope of this exemption. For the reasons set out above, we remain firmly of the view that communications between Her Majesty and other members of the Royal Family with Scottish Ministers – and other public authorities - should be handled sensitively and confidentially, with appropriate application of the exemptions contained within the Freedom of Information Act. However, I am now persuaded that this can be provided for under existing arrangements which include consideration of the public interest.

I would also reiterate that, subject to other amendments in the Bill, our intention is to revise the lifespan of the section 41(a) exemption. As previously announced, our objective is to reduce the lifespan from 30 to 20 years, or 5 years from the date of death of the relevant member of the Royal Family, whichever is the later. While in some instances this in effect increases the current lifespan of the exemption, critically, its application remains subject to the public interest. I would also note that the order is subject to affirmative Parliamentary procedure.

**Extension of coverage**

I turn now to the second area of contention, though one not directly related to the Amendment Bill. As the Committee report notes, the issue of extending coverage of the Freedom of Information (Scotland) Act 2002 was widely raised during the stage 1 inquiry (as well as in a number of consultation responses).

As the report also notes, the issue of extension has been the subject of a number of consultations by previous and current administrations. However, as yet, the section 5 order-making power has not been used. I do not though share the view that the section is not fit for purpose simply because Scottish Ministers of successive Administrations have not used the relevant order-making power. And, as noted in the debate, schedule 1 of the Act has been updated on many occasions under both primary and secondary legislation to ensure it remains as up-to-date as possible given the changing public sector landscape.

We should also not disregard the many other avenues available to acquire information – both from bodies subject to the legislation and from those not covered. There is also the increasing expectation and indeed requirement by means of a range of regulation and legislation that information will be made available in the public domain. However, as I have
previously indicated, I am very sympathetic to those who consider that freedom of
information legislation has not adapted as quickly and as flexibly as was initially thought
would be the case.

The committee has invited me to provide details and timings of how the Scottish Government
intends to take forward debate on extension of coverage, clarifying what options are being
considered and the possibility of stage 2 amendments. I am happy to do so – and repeat my
offer to return to the committee in due course to further discuss extension.

As I indicated in the stage 1 debate I intend to set out my intentions regarding extension
before the conclusion of the Bill’s progress through the Parliament. This is earlier than
previously indicated when the Scottish Government envisaged a more sequential rather than
overlapping process.

The issues around extension are complex. However, while risking oversimplification, I would
reiterate my agreement with the comments of the Deputy Convenor who identified two
distinct categories of organisation central to the extension question 1) those where rights
have been lost through, for example, outsourcing and 2) those for whom coverage would be
completely new. In the first category fall various arms-length organisations and I suggest
this is certainly an area where early progress could be made. Longer-term I would envisage
a staged approach to moves towards greater extension allowing time for appropriate
analysis of those functions and services undertaken by non public organisations – as
required by the Act.

confirm that I intend to set out an indication of intentions regarding extension of coverage at
stage 3 of the Bill.

Other Scottish Government Stage 2 amendments

return now to other amendments I intend bringing forward at stage 2. I have been guided by
the proposals put forward by the Scottish Information Commissioner – to whom I am grateful
and can confirm to the Committee that I intend to bring forward amendments incorporating
the duty to regularly report on the use or otherwise by Scottish Ministers of the section 5
powers as well as to widen the scope of consultation beyond those directly affected by the
proposed order.

Indeed, in proposing a requirement to report to the Scottish Parliament I am going beyond
the suggestion of building in regular review of the section 5 power. Nor do I intend this
reporting period to operate as a default trigger for a review of the power to extend. The
section 5 order-making power can be used at any time (subject to appropriate consultation)
and my intention to introduce a regular reporting period should not be seen as a move away
from the option of bringing forward an order at any time.

Costs of request handling

Finally, the issue of costs associated with request handling was raised in the Committee
session with the Bill team. My officials subsequently provided the Committee with a copy of
the cost report published in 2010 which provided data on the costs responding to request,
reviews and appeals. Officials also indicated that an updated exercise had been undertaken
and that they anticipated publishing a report of the findings prior to the stage 1 debate.

As the Committee is aware the latest report was published on 14 November 2012 and
contained figures based on research undertaken earlier in 2012. The 'headline' figure from
survey data for responding to a request has reduced very slightly – from £236 to £231. While there is greater fluctuation in figures for reviews and appeals, as significantly fewer reviews and appeals are handled the data is not as statistically robust.

As in the previous report the survey data has been annualised so that an overall figure can be estimated for all requests, reviews and appeals handled over the course of a year. The earlier report produced an annualised total of £552,486 (based on 1802 requests, 147 reviews and 72 appeals). Using 2012 data, the annualised total for 2011 is £525,192 (based on 1656 requests, 123 reviews and 86 appeals).

The new report provides greater detail on the allocation of time spent by officials in responding to requests (and also reviews). This data suggests that for both these stages most time is spent in locating and retrieving information as well as in considering how to respond – the ‘thinking time’. Officials will consider whether improvements in record keeping as well as in training and guidance can reduce the time spent on these elements in the interests of reducing overall organisational costs.

Indications are that end of year totals for requests, reviews and appeals in 2012 will all be higher than in 2011.

Conclusion

I hope that these remarks are helpful in your further consideration of the Bill.

The Stage 1 debate showed strong cross-party support for the principles of the Bill, but with concerns about two distinct issues. I hope that with the amendments I propose to bring forward at Stage 2 we will reach a satisfactory resolution to these concerns.

I am copying this letter to the Clerk of the Finance Committee.

NICOLA STURGEON
Dear Kenneth,

Freedom of Information (Amendment) (Scotland) Bill: Stage 2

I refer to previous correspondence, and the proposed amendments to the Freedom of Information (Amendment) (Scotland) Bill at stage 2 (the Amendment Bill).

Generally, I am supportive of the amendments proposed in the Amendment Bill but have concerns in two specific areas, section 5 (inc. 7A), and section 59 (inc. 1ZA and 1ZB). In summary, my concerns are:

1. Around section 5 that the consultation, particularly who is consulted, is too broadly stated and would benefit from greater clarity, and that the timescales proposed for reporting to Parliament, particularly in relation to the first report, are too long.

2. Around section 59, specifically in relation to the proposed 1ZB, that both the word “event” in 1ZB(a), and the general wording of 1ZA(b) are ambiguous.

Attached to this letter is a briefing note in which I have set out a response to the whole amendment bill. For ease of reference I have presented these by section as set out in the Amendment Bill, indicating which sections of FOISA would be impacted.

The note gives further details about my two general areas of concern and the issues I believe it would be helpful for the Committee to address in their deliberations. It also sets out those areas of the Amendment Bill, where my views remain unchanged from stage 1.
As a final point, the current draft Amendment Bill, no longer includes the stage 1 proposal that came to be referred to as “The Royal Exemption”. This is something I support and welcome as it means that in practice that section 41(a) of FOISA will remain subject to the public interest test.

If you have any questions about the points made in the attached note, please contact us on 01334 464610.

Yours sincerely

Rosemary Agnew
Scottish Information Commissioner
Original section 1, amending Section 2 of FOISA

The original Amendment Bill proposed a change to section 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), to make section 41(a) an absolute exemption, removing the public interest test – the proposal that came to be referred to as “The Royal Exemption”. Following the recommendation of the Committee in their stage 1 report, this has been removed by Ministers. I welcome this.

New section 1 on designation, amending Section 5 and inserting section 7A of FOISA

- 5 - Further power to designate Scottish public authorities
I support the proposals to introduce a requirement for wider consultation at section 5(5)(b) of FOISA. However, I am concerned that the amendment proposed by Ministers lacks precision, in that it fails to indicate the types of persons or bodies who should be included in such a consultation. As I set out in my letter to the Committee of 28 September, a weakness of the current provision is that it does not require consultation with the users of public services whose rights may be curtailed as a result of changes in public service delivery. I would therefore urge the Committee to consider how the current proposed wording will provide the necessary safeguards to ensure the general public, and those who represent them, will be appropriately represented in any future consultation.

- 7A - Reports on section 5 power (to be inserted after section 7)
I support the proposal to introduce mandatory reporting to Parliament on the exercise (or otherwise) of the section 5 power. However, given that the section 5 power has now lain dormant for ten years, I would question whether it is appropriate to delay the laying of an initial report for a further three and a half years, until June 2016. The Committee may want to consider whether it may be appropriate for this timescale to be brought forward, in order to provide both the public and the Parliament with a speedier reassurance that FOI rights are being protected - and if not why not?

The Committee may also wish to consider the rationale behind the proposal to leave a period of three years between parliamentary reports. I would suggest that it may be desirable to consider whether reports can be laid more frequently (e.g. every two years). This would help ensure that, where rights are lost through e.g. the outsourcing of public services or the transfer of housing stock, service users or tenants are not faced with a lengthy delay before this loss of rights is remedied. It would also ensure more regular Parliamentary scrutiny.
Sections 2 and 5, amending sections 18 and 65 of FOISA

- 18 - Further provision as respects responses to request
- 65 - Offence of altering etc. records with intent to prevent disclosure and inserting after s65, 65A Time limit for proceedings

I support the proposed amendments and have no additional comments to make to those made at stage 1.

Section 3, amending section 25 of FOISA

- 25 - Information otherwise accessible

The proposed wording appears to give the clarity desired and I support the amendment.

Section 4, amending sections 57, 58, 59 and 72 of FOISA by the insertion of sections (1ZA) and (1ZB)

- 57 - The expression “historical record”
- 58 - Falling away of exemptions with time
- 59 - Power to vary periods mentioned in sections 57 and 58
- 72 - Orders and regulations

Having reviewed this amendment in detail, I am concerned about its potential impact on the lifespan of exemptions. In particular, I am concerned about unforeseen consequences that may arise in relation to the lifespan of the exemption under section 41(a) of FOISA (Communications with Her Majesty, etc.).

Section 59(1ZA) gives Ministers the power to modify any rule by which a record becomes a historical record. I am unclear as to the purpose of this amendment and what it may achieve over and above the existing provision in section 59(1). It strikes me that the key factor which qualifies a record as “historical” will be its age. The Committee may wish to consider what “rules” beyond this factor that Ministers consider might be relevant here and whether the ability to vary them would support or undermine the aims of FOISA.

Section 59(1ZB)(a) looks to the section 41(a) exemption and gives examples of the types of rules the Ministers may make for that exemption. In relation to section 59(1ZB)(a), Ministers suggest they may want to make regulations which will allow the Royal Communications exemption to fly-off after a period of less than the current 30 years or after no more than 30 years after an “event”. There is no further definition provided in relation to what is meant by an “event”.

I am extremely concerned about this provision, and the lack of definition of an “event”. As drafted, a relevant event could be one which happens many years in the future (e.g. such as the coronation or death of a future monarch), which would have the effect of substantially lengthening the period during which the exemption can be applied. In addition, the term “event” can be defined so widely as to be almost meaningless. The only thing that is clear from section 59(1ZB)(a)(ii) is that it doesn’t include the creation of a record. The current proposed amendment has the potential to conflict with the Bill’s intent to reduce the timespan for the falling away of exemptions.
It is clear that any future rules would be required to go through the affirmative resolution procedure (as set out in the proposed amendment to section 72(2)(b)). It is also clear from the amendment withdrawn by the Deputy First Minister that the section 41(a) exemption will remain subject to the public interest test.

Nevertheless, I would suggest that the Committee ensure that the section 59(1ZB)(a) provision is fully scrutinised at stage 2, in order to ensure that the circumstances in which it might be applied, including any potential unintended consequences in relation to the lifespan of exemptions, are fully understood.
Freedom of Information (Amendment) (Scotland) Bill

Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 8 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Before section 1

Elaine Murray

8 Before section 1, insert—

<Purposes of FOI Act

Before section 1 of the FOI Act there is inserted—

“A1 Purposes

The purposes of this Act are, consistent with the Scottish Parliament’s founding principles of openness, accessibility and accountability—

(a) to increase progressively the availability of information held by Scottish public authorities in order—

(i) to enable more effective public participation in the making and administration of laws and policies,

(ii) to promote the accountability of Scottish public authorities, and

(iii) to facilitate the informed discussion of public affairs,

and, in doing so, enhance respect for the law and promote good government, and

(b) to provide an enforceable right of access to information held by Scottish public authorities or persons providing services for them in accordance with the principle that information should be available to any person requesting it.”.

Section 1

Nicola Sturgeon

Supported by: Elaine Murray

1 Leave out section 1
After section 1

Nicola Sturgeon

2* After section 1, insert—

<Designation of authorities

(1) In section 5 (further power to designate Scottish public authorities) of the FOI Act, for subsection (5) there is substituted—

“(5) Before making an order under subsection (1), the Scottish Ministers must—

(a) consult—

(i) every person to whom the order relates, or

(ii) persons appearing to them to represent such persons, and

(b) also consult such other persons as they consider appropriate.”.

(2) After section 7 of the FOI Act there is inserted—

“7A Reports on section 5 power

(1) In accordance with this section, the Scottish Ministers must lay before the Parliament reports about the exercise of the section 5 power.

(2) The first report is to be laid on or before 30 June 2016.

(3) Each subsequent report is to be laid no later than 3 years after the date on which the previous report is laid.

(4) A report must—

(a) state whether the section 5 power has been exercised during the reporting period, and

(b) as the case may be—

(i) explain how the power has been exercised during the reporting period (and why), or

(ii) give the reason for leaving the power unexercised during the reporting period.

(5) A report may—

(a) summarise any response to a consultation carried out during the reporting period as regards the exercise of the section 5 power,

(b) indicate any intention to exercise the power in the future,

(c) include such additional information as the Scottish Ministers consider appropriate.

(6) In this section—

“reporting period” means—

(a) in the case of the first report, period of at least 3 years preceding the date on which the first report is laid,
(b) in the case of a subsequent report, period of time from the date on which the previous report is laid until the date on which the subsequent report is laid,

“section 5 power” means order-making power conferred by section 5(1).”.

Elaine Murray

2A As an amendment to amendment 2, line 9, leave out from <such> to end of line and insert <members of the public and other interested parties.”>.

Elaine Murray

2B As an amendment to amendment 2, line 9, at end insert—

<( ) The Scottish Ministers must have due regard to any responses made to the consultation under subsection (5) in deciding how to proceed in relation to the order.”>.

Elaine Murray

2C As an amendment to amendment 2, line 14, leave out <2016> and insert <2013>

Elaine Murray

2D As an amendment to amendment 2, line 15, leave out <3 years> and insert <12 months>

Elaine Murray

2E As an amendment to amendment 2, line 25, leave out from <may> to end of line 27 and insert <must also>—

(a) state whether any consultation has been carried out during the reporting period as regards the exercise of the section 5 power,

(b) summarise any responses made to such a consultation, and

(c) explain how any such responses influenced the decision on whether to exercise the section 5 power.

( ) A report may also—>

Elaine Murray

2F As an amendment to amendment 2, line 33, leave out <3 years> and insert <12 months>

Elaine Murray

9 After section 1, insert—

<Duty to exercise power to designate Scottish public authorities>

After section 7 of the FOI Act there is inserted—

“7A Duty to exercise power to designate Scottish public authorities

(1) The Scottish Ministers must—
(a) lay before the Scottish Parliament reports setting out proposals for the exercise of the order-making power conferred by section 5(1), and
(b) no later than 20 working days (excluding days when the Parliament is in recess) after laying a report under paragraph (a), lay (under section 72(2)) a draft of a statutory instrument containing an order implementing those proposals.

(2) The first report under subsection (1) must be laid on or before 30 September 2013.

(3) Each subsequent report must be laid no later than 12 months after the day on which the previous report is laid.

(4) Subject to subsection (5), an order under section 5(1) made by virtue of subsection (1) must provide for the bodies listed in the order to be designated as Scottish public authorities with effect from the day after the order is made.

(5) The order may, in exceptional circumstances, provide for the designation of a body as a Scottish public authority to take effect on a later date than that specified in subsection (4).

(6) If an order makes provision of the kind mentioned in subsection (5), the Scottish Ministers must lay, along with the draft statutory instrument containing the order, an explanation of the exceptional circumstances.

(7) The Scottish Ministers need not comply with subsection (1) if, at the time when a report under paragraph (a) of that subsection would (but for this subsection) be due to be laid, there are no bodies eligible for designation as Scottish public authorities under section 5(1) which have not already been so designated.”.

Elaine Murray

10 After section 1, insert—

<Protection of rights to access information>

After section 7A of the FOI Act there is inserted—

“7B Protection of rights to access information

(1) Subsection (2) applies where—

(a) a Scottish public authority proposes to make arrangements for another person (other than another Scottish public authority) to exercise any of its functions or provide services on its behalf, and

(b) the proposed arrangements are not arrangements that will result in—

(i) the person being a Scottish public authority within the meaning of section 3(1)(a)(i) or (b), or

(ii) information relating to the functions or services being regarded as information held on behalf of the authority within the meaning of section 3(2)(b).
The arrangements made by the authority must include provision ensuring that the rights of persons to access information relating to the functions or services will be at least equivalent to the rights that those persons would have under this Act in relation to that information if the authority continued to exercise the functions or, as the case may be, provide the services itself.”.>

Elaine Murray

After section 1, insert—

\textbf{Information relating to performance of contracts}

In section 3 (Scottish public authorities) of the FOI Act, after subsection (3) there is inserted—

“(3A) Subsection (3B) applies where—

(a) a person (“the contractor”) is providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority,

(b) the contract was entered into after the day on which this subsection came into force, and

(c) the total sum to be paid by the authority under the contract exceeds £1 million.

(3B) Information of the type mentioned in subsection (3C) is to be regarded, for the purposes of subsection (2)(b), as information held on behalf of the authority.

(3C) That information is information, relating to the performance of the contract, which is held by—

(a) the contractor,

(b) any person sub-contracted to provide the service or any part of it (“a sub-contractor”), or

(c) any person holding information on behalf of the contractor or a sub-contractor.”.>

Section 4

Nicola Sturgeon

In section 4, page 2, line 10, leave out <after subsection (1) there is inserted> and insert—

\textbf{in subsection (1), the words “subsection (1) of section 57 or” are repealed,}

\textbf{after subsection (1) there is inserted—}

“(1ZA) The Scottish Ministers may by order—

(a) make provision modifying any rule in accordance with which a record becomes a “historical record” for the purposes of this Part, and

(b) do so by amending this Part or otherwise.

(1ZB) Provision by virtue of subsection (1ZA) may (in particular) state that a record becomes such a “historical record”—

(a) in relation to the exemption under section 41(a), at the end of—
(i) a specified period (not exceeding 30 years) beginning with the date on which the record is created or a particular date in the calendar year following that date, or

(ii) a specified period (not exceeding 30 years) beginning with the occurrence of an event apart from the creation of the record,

(b) in relation to any other exemption under Part 2, at the end of a specified period (not exceeding 30 years) beginning with the date on which the record is created or a particular date in the calendar year following that date.>

Nicola Sturgeon

4 In section 4, page 2, line 11, after <(1)> insert <or (1ZA)>

Nicola Sturgeon

5 In section 4, page 2, line 14, at end insert—

<( ) in subsection (2)—

(i) after the words “subsection (1)” there is inserted “or (1ZA)”,

(ii) for the words “transitional provisions and savings” there is substituted “supplemental, incidental, consequential, transitional, transitory or saving provision”.

Nicola Sturgeon

6 In section 4, page 2, line 14, at end insert—

<( ) In section 72 (orders and regulations) of the FOI Act, after the words “59(1)” in subsection (2)(b) there is inserted “or (1ZA)”.>

Long Title

Nicola Sturgeon

7 In the long title, page 1, line 2, after <to> insert <the designation of authorities,>
Freedom of Information (Amendment) (Scotland) Bill

Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated on the day of Stage 2 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

**Purposes of FOI Act**
- 8

**Royal exemption**
- 1

**Designation of authorities**
- 2, 2A, 2B, 2C, 2D, 2E, 2F, 9, 7

**Arrangements by Scottish public authorities**
- 10, 11

**Historical periods**
- 3, 4, 5, 6
Present:
Gavin Brown    Kenneth Gibson (Convener)
Jamie Hepburn    John Mason (Deputy Convener)
Michael McMahon    Elaine Murray
Jean Urquhart

Also present: Nicola Sturgeon (Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities)

Freedom of Information (Amendment) (Scotland) Bill: The Committee considered the Bill at Stage 2.

The following amendments were agreed to (without division): 2, 3, 4, 5, 6 and 7.

Amendment 1 was agreed to by division (For 5, Against 1, Abstentions 0).

The following amendments were moved and, no member having objected, withdrawn: 8, 2A and 10.

The following amendments were not moved: 2B, 2C, 2D, 2E, 2F, 9 and 11.

The following provisions were agreed to without amendment: sections 2, 3, 5, 6, 7 and 8.

The following provisions were agreed to as amended: section 4 and the long title.

The Committee completed Stage 2 consideration of the Bill.
Freedom of Information (Amendment) (Scotland) Bill: Stage 2

09:30

The Convener: Item 2 is stage 2 of the Freedom of Information (Amendment) (Scotland) Bill. For this item, we are joined by the Cabinet Secretary for Infrastructure, Investment and Cities. Good morning and welcome to the meeting, cabinet secretary.

Members should note that, as officials cannot speak on the record at stage 2, all questions should be directed to the cabinet secretary. Members have the marshalled list of amendments and the groupings. We will take each amendment on the marshalled list in turn. The running order is set by the rules of precedence that govern the marshalled list. I will call the amendments in strict order from the list, and we cannot move backwards on it.

There will be one debate on each group of amendments. I will call the member who lodged the first amendment in the group to speak to and move that amendment and to speak to all other amendments in the group. Members who have not lodged amendments in the group but who wish to speak should indicate that by catching my attention in the usual manner.

The debate on each group will be concluded by me inviting the member who moved the first amendment in the group to wind up. I will invite the cabinet secretary to contribute to the debate just before I move to the winding-up speech. Following the debate on each group, I will check whether the member who moved the first amendment in the group wishes to press it to a vote or to withdraw it. If they wish to press ahead, I will put the question on the amendment. If a member wishes to withdraw their amendment after it has been moved, they must seek the committee’s agreement to do so. If any committee member objects, the committee will immediately move to the vote on the amendment. If no one moves the amendment, I will immediately call the next amendment on the marshalled list.

Only committee members are allowed to vote. Voting in any division is by show of hands. It is important that members keep their hands clearly raised until the clerk has recorded the vote. The committee is required to indicate formally that it has considered and agreed each section of the
Let us move to the business.

Before section 1

The Convener: Amendment 8, in the name of Elaine Murray, is in a group on its own.

Elaine Murray (Dumfriesshire) (Lab): During our consideration of the bill at stage 1, I asked the Campaign for Freedom of Information Scotland to suggest any amendments for stage 2 that it would like the committee to consider. I am grateful to Carole Ewart of the campaign for proposing the amendments that are lodged in my name. I am also grateful to Frances Bell of the Parliament’s legislation team for all her hard work in shaping and rewording the amendments, which she did until the wee small hours to ensure that they were ready in time for publication. The amendments in my name are also supported by the union Unison.

The Campaign for Freedom of Information has argued that the public’s right to know is now far weaker than it was when the Freedom of Information (Scotland) Act 2002 was passed, because section 5 of the act has never been used and, at the same time, a variety of bodies is no longer within the remit of the act.

A number of freedom of information laws around the world contain a purpose clause, including those in New Zealand and Canada, which were used to inform the drafting of amendment 8. The Campaign for Freedom of Information considers that a purpose clause is necessary, as the Freedom of Information (Scotland) Act 2002 has not operated as intended. Many of the bodies that have been created by public authorities since 2002 are not covered by the act. Parliament needs to be clear about its expectations of the act and of public sector bodies. The CFOIS wants the rights to be retained and therefore it wants newly created bodies to be subject to the act.

Amendment 8 aims to achieve an increase in the availability of information and reflects recent commitments on the transparency agenda. It would introduce a purpose clause to the 2002 act, which would mean that the public’s right to know would remain effective even if the delivery of public services changes in future.

The purpose clause reiterates the three founding principles of the Scottish Parliament—openness, accessibility and accountability—and requires the availability of information that is held by Scottish public authorities to increase progressively, rather than to decrease, as has been the case in the 10 years since the act was passed. That requirement promotes public participation and the accountability of public authorities and facilitates informed discussion, thereby improving governance. The purpose clause also confers on the Scottish public an enforceable right to access information about all public services and services of a public nature.

I move amendment 8.

John Mason (Glasgow Shettleston) (SNP): I have some sympathy with what Elaine Murray is saying and all of us, I think, agree on the principles of openness, accessibility and accountability. If we were writing legislation from scratch, I would kind of agree that it should contain a purpose clause, but I have reservations about adding in a purpose clause as an amendment, as that would change the fundamental ethos of the legislation and the other amendments to the bill.

We are where we are, with existing legislation that we are amending, and I have reservations about inserting a purpose clause at this stage.

The Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities (Nicola Sturgeon): I listened carefully to the committee during stage 1 and will continue to do so. Last week, I met representatives of the Campaign for Freedom of Information and said to them the same thing that I will say to the committee just now. Even though I am asking the committee to reject amendments this morning—including amendment 8—for specific reasons, I will continue to consider the scope for introducing amendments at stage 3 that try to encapsulate the views of the campaign and the committee, where that is possible.

Amendment 8, as Elaine Murray said, advocates the insertion of a purpose clause. Like John Mason, I am not unsympathetic to the thinking behind the amendment, but I question the need for it. More importantly, I am concerned about the possibility that introducing such a clause as an amendment might, as John Mason said, lead to unintended consequences. I do not agree that such a clause is required in order for the legislation to continue to deliver on its underlying principles. As a matter of good lawmaking, if the act were failing to deliver on those principles—which I do not accept that it is—the proper way to address that would be through careful amendment of the act’s provisions, rather than by overlaying the provisions with a purpose clause, the effect of which would be uncertain. There is also the potential for such a clause to cause doubt to be cast on how the act operates; it could have unknown and unintended consequences for the operation of the existing legislation as a whole.

I recognise that there is frustration about the failure, to date, to extend the 2002 act and to designate new bodies, but I do not believe that the weakness of the act is down to a lack of clarity about the act’s purpose, which I think is clear. The long title states that the act makes provision for
“the disclosure of information held by Scottish public authorities or by persons providing services for them”, and section 1(1) of the act states:

“A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.”

Further, in the application of the public interest test, there is an underlying presumption in favour of disclosure.

The committee should not necessarily be bound by this but, in 2002, the lead committee on the bill that became the 2002 act stated in its report that it was not persuaded of the need for a purpose clause.

Those are my reasons for saying that I do not believe that a purpose clause is necessary. I am saying not that the act is perfect or that the way in which it is being applied is perfect, but that I have a fundamental objection to the amendment, which links to the points that John Mason made. Like him, I worry about the unintended consequences of overlaying a purpose clause on an existing act via an amendment to an amending act, without having full consultation on the issue and scrutiny of what those consequences might be.

The 2002 act has been the subject of considerable interpretation and implementation by the Scottish Information Commissioner and has been subject to substantial consideration by the courts. If the purpose clause were added at this stage, the commissioner and the courts would have to reconsider the meaning of all the provisions in the act against the new purpose clause. That would produce a substantial degree of uncertainty for authorities and for the public who wish access to information. Adding such a clause in that manner would be unpredictable, because it could lead to the act being interpreted in a very different manner from the one in which Parliament originally intended it to be interpreted. As I said, we would also be adding it without the normal consultation and proper in-depth scrutiny of what those consequences might be.

For those reasons, although I am not unsympathetic to the motive behind amendment 8, I ask the committee to reject the amendment. I mentioned the issue of extension earlier and I will no doubt touch on that issue in relation to further amendments.

I recognise the frustration that is felt and I certainly have a willingness and a determination to address it, but I do not believe that the way to address it is through a purpose clause, which is not necessary and could have quite significant unintended—or, at the least, unpredictable—consequences.

Elaine Murray: On a point of information, in relation to unintended consequences and having to reconsider all the provisions, are you implying that some of this might be retrospective, in terms of having to reopen old cases?

Nicola Sturgeon: No, that is not what I mean. There is already case law—court case law and decisions that the Scottish Information Commissioner has made. I am not suggesting that cases that have already been decided would have to be reopened but, in future, interpretations of clauses of the act—that are perhaps well understood and settled—would have to be looked at afresh in light of a new purpose clause. “Unintended” is perhaps not the best word in relation to the consequences; “unpredictable” is a better one. We do not know what the amendment would mean for settled interpretations of aspects of the act.

If Parliament is going to do something like that, there is a better, more considered way of doing it than by introducing an amendment to an amendment act. I believe that doing it in that way potentially has unpredictable consequences. Although I acknowledge the frustrations about the act, I do not believe that they stem from a lack of clarity about the purpose of the act; so far, they stem from the unwillingness—or failure—of successive Administrations to use powers in the act to extend its coverage.

Elaine Murray: I appreciate what the cabinet secretary says about the unpredictability of interpretation of the act, particularly as the amendment only arrived on the last day for publication of amendments, so there has not been much opportunity for the Scottish Information Commissioner or anybody else to consider the amendment’s implications. Given that, I am happy to withdraw the amendment.

Amendment 8, by agreement, withdrawn.

Section 1—Royal exemption

The Convener: Amendment 1, in the name of the cabinet secretary, is in a group on its own.

Nicola Sturgeon: Amendment 1 addresses what was undoubtedly one of the most contentious provisions in the bill. In my response to the committee’s stage 1 report, I set out the Government’s reasons for proposing that information relating to communications with the current and future heads of state should be given additional protection. I will not rehearse all of those arguments but, in summary, it was to ensure consistency of approach across the United Kingdom to the handling of the same or similar information and in the interests of safeguarding the political neutrality of the monarchy by giving appropriate regard to the confidentiality of communications between Her Majesty and Scottish public authorities.
As I noted previously, many access to information regimes contain protections that are tailored to their nations’ heads of state. However, I said at the time of the stage 1 debate, in reflecting on the clear view that the committee expressed in its stage 1 report, that I would give further consideration to whether the existing public interest test provides adequate protection. I looked at how the royal exemption has been applied in Scotland and whether experience in Scotland in fact necessitates the same approach as is now taken elsewhere in the UK.

I have given that further consideration and my conclusion is that this part of the bill is not strictly speaking necessary. The exemption is seldom applied and although it has rarely been tested, it is generally fully upheld by the Scottish Information Commissioner. I also note the original understanding of what constitutes an absolute exemption and, in essence, they are of a technical nature and support the effective operation of the legislation.

My decision to lodge an amendment to remove section 1 from the bill took account of views that were expressed during consultation, during the committee’s consideration and during the stage 1 debate. We will continue to apply the exemption in the interests of protecting the constitutional position of the monarchy, with full regard to the established conventions of confidentiality, in particular in respect of communications to and from Her Majesty. However, I have been persuaded, not least by the committee, of the importance of retaining consideration of the public interest in relation to disclosure of that class of information.

I move amendment 1.

09:45

Gavin Brown (Lothian) (Con): There is

"a strong and compelling argument that the arrangements for dealing with communications between the monarch and, for example, the Prime Minister’s office, should be the same as the arrangements that pertain to communications between the Queen and the First Minister’s office. The point about consistency is important ... it would be strange to have a situation in which communications between the monarch and the Prime Minister were treated differently from communications between the monarch and the First Minister. That is the motivation for the change ... The consistency argument that I have given is the foundation for that and I think that it is a strong one.”

It would be

"odd, to say the least,"

to have different positions, and the issue

"goes to the fundamental nature of the relationships ... I have given you what I think is a strong reason for the change that we propose"—[Official Report, Finance Committee, 12 September 2012; c 1521-2, 1523, 1532, 1533.]

That is what the cabinet secretary said a few short months ago, when she told the committee why section 1 was important and ought to be included. I was persuaded by the cabinet secretary at the time. I agree with what she said about consistency being important. On that basis, I encourage the cabinet secretary not to press amendment 1 and I encourage members to vote against it.

Elaine Murray: I disagree with Gavin Brown. It is refreshing that the cabinet secretary has been prepared to listen to the arguments of the majority of committee members, which reflected the strong evidence that we received at stage 1. Despite the desire for consistency, when the United Kingdom Parliament has passed inappropriate legislation, which I understand was not fully discussed prior to its passage, it would be folly for the Scottish Parliament to go down the same lines.

John Mason: I was not going to speak on amendment 1, because I am perfectly comfortable with it, but I was slightly wound up by Gavin Brown’s comments, especially his remark that he was “persuaded” by the cabinet secretary’s arguments when, as far as I am aware, he had made up his mind before and might not even have been at the meeting to which he referred.

I echo what Elaine Murray said. I am encouraged that the Government and the cabinet secretary, in particular, listened to the arguments, which did not come just from the committee but largely reflected the views that we heard from people outside the Parliament. The committee system in the Parliament has sometimes been criticised, but this is a good example of a committee taking a firm line and the Government listening and responding, which is to be commended.

Jamie Hepburn (Cumbernauld and Kilsyth) (SNP): I was not a member of the committee when it took evidence on the issue. I am sure that there is an argument for the position that the Scottish Government initially advanced, but I am instinctively uneasy about the application of absolute exemptions to freedom of information provisions. I am not convinced that just because the UK takes a certain position, it follows that the Scottish position must necessarily be the same. A body of evidence was presented to the committee and the Government should be commended for listening to the committee. We should support amendment 1.

Nicola Sturgeon: I say to Gavin Brown that there is a strong argument for the view that I articulated at stage 1, but I have listened to the counter-argument that was made. Opposition members frequently say that the Government should listen more to committees. I take committees’ views seriously and, on this occasion,
the committee was right and reflected opinions that had been presented.

My reflection took me to the view that having in place different processes north and south of the border does not inevitably lead to inconsistent outcomes. As the limited experience so far shows, the application of the public interest test will in many cases lead to communications with the monarch remaining confidential. However, the public interest test must be passed. That is appropriate and strikes the right balance.

For all those reasons, I press amendment 1.

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Gibson, Kenneth (Cunninghame North) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Murray, Elaine (Dumfriesshire) (Lab)
Urquhart, Jean (Highlands and Islands) (Ind)

Against
Brown, Gavin (Lothian) (Con)

The Convener: The result of the division is: For 5, Against 1, Abstentions 0.

Amendment 1 agreed to.

After section 1

The Convener: Amendment 2, in the name of the minister, is grouped with amendments 2A to 2F, 9 and 7. Members have already been informed that the Presiding Officer has determined under rule 9.12.6C that, if amendment 9 were to be agreed to, the bill would require a financial resolution. As no resolution has been agreed to, amendment 9 may be moved and debated but I cannot put the question on it.

Nicola Sturgeon: I apologise for making lengthier comments about this group, as I will try to cover all the amendments in it.

The issue of extending coverage is separate from revising the freedom of information legislation to ensure that it remains fit for purpose. The Government’s approach has always been that we will return to the question of extension once the bill has completed its parliamentary passage. However, I appreciate that the failure to extend coverage so far has disappointed a lot of people who see the extension of coverage as closely related to ensuring that the legislation remains robust and fit for purpose. Of the two issues that have created most debate about the bill, extension is undoubtedly more substantive and has more long-term significance.

Critics rightly note that three consultations have been held on extending coverage and that, before the 2002 act came into force, expectations were high that the section 5 power would be used early. That has not proved to be the case. I fully accept that one way in which Scotland can, and must, seek to maintain its reputation for progressive freedom of information rights is by regular assessment and, when necessary, use of the power to keep the act’s coverage up to date.

The mechanisms through which public services are delivered are changing rapidly—the committee commented on that at stage 1. Legislation must keep up to date but, to be perfectly frank, this legislation has not kept up to date with all the changes. I said at stage 1 that I intend to produce an order in early course to extend coverage. At stage 3, I will say more about the coverage of that order.

Amendment 2 was developed from proposals that the Scottish Information Commissioner made. It will ensure that appropriately focused consultation takes place and that ministers are made clearly accountable to Parliament for the use or otherwise of the power. The amendment allows more extensive consultation than the 2002 act provides for, without mandating full public consultation in every case, because that is not always appropriate or proportionate.

The amendment strikes a balance on reporting at three years. I stress that that does not mean that only one order could be made every three years. We seek to have a timescale that will enable appropriate consultation to be undertaken on a draft order and allow appropriate time for scrutiny and consideration of any order by Parliament. The report to Parliament can and should give full clarification of how and why the power has or has not been used and include a helpful indication of any intention to use it. The measures in amendment 2 on both consultation and reporting on the use of the section 5 power are responsible and proportionate.

I accept and sympathise with the approach behind Elaine Murray’s amendments, but I believe that the Government amendment’s approach is preferable, as Elaine Murray’s amendments are in certain respects ill defined and in other respects overly bureaucratic.

I will deal with the amendments in turn. Amendment 2A removes a standard consultation obligation and replaces it with an obligation to consult “members of the public and other interested parties.”

The “other interested parties” are not defined, which begs the question of who they are if they are not members of the public. What does “interested” mean for the purposes of that
provision? What would be the consequences if someone who had not been consulted later asserted what they described as an interest, and how would that interest be defined and adjudicated on?

Amendment 2B is not wrong, but it is unnecessary. It is already a matter of administrative law that due regard is given to the results of a consultation, so the amendment adds little by restating an existing obligation of ministers and legislating for it in the text of the bill. The purpose of legislation is to change the law, but the amendment would not do that because administrative law already requires ministers to give due regard to consultation results.

The timescales that are proposed in amendment 2C would mean that, within two months of commencing the provision, the first report would be due, which is not appropriate. We all know the position right now, which is that the power has not been used; I am not sure that we need a report in a few months’ time to tell us that.

Our proposed provision for reporting in three years is designed to better align the reporting period with the lifespan of a session of Parliament, which will appropriately cover any consultation period and any subsequent orders that are made on that timescale. That is a more reasonable approach. Again, I stress that it does not mean that an order will not be passed before then—indeed, as I noted earlier, I have already said that we will introduce an order, on which I will give details at stage 3.

Amendments 2D and 2F require an annual report, which would lead to a never-ending cycle of reporting without adequate time for due scrutiny, consultation and consideration. Amendment 2E is unnecessary: if we have consulted, we are likely to report on that, particularly as our amendment requires us to state whether the power has been exercised during the reporting period.

I note that amendment 9 will be debated today but will not be voted on due to the Presiding Officer’s decision that it requires a financial resolution. Amendment 9 would result in bureaucratic overload, with a lot of confusion on top of that. There appears to be a lot of overlap between amendments 9 and 2, but they still appear to do different things. Perhaps Elaine Murray will clarify how those amendments would fit together.

Amendment 9 requires annual reports to be laid regarding the exercise of the power to extend the coverage, and for draft instruments to be laid following each report. It similarly requires a report to be laid shortly after the commencement of the provision which, as I have explained, seems to be of little value. From one reading, it appears that it would require two reports to be laid in a very short space of time.

Amendment 9 creates an obligation on ministers first to report and then to designate bodies every year. It is not clear how that would sit with the need to carry out proper consultation, including building in appropriate time periods for that to take place and for ministerial decisions to be made. Are we really saying that it will always—every single year—be appropriate to use the power? How do we know that there will not be years when we have reached the point at which there are no bodies that are appropriate for designation?

An instrument that is laid so soon after a report is hardly a recipe for appropriate scrutiny and reflection. It would lead to an extension process becoming automatic rather than resulting from deliberation and proper consideration.

Amendment 7 is a technical amendment to the bill’s long title to reflect the provisions concerning the power to designate authorities in amendment 2.

In many respects, the Government’s amendment 2 and all the other amendments in the group, which have been lodged by Elaine Murray, try to do the same things. I simply argue that amendment 2 will achieve those things in a proportionate way that builds in sensible timescales and which, crucially, allows appropriate opportunities for Parliament to scrutinise and ministers to consider decisions with due care and attention. I look forward to hearing what Elaine Murray has to say, and I hope that I will be able to persuade her to support amendment 2.

I move amendment 2.

10:00

Elaine Murray: The majority of my amendments are amendments to amendment 2. I welcome the provisions that amendment 2 proposes. My amendments to it are an attempt to find out whether what it seeks to do can be taken a little further.

As the cabinet secretary said, amendment 2A seeks to replace the requirement on Scottish ministers to consult

"such other persons as they consider appropriate"

with a requirement to consult

"the public and other interested parties”

when authorities are designated to be included in the Freedom of Information (Scotland) Act 2002. I hear what the cabinet secretary says about the definition of “other interested parties”. That phrase was used because the Campaign for Freedom of Information in Scotland was concerned that it would not be covered by the term “members of the
public”. If the cabinet secretary can confirm on the record that the terminology in amendment 2 would cover such bodies, we would be able to reassure COFIS that it would automatically be consulted.

Amendment 2B would require ministers to have due regard to the consultation responses “in deciding how to proceed in relation to the order.”

The cabinet secretary has put on record the fact that that is already a requirement in law, so I do not intend to move amendment 2B.

Amendment 2C would require the first report on the section 5 power to be laid on or before 30 June next year rather than on or before the same date in 2016. Members of the committee will be aware that the Scottish Information Commissioner raised concerns about the length of time before a report would have to be laid before Parliament under amendment 2. Under the current drafting, the first report would not be presented to Parliament until 14 years after the original act was passed. We should recall that, when the 2002 act was passed, the then Minister for Justice, Jim Wallace, promised early consultation on the extension of the act to cover registered social landlords and companies involved in major public-private partnership/private finance initiative projects. To date, progress has been fairly slow. It may be that 2013 is too soon, but it could still be argued that 2016 is too late. Perhaps there is room for a compromise.

Amendments 2D and 2F would require annual reporting rather than reporting every three years. Their purpose is to ensure that the strength of the legislation in relation to timelines will be retained.

Amendment 2E seeks to replace the provision that the report may summarise the responses to any consultations that are carried out on the exercise of the section 5 power with a requirement to report more broadly on whether any consultation has been carried out, to summarise the responses and to explain how they were taken into account when a decision was made on whether to exercise the section 5 power. Amendment 2E’s intention is to make the process more transparent and to illuminate the Government’s reasoning. In that way, the public can be reassured that the correct process was undertaken diligently, even if the public disagree with the conclusion of the report.

The drafting of amendment 9 has been a difficult process. COFIS proposed it because successive ministers have undertaken consultations that repeatedly supported additions that were not actioned. The Scottish Executive consulted in 2006 but subsequently declined to act. It promised further consultation. In 2008, the Scottish Government launched a discussion paper and a consultation was issued in 2010, which commanded wide support for the designation of new specified bodies. However, to date no timeline has been published for the addition of new bodies, and no action is expected until next year, when the bill has been passed. That was confirmed recently by the First Minister.

Amendment 9 would require Scottish ministers to be proactive on the designation of additional bodies and to set out timescales for action. COFIS wishes to see the designation of those public authorities on which there was consultation in 2010, and action on further designation. The amendment was drafted by the legislation team, who put a fair amount of work into reflecting the policy intention in legislation. That is probably the cause of some of the duplication, as it was a difficult task to find an appropriate legislative way of interpreting the policy intention. They wished the amendment to act in three ways: setting out a timetable for designated public authorities to be covered by the act; drawing up a second list of organisations to be covered by the act; and embarking on a third consultation on a new list. They cite the fact that the 2010 consultation included the Glasgow Housing Association but not other registered social landlords.

Amendment 9 would require a draft statutory instrument to be placed no later than 20 days after the report setting out the proposals for exercising the order-making powers, and the first report to be laid on or before September next year and subsequent reports to be laid annually. In effect, it is intended to ensure that at least one public authority is designated each year, except under exceptional circumstances, which ministers would be required to explain.

As we know, the Presiding Officer has advised that amendment 9 would require a financial memorandum to be provided by the Scottish Government, so it can be only debated today and no question on it can be put. Again, because of the difficulties in interpreting the policy intention for legislation, I am interested in hearing the committee’s comments. No question on the amendment will be put, but it would be useful to have the committee’s thoughts on whether some policy intentions could be translated into legislation for stage 3.

I move amendment 2A.

John Mason: First, I welcome amendment 2 and the fact that the Government has again listened to what the committee has said. At Westminster, I served on two public bill committees, but I do not remember any significant compromise on the part of the Government at the committee stage. Specifically, amendment 2 is welcome because it definitely strengthens the overall position and the reporting back to Parliament, which I am certainly supportive of.
Frankly, however, I think that the Government’s amendment 2 and Elaine Murray’s amendment 2A are quite weak in some respects. Amendment 2 has the wording

“also consult such other persons as they consider appropriate.”

I am not sure that that means much. However, I am not sure that it would be better to replace that wording with

“members of the public and other interested parties.”

I am not enthusiastic about either wording, but there we go.

I think that both Nicola Sturgeon and Elaine Murray have accepted that amendment 2B would not add much. The issue of consultation with the public is interesting, because I think that some of the public view it as a kind of voting contest or a referendum and that those who return the most responses should be listened to. However, I do not think that that should be the case. There would be little point in having a consultation if ministers did not listen and have some regard to it. I do not see that writing that down would make a huge difference.

The amendment that I am most sympathetic to in this batch of Elaine Murray’s amendments is amendment 2C, which would replace the 2016 date with 2013. I accept Nicola Sturgeon’s point that 2013 is probably too close given how the bill is going. I think that June 2013 would certainly be too close, but I wonder whether the cabinet secretary would consider whether the date could be brought forward a bit from 2016. If we were starting from scratch again, the three-year period might be acceptable. However, because of the history of the legislation and people’s feeling that there has been such a long delay with it, it might be better to choose the date of 2014 or 2015, both of which would have the advantage of being within this session of Parliament. The June 2016 date is after the next election, which might be a slight disadvantage.

On amendment 2D, I accept the arguments on both sides: three years is quite long and 12 months is too short. I wonder whether it would be possible to compromise with two years.

Jean Urquhart (Highlands and Islands) (Ind): I support amendments 2C and 2D, which I think should be considered because 2016 seems a long way off into the future.

On the Presiding Officer’s letter on the financial implications of amendment 9, there may be something that I am just not understanding. I have some sympathy for the amendment because it would bring in other organisations, including arm’s-length external organisations. All of the work that was done prior to an ALEO being established was eligible for freedom of information as part of the local authority’s everyday work, if you like. Most ALEOs have been set up to run leisure and arts activities and so on, so it seems to me that there would be no financial implication from that, although perhaps I am being naive. In that case, should ALEOs in particular be separate from the considerations that apply to other organisations such as housing associations, or would that be the same thing? I cannot quite understand.

The Convener: The position is that the Presiding Officer has ruled that we cannot move on the issue, so we cannot move on it—it is as simple as that. I do not see that there is any point in debating the issue further, given that we cannot take it forward. However, that does not mean that the issue cannot be raised again at stage 3.

Michael McMahon (Uddingston and Bellshill) (Lab): Convener, I apologise for my late arrival. Every Wednesday morning, every broken-down lorry in the central belt seems to arrive on the M8 in front of me. I also apologise to the cabinet secretary.

To reiterate Elaine Murray’s comments, there is essentially nothing wrong with amendment 2, but it would be helpful to have some clarification of the intention, because there are some concerns that the amendment does not say clearly how far it is intended to go. If that could be made clear and if some commitment could be given to strengthen the matter in guidance or what have you, that would be helpful to those who have an interest in the bill. As Elaine Murray said, the other amendments are add-ons, if you like. Once amendment 2 is in place, the other amendments would follow in tightening up and strengthening the provision in line with the evidence that we heard during the consultation.

On “other interested parties”, lots of legislation goes through without a clear definition in the bill of exactly what every aspect of it means. Such matters can be found out in the guidance, which can be negotiated, discussed and added to as things move forward. To include “other interested parties” in the bill would not necessarily create a problem; it would just create an environment in which the definition of “other interested parties” could be clarified in guidance.

On amendment 2C, I know that there are concerns about requiring the report next year, but a lot of the information, as previous speakers have mentioned, has already been collected and is already known, although it is not currently covered by the legislation. Therefore, if we were to pass the bill this year in a form that required the report to be produced by the end of December 2013, I do not believe that it would be beyond the ability of the Government to pull together within one year a report based on a lot of evidence that already exists.
On amendment 2D, once that information has started to be processed, annual reporting would not be such a problem. The on-going matter would be to add to and build on what already exists. I just do not see why there would be a huge issue if Elaine Murray’s amendments were added to the bill for clarification. The provisions could then be expanded on in the regulations or guidance that might follow on from their inclusion in the bill.

On amendment 9, which I know that we are not going to discuss, I just want to make one point.

The Convener: We can debate and speak to, but not move, amendment 9.

Michael McMahon: If there was a period in which there were no bodies to be added, it would be better to know that there was nothing to be added than to be left in the position where we do not know whether trusts or ALEOs have been created that could come under the remit of the bill. To say that we should not have that clarification just because there might not be any body that needs to be added does not seem to me to be a particularly strong argument for rejecting the possibility of adding all the other bodies that might need to be added in subsequent years.

10:15

Jamie Hepburn: I join other members in welcoming amendment 2. It is useful to have a degree of clarity about how an order can be consulted on, reported on and acted on. We should listen closely to the cabinet secretary’s points about amendment 2C. I welcome the fact that Elaine Murray has lodged her amendments in the group, because it is useful to debate some of the details. However, the cabinet secretary has made it clear that, just because the date for the first report is set some time in the future, that does not preclude the prospect of earlier action. Indeed, there has been a commitment on that, and we will hear some details on that at stage 3. If we take that in good faith—as we should—I am not convinced of the necessity for amendment 2C.

I have much the same feeling about amendment 2D. The requirement to produce a report every year might be somewhat onerous and would not allow for adequate scrutiny. I have no doubt that dialogue on the specific details will continue but, at this stage, I am not convinced of the necessity for amendments 2C and 2D.

Nicola Sturgeon: I thank Elaine Murray for lodging her amendments, and I thank all members who have contributed to the debate, which has been worth while, because there are no absolute rights and wrongs in relation to the timescales and who we consult. The issue is about trying to get the legislation proportionate and balanced so that it does the job that it is designed to do.

I will start with some of the timescale issues. Under amendment 2, a first report would be laid in 2016. I have sympathy with the view that has been expressed that that is too far into the future, particularly in light of the length of time for which the 2002 act has already been in existence. A requirement to produce a report next year would be going too far in the other direction, but I am happy to give further consideration to whether we could bring the date forward by a year. I was struck by John Mason’s point that we should try to produce the report in the current session of Parliament, and I have a lot of sympathy with that. If amendment 2 is agreed to, I will give consideration to an amendment at stage 3 that would perhaps change the date from 2016 to 2015.

Even if we stick with 2016, I hope that it will give members some reassurance to point out that we are not setting a date in a vacuum, if you like, with nobody knowing whether the power to introduce an order will be used. I have given a commitment that there will be an order. Therefore, by the time we get to 2016, the first order will have been introduced. Nevertheless, the points are well made, so I am happy to give the issue further consideration in advance of stage 3.

Similarly, we have set the timescale for regular reporting at three years, because we think that that strikes the right balance. I strongly believe that annual reporting would be too frequent and would not allow for proper consideration of orders. It would give a committee no time to scrutinise an order before the next report was due. Therefore, annual reporting would be too frequent. A three-year period feels right to me, although I have heard people say that two years might be a better balance. I received a letter yesterday from the Scottish Information Commissioner—I am sure that the committee did, too—saying that two years might be a better balance. I am not convinced of the necessity for amendment 2C.

I am happy to give further consideration to whether we could bring the date forward by a year. I was struck by John Mason’s point that we should try to produce the report in the current session of Parliament, and I have a lot of sympathy with that. If amendment 2 is agreed to, I will give consideration introducing a further amendment at stage 3 that would change the period from three years to two. I am not giving an absolute commitment to do that, but I am certainly giving a commitment to consider it.

On the issue of who is consulted, amendment 2 tries to strike the right balance. A consultation needs to be sufficiently focused, given that a plethora of organisations could be brought into the ambit of FOI and that the same reach of consultation will not necessarily be appropriate for every single one of them. I do not think that a full public consultation will be proportionate or necessary in every instance. Equally, however, the current wording of the 2002 act is too narrow. We have tried to strike a balance between being sufficiently focused and allowing enough scope to
consult as required, for example, with the consumers and users of organisations. It is inconceivable that the Campaign for Freedom of Information would not be considered an appropriate body to consult in any consultation on an extension of the act.

Michael McMahon suggested that the wording of the act could be fleshed out in guidance. I am happy to consider how that can be done to make clearer the kind of organisations that we are talking about in specific circumstances. That might be a useful compromise.

Finally, if Elaine Murray is minded not to press her amendments today, I am willing to discuss with her how amendment 2 could be further amended at stage 3 to incorporate some of the key points that have been made about timescales. I would be happy to ask my officials to have a direct conversation with Elaine Murray in advance of the deadline for the submission of stage 3 amendments to see whether we can find some common ground on how what I think amendment 2 does to strengthen the legislation could be strengthened further in some of the ways that we have spoken about.

Elaine Murray: I am happy to hear the cabinet secretary’s assurances and offer of further discussion. I lodged the amendments to air some of the concerns, to look at whether they could be resolved, and to identify whether there are any particular problems in the wording of the amendments that could be resolved later. I am happy, therefore, not to press amendment 2A and to support amendment 2 on the understanding that there will be further discussion to achieve some of the aims of amendment 9, which, if moved, cannot be voted on.

I applaud the legislation team for the work that it did to interpret that policy intention. There are clearly still some issues around that that might need to be revisited at stage. I will not press amendment 2A.

Amendment 2A, by agreement, withdrawn.
Amendments 2B to 2F not moved.
Amendment 2 agreed to.
Amendment 9 not moved.

The Convener: Amendment 10, in the name of Elaine Murray, is grouped with amendment 11.

Elaine Murray: When the Freedom of Information (Scotland) Act 2002 was passed, it was expected that the public’s rights would be exercised in relation to existing bodies as well as bodies created in future to deliver public services or services of a public nature. Those provisions are encompassed in sections 3, 6 and 7 of the 2002 act, although section 7 refers to the right of access to information only in respect of information that is held by the authority and which relates to public services or services of a public nature.

However, since the passage of the 2002 act, many public services have been moved to bodies that the act does not cover, such as arm’s-length external organisations, and, through council housing stock transfer, registered social landlords. Amendment 10 seeks to place the duty back on the public body that creates the new body or transfers the function or service to another body that is not covered by the 2002 act. If amendment 10 were agreed to, it would apply not retrospectively but only to future transfers, and Scottish ministers would not have to readmit bodies to which services had been transferred retrospectively through the use of the section 5 power. The duty would rest with the public authority to ensure that the right to freedom of information remained. The public authority would therefore be required to provide information under the 2002 act on the services that it had transferred.

Amendment 11 is similar to amendment 10, but refers to public sector contracts of a value that exceeds £1 million. The duty to provide information again would remain with the public authority rather than transferring to the contractor. That would maintain the simplicity of the freedom of information process. Members of the public could make a request and it would not be necessary even to mention the 2002 act. If the person was dissatisfied with the answer, they could refer their complaint to the Scottish Information Commissioner. That is now a fairly familiar process.

Information about public services, or services of a public nature, will be associated with a public authority, such as a health board or a local authority, rather than with the individual contractor who is providing the service.

The simple solution with regard to the provision of information about public sector contracts is, therefore, to ensure that the freedom of information duties remain with the public authority rather being transferred to the contractor, so that members of the public can seek that information through the commissioning public authority.

I move amendment 10.

John Mason: Again, I have sympathy with what Elaine Murray seeks to do with amendment 10. However, I feel that her proposed mechanism is quite cumbersome. The 2002 act is set up to list the organisations that are included, and I have concerns about the roundabout way of doing that that the amendment proposes. For example, if bits of Glasgow City Council—a body that I am interested in—were chopped off and allowed effectively to leave the freedom of information
regime, the onus would be put on the council to include them. I find that a bit unsatisfactory in comparison with listing individual organisations.

As I said earlier with regard to the purpose clause, if the 2002 act had been set up in that way, that would be fair enough. However, I wonder whether the suggestion is perhaps too roundabout a route, even if it might be marginally quicker. I will be interested to hear what the cabinet secretary has to say on the matter.

I have slightly more sympathy with the intention behind amendment 11, because I do not think that such contracts would normally be covered at all, as private sector organisations would not normally be included in the freedom of information regime. I believe that the suggestion has been implemented in other countries. I am happy to listen to what the cabinet secretary says on that point.

Nicola Sturgeon: Again, I do not lack sympathy for the amendments, and there is a great deal of attraction to the idea of putting an obligation on public bodies, not least because that would take the obligation away from the Scottish Government, to some extent. However, I struggle to understand how amending the legislation in the way that is suggested will achieve the objective that Elaine Murray is aiming at. I have been thinking about the ways in which that objective could be achieved, and I am certainly happy to continue to think about it, but I really do not believe that amendments 10 and 11 achieve the aim.

It is not clear to me how the provisions will be put into effect in practice once the statutory bit of the work is done. It is not clear how they would be regulated or enforced. The 2002 act has rights that are clearly understood and, crucially, enforceable. Amendments 10 and 11 seem to be saying that every public authority would be able to make its own arrangements. What would be the terms of those arrangements? There is potential for huge inconsistency among public authorities. I am not sure how such arrangements would have the equivalent of the force of statute if the arrangements themselves were not embedded in statute. For example, what right would a member of the public have to ensure compliance in relation to a person who was not a public authority and with whom they had no relationship?

For the reasons that John Mason outlined—the amendments seek to bolt something on or do something by the back door—we run the risk of creating considerable confusion. At the moment, however imperfect and badly in need of extension it might be, the 2002 act is simple and straightforward, is understood to a great degree by the public and is enforceable, with a clear route to enforceability.

The 2002 act is simple, in that it applies to bodies that are clearly named in it and bodies that are wholly owned by public authorities. The power to extend by designating bodies and legal certainty about the coverage of the act should remain within the scheme of the existing act, with the exercise of powers by a minister subject to parliamentary scrutiny. The proper way to address the extension of the application of the act is through the use of section 5. It has not been used, and we all understand the frustration around that, but I still think that that is the correct route.

10:30

On amendment 11, it is unclear whether the concern relates to information that is held on behalf of a public authority—in which case, it is already subject to the 2002 act—or information that is otherwise held by the contractor. The amendment would provide that the relevant information is “information, relating to the performance of the contract,” but the meaning of that is not precise or clear. Contracts can cover a broad range of activities, including functions of an authority. Information relating to performance of a contract might cover more than simply information on the performance of a function. To define information in such a way is to risk straying into areas that are not appropriate for coverage by the act.

A practical concern is that the provision could be made effective only by the authority imposing contractual obligations on the contractor to ensure that, in the event of a request for information, the contractor and people further down the supply chain would provide the information. That immediately raises issues of enforcement. How would the approach be enforced in practice?

There is also an issue to do with the relationship with the provisions in the Public Records (Scotland) Act 2011. I can go into more detail about that if the committee wants me to do so.

I have some sympathy with the aims of amendments 10 and 11, but I come back to the view that the 2002 act has a mechanism for extending its coverage. The fact that the mechanism has not yet been used does not mean that it is not fit for purpose, and I have given a commitment to use it.

I am willing to discuss with Elaine Murray whether we can progress the issue. I do not want to raise expectations, because the area is incredibly difficult for the reasons that John Mason gave, but I am happy to see whether we can get to common ground in advance of stage 3. My fundamental view is that we need to use section 5 of the 2002 act rather than provide for different mechanisms, which have lots of imperfections, simply because there is frustration that section 5
Elaine Murray: May I ask for clarification in respect of amendment 11? Can the issue to do with large-scale public contracts be resolved by designation under section 5?

Nicola Sturgeon: My understanding is that there could be designation—

Elaine Murray: Jim Wallace intended to do it, but it was not clear—

Nicola Sturgeon: I would certainly welcome further discussion about whether the aims of amendment 11 could be met by section 5 or whether there is something more that we could do.

I will be frank and say that I am not giving guarantees that the discussion will lead to Government amendments at stage 3. I understand what Elaine Murray is trying to achieve, but I think that the route to achieving it is through use of the existing mechanism in the 2002 act rather than the creation of a new mechanism because of frustration that section 5 has not been used.

Elaine Murray: My intention in lodging amendment 10 was to simplify the situation so that, as councils or other bodies created ALEOs, ministers would not continually have to make section 5 designation orders to bring the new bodies into the scope of the legislation. I was trying to circumvent that problem. However, I take on board what the cabinet secretary said about it being inappropriate at this stage to provide for a mechanism that is different from the one in the 2002 act.

There is a significant issue to do with accountability in relation to the performance of contracts that involve large amounts of public money. I am happy to withdraw amendment 10, with the committee’s agreement, and I will not move amendment 11, but I am interested in further discussion about how the intention of amendment 11 might be met by use of the section 5 power.

The Convener: The question is, that amendment 10 be agreed to. Are we agreed?

Elaine Murray: Convener, I was seeking leave to withdraw amendment 10.

The Convener: Sorry. I thought that you said that you would press amendment 10 but not move amendment 11.

Elaine Murray: In that case I have caused confusion. Although my intention was to circumvent the need for ministers to keep exercising the section 5 power, I heard what the cabinet secretary said and I accept that adopting a different mechanism might cause problems. I am happy to withdraw amendment 10, if the committee is content for me to do so.

Amendment 10, by agreement, withdrawn.

Amendment 11 not moved.

Sections 2 and 3 agreed to.

Section 4—Historical periods

The Convener: Amendment 3, in the name of the cabinet secretary, is grouped with amendments 4 to 6.

Nicola Sturgeon: First of all, I must apologise to the committee for the technical nature of these amendments. I also stress at the outset that they do not change the policy intention behind the bill but simply ensure that the bill is drafted in a way that fulfils its policy intention.

Members will be aware that in 2009 the Government decided to open its files containing historical information at 15 rather than 30 years. As a result of that decision, National Records of Scotland has opened 12,000 files, which has contributed to our having a greater awareness and understanding of Scottish affairs than would have originally been the case. The experience has been positive and is a tangible sign of our commitment in Scotland to progress freedom of information legislation in its broadest sense.

However, the decision to half the release period was a policy decision, not a matter of law. As we discussed at earlier stages of the process, simply reducing by means of the order-making power under section 59(1) of the 2002 act the 30-year lifespan to 15 years for all relevant records is not considered appropriate in all cases. Nevertheless, the present legislation does not allow for the creation of separate provision for particular exemptions for different types of records. As it stands, the bill seeks to provide greater flexibility with regard to the order-making power. For example, it allows for the making of different provisions for records of different descriptions and for different individual exemptions.

That said, it has become apparent that the bill’s provisions do not contain sufficient vires to enable the intended policy objective to be met. The Government has already publicly set out its intentions in respect of all 30-year exemptions, with the aim of introducing an order in early course to reduce the lifespan of most relevant exemptions to 15 years. However, in order to address sensitivities around confidentiality, the section 36 exemption is likely to remain at 30 years.

In addition, it is proposed that the rules in relation to the exemption concerning communications with Her Majesty, members of the royal family and the royal household be capable of being amended by order to take into account a particular event. The term “event” has been left undefined to confer a measure of flexibility in linking the period to particular circumstances, such
as the death of a relevant member of the royal family. The proposal is that, in such cases, the specified period for historical records should be the later of 20 years after the creation of a record or five years after the date of the death of the relevant member of the royal family. However—I hope that members are following me—that could increase the lifespan of the exemption to more than 30 years. For example, if someone dies 30 years from now, the five-years-after-the-death provision could take the lifespan of the exemption to 35 years. The current order-making power only enables a reduction in the period of time at which a record is classified as historical in relation to the royal exemption.

As a result, in order to deliver the policy intention—which, as I have said, is not being changed—amendment 3 seeks to modify further the order-making power to allow for greater variation in the definition of “historical record”, and the power is framed to enable an order to make the necessary provision with regard to rules around the meaning of “historical period”, for example, to cover different types of record in different time periods relating to particular records.

The exemption set out in section 41(a) of the 2002 act allows the period to start either with the date of the record’s creation or with another event, such as a death. In either case, the period specified must be no more than 30 years after the starting point. For exemptions other than those under section 41(a), the maximum period that can be specified in an order will continue to be 30 years from the creation of the record.

Amendments 4 and 6 seek to make consequential changes, and amendment 5 seeks to allow an order to make ancillary provision to ensure the smooth transition from one set of rules to another.

Although I understand that there might be concerns about legislating for the possibility of increasing as well as reducing the period of time at which a record becomes historical, we have always been very clear that our intentions in this regard relate very specifically to the royal exemption. I also note that in his response to the consultation on the draft bill, the former Information Commissioner explicitly stated that were the exemption to remain subject to consideration of the public interest—which amendment 1 ensures will be the case—he could accept the revised lifespan in section 41(a).

I also point out that, under amendment 6, the relevant power will remain subject to the use of the affirmative procedure in the Parliament and that the order putting the Government’s proposals into effect will be subject to further consultation.

I hope that the committee has stayed with me through what has been at times a technical explanation. I move amendment 3.

The Convener: I thought that that was all pretty straightforward. [Laughter.]

Nicola Sturgeon: Maybe it was just me who found it difficult to understand.

The Convener: No members wish to speak on these amendments. Do you wish to wind up, cabinet secretary?

Nicola Sturgeon: I only ask the committee to support the amendments.

Amendment 3 agreed to.

Amendments 4 to 6 moved—[Nicola Sturgeon]—and agreed to.

Section 4, as amended, agreed to.

Sections 5 to 8 agreed to.

Long title

Amendment 7 moved—[Nicola Sturgeon]—and agreed to.

Long title, as amended, agreed to.

The Convener: I am pleased to say that that ends stage 2 consideration of the bill. I thank the cabinet secretary for attending. The bill will now be reprinted as amended and will be available tomorrow morning. Although the Parliament has not determined when stage 3 will take place, members are now able to lodge stage 3 amendments with the legislation team and will be informed of the deadline for amendments once it has been determined.

Given that, last week, we agreed to take the next item in private and that, at the start of today’s meeting, we agreed to take items 4 and 5 in private, I close the public part of the meeting to allow the public and official report to leave.

10:42

Meeting continued in private until 12:04.
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Amendments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1A</td>
<td>Designation of authorities</td>
</tr>
<tr>
<td>2</td>
<td>Refusal notice</td>
</tr>
<tr>
<td>3</td>
<td>Accessible information</td>
</tr>
<tr>
<td>4</td>
<td>Historical periods</td>
</tr>
<tr>
<td>5</td>
<td>Time limit for proceedings</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>General</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>References to the FOI Act</td>
</tr>
<tr>
<td>7</td>
<td>Commencement</td>
</tr>
<tr>
<td>8</td>
<td>Short title</td>
</tr>
</tbody>
</table>
ACCOMPANYING DOCUMENTS
Amendments to the Bill since the previous version are indicated by sideling in the right
margin. Wherever possible, provisions that were in the Bill as introduced retain the original
numbering.

Freedom of Information (Amendment) (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to amend provisions of the Freedom of Information (Scotland)
Act 2002 relating to the designation of authorities, the effect of various exemptions and the time
limit for certain proceedings.

Amendments

1A Designation of authorities

(1) In section 5 (further power to designate Scottish public authorities) of the FOI Act, for
subsection (5) there is substituted—

“(5) Before making an order under subsection (1), the Scottish Ministers must—

(a) consult—

(i) every person to whom the order relates, or

(ii) persons appearing to them to represent such persons, and

(b) also consult such other persons as they consider appropriate.”.

(2) After section 7 of the FOI Act there is inserted—

“7A Reports on section 5 power

(1) In accordance with this section, the Scottish Ministers must lay before the
Parliament reports about the exercise of the section 5 power.

(2) The first report is to be laid on or before 30 June 2016.

(3) Each subsequent report is to be laid no later than 3 years after the date on
which the previous report is laid.

(4) A report must—

(a) state whether the section 5 power has been exercised during the reporting
period, and

(b) as the case may be—
(i) explain how the power has been exercised during the reporting period (and why), or
(ii) give the reason for leaving the power unexercised during the reporting period.

(5) A report may—
(a) summarise any response to a consultation carried out during the reporting period as regards the exercise of the section 5 power,
(b) indicate any intention to exercise the power in the future,
(c) include such additional information as the Scottish Ministers consider appropriate.

(6) In this section—
“reporting period” means—
(a) in the case of the first report, period of at least 3 years preceding the date on which the first report is laid,
(b) in the case of a subsequent report, period of time from the date on which the previous report is laid until the date on which the subsequent report is laid,
“section 5 power” means order-making power conferred by section 5(1).”.

2 Refusal notice

In section 18 (further provision as respects responses to request) of the FOI Act, in subsection (1), after the words “sections 28 to 35,” there is inserted “38,”.

3 Accessible information

In section 25 (information otherwise accessible) of the FOI Act, for subsection (3) there is substituted—
“(3) For the purposes of subsection (1), information is to be taken to be reasonably obtainable if—
(a) it is available—
(i) on request from the Scottish public authority which holds it, and
(ii) in accordance with the authority’s publication scheme, and
(b) any associated payment required by the authority is specified in or determined under the scheme.”.

4 Historical periods

(1) In section 59 (power to vary periods mentioned in sections 57 and 58) of the FOI Act—
(a) in subsection (1), the words “subsection (1) of section 57 or” are repealed,
(b) after subsection (1) there is inserted—
“(1ZA)The Scottish Ministers may by order—
(a) make provision modifying any rule in accordance with which a record becomes a “historical record” for the purposes of this Part, and
(b) do so by amending this Part or otherwise.

(1ZB) Provision by virtue of subsection (1ZA) may (in particular) state that a record becomes such a “historical record”—

5

(a) in relation to the exemption under section 41(a), at the end of—

(i) a specified period (not exceeding 30 years) beginning with the date on which the record is created or a particular date in the calendar year following that date, or

(ii) a specified period (not exceeding 30 years) beginning with the occurrence of an event apart from the creation of the record,

(b) in relation to any other exemption under Part 2, at the end of a specified period (not exceeding 30 years) beginning with the date on which the record is created or a particular date in the calendar year following that date.

10

(1A) An order under subsection (1) or (1ZA) may make different provision for—

(a) records of different descriptions,

(b) exemptions of different kinds,

(c) different purposes in other respects.”,

20

(c) in subsection (2)—

(i) after the words “subsection (1)” there is inserted “or (1ZA)”,

(ii) for the words “transitional provisions and savings” there is substituted “supplemental, incidental, consequential, transitional, transitory or saving provision”.

25

(2) In section 72 (orders and regulations) of the FOI Act, after the words “59(1)” in subsection (2)(b) there is inserted “or (1ZA)”.

5 Time limit for proceedings

After section 65 of the FOI Act there is inserted—

“65A Time limit for proceedings

(1) Proceedings for an offence under section 65(1) may be commenced within the period of 6 months beginning with the date on which evidence that the prosecutor believes is sufficient to justify the proceedings came to the prosecutor’s knowledge.

(2) No such proceedings may be commenced more than 3 years—

(a) after the commission of the offence, or

(b) in the case of a continuous contravention, after the last date on which the offence was committed.

(3) In the case of a continuous contravention, the complaint may specify the entire period during which the offence was committed.
(4) A certificate signed by or on behalf of the prosecutor stating the date on which the evidence referred to in subsection (1) came to the prosecutor’s knowledge is conclusive as to that fact (and such a certificate purporting to be so signed is to be regarded as being so signed unless the contrary is proved).

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

General

6 References to the FOI Act

In this Act, “the FOI Act” means the Freedom of Information (Scotland) Act 2002.

7 Commencement

(1) Section 6, this section and section 8 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may include transitional, transitory or saving provision.

8 Short title

The short title of this Act is the Freedom of Information (Amendment) (Scotland) Act 2012.
Freedom of Information (Amendment) (Scotland) Bill
[AS AMENDED AT STAGE 2]


Introduced by: Bruce Crawford
On: 30 May 2012
Supported By: Brian Adam
Bill type: Government Bill
FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Freedom of Information (Amendment) (Scotland) Bill (introduced in the Scottish Parliament on 30 May 2012) as amended at Stage 2. Text has been added as necessary to reflect amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND


5. The 2002 Act has been in force since 1 January 2005. Two areas of the 2002 Act have been identified as requiring amendment which can only be achieved through primary legislation.

6. The two areas concern:

   • the order-making power relating to the definition of what constitutes a ‘historical record’ and the lifespans of certain exemptions, and
   • the ability to prosecute in the event of information not being disclosed due to, for example, alteration, destruction or concealment.

7. The Bill also expands the provisions at section 5 of the 2002 Act relating to the use of the power to extend coverage by widening the scope of consultation and introducing the requirement for Scottish Ministers to report periodically on the use (or otherwise) of the order-making power.
8. In addition, the Bill proposes two minor amendments intended to add clarity and strength to the 2002 Act. Both these amendments arise from the Special Report to the Scottish Parliament\(^1\) submitted by the then Scottish Information Commissioner in January 2012.

**THE BILL – SECTIONS**

**Section 1A – Designation of authorities**

9. Section 5 of the 2002 Act provides that the Scottish Ministers may by order designate as a Scottish public authority for the purposes of the Act any person who is neither listed in schedule 1 nor capable of being added to that schedule under section 4(1), is neither a public body nor the holder of a public office, and who appears to the Scottish Ministers to exercise functions of a public nature or who is providing, under contract to a Scottish public authority, any service whose provision is a function of that authority.

10. The Bill expands on section 5 in two respects. Firstly, it broadens the required scope of consultation on an order made under section 5(5) to include “other persons as Ministers consider appropriate”, for example, those likely to use the services of a body proposed for coverage. The Bill also introduces a requirement for the Scottish Ministers to report periodically to the Parliament on the use, or otherwise, of the power to extend coverage under section 5. The reporting period is set at three years - though this in no way precludes the use of the power at any other time during this period.

**Section 2 – Refusal notice**

11. Section 18 of the 2002 Act sets out that a Scottish public authority can issue a refusal notice in responding to a request for information, if to reveal whether the information existed or was held would be contrary to the public interest. Such a response, usually referred to as ‘neither confirm nor deny’ can only be issued in relation to certain exemptions which would apply to the information, if held.

12. The Bill adds section 38 (which provides exemption for personal information) to those exemptions listed at section 18 of the 2002 Act, enabling a ‘neither confirm nor deny’ response to be issued where a request concerns personal information. The amendment also brings the Bill into line with the Environmental Information (Scotland) Regulations 2004 which already provide for a ‘neither confirm nor deny’ response to be issued in respect of personal information.

**Section 3 – Accessible information**

13. Section 25 of the 2002 Act concerns information which is otherwise accessible. All public authorities subject to the 2002 Act are required to satisfy the requirement to adopt a publication scheme. The Bill clarifies that any information made available under an approved publication scheme is exempt and does not need to be provided to the applicant.

\(^1\) [http://www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReport2012.asp](http://www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReport2012.asp)
Section 4 – Historical periods

14. Section 57(1) of the 2002 Act defines the period of time after which a record becomes a “historical record”, which is currently thirty years. Section 58 of the 2002 Act identifies those exemptions which are time limited, including, at section 58(1), those exemptions which cannot be applied to information contained in a ‘historical record’.

15. Section 59 of the 2002 Act contains order-making powers to reduce the period of time after which a record becomes ‘historical’ (thereby reducing the period of time those exemptions mentioned at section 58(1) can be applied) and also the lifespans of those exemptions mentioned at section 58(2). At present, an order amending the specified time period at section 57(1) would affect all those exemptions mentioned at section 58(1) – it is not possible to reduce the lifespan of just some of the exemptions mentioned at section 58(1).

16. The Bill replaces the existing power to modify section 57(1) with a new power to modify the rules around the meaning of “historical record”. In particular, it provides that in modifying the definition of “historical record” an order may set specific time periods (though not exceeding thirty years) beginning with the date on which the record is created, or a particular date in the calendar year following that date, in line with the power in section 59(1). Specifically in respect of the exemption in section 41(a) (Communications with Her Majesty etc.) the specified time period can begin with the occurrence of an event other than the creation of the record, for example, the death of the relevant member of the Royal Family.

17. The Bill also amends section 59 to allow for an order in relation to either the meaning of “historical record” or section 58 to make different provision for individual exemptions and records of certain descriptions, or for different time periods for particular records.

18. The Bill further allows such an order to make such ancillary provision (for example, consequential, supplementary, incidental, transitional, transitory or saving provisions) as the Scottish Ministers think fit.

Section 5 - Time limit for proceedings

19. Section 65 of the 2002 Act sets out that a person who, with the intention of preventing disclosure of information subject to a request, alters, defaces, blocks, erases, destroys or conceals the information is guilty of an offence. An offence under section 65 is a summary only offence with a fine not exceeding, at current levels, £5,000. As a summary only offence, any prosecution must be brought within six months of the commission of the offence, in accordance with section 136 of the Criminal Procedure (Scotland) Act 1995.

20. The Bill amends the 2002 Act by specifying that the time period within which a prosecution must be brought is six months from the date on which evidence, sufficient in the opinion of the prosecutor to justify proceedings, comes to his or her knowledge. No proceedings can be commenced more than three years after the commission of the offence.
This document relates to the Freedom of Information (Amendment) (Scotland) Bill as amended at Stage 2 (SP Bill 14A)

Section 7 – Commencement

21. This section brings into force sections 6 to 8 on the day after Royal Assent. Other sections come into force on such a day as the Scottish Ministers may by order determine.
SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Freedom of Information (Amendment) (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION AMENDED AT STAGE 2

Section 4 – historical periods

- **Power conferred on:** the Scottish Ministers
- **Power exercisable by:** regulations made by statutory instrument
- **Parliamentary procedure:** affirmative procedure

3. Section 4 (as introduced) enhances the existing order-making power in section 59(1) of the Freedom of Information (Scotland) Act 2002 (‘the 2002 Act’) by enabling the Scottish Ministers to make different provision for records of different purposes, exemptions of different kinds, or different purposes in other respects.

4. Section 4 was amended at Stage 2. Section 4 now adds a new power to section 59 of the 2002 Act to allow for modification, by order, of the meaning of ‘historical record’. In particular, the new power allows for a record to become ‘historical’ after a specified period (not exceeding 30 years) beginning with the date on which the record is created or a particular date in the calendar year following that date (in line with the existing power in section 59(1)), though particular provision is made in relation to communications with the Royal Family.

5. In addition, specific to section 41(a) of the 2002 Act (concerning communications with the Royal Family), the power allows for a record to become ‘historical’ after a specified period...
This document relates to the Freedom of Information (Amendment) (Scotland) Bill as amended at Stage 2 (SP Bill 14A)

(not exceeding 30 years) beginning with the occurrence of an event apart from the creation of the record.

6. This replaces the existing power in section 59(1) of the 2002 Act to modify section 57(1). As with the existing power, the new power is subject to the affirmative procedure.

7. Section 4 (as amended) also amends section 59(2) to enable an order under section 59(1) or the new section 59(1ZA) to make supplemental, incidental, consequential or transitory provision, in addition to transitional and saving provision.

Reason for taking power

8. The purpose of section 4 of the Bill is to provide enhanced, more flexible order-making powers primarily so that the meaning of ‘historical record’ and the lifespan of ‘30-year’ exemptions can be adjusted on an exemption-by-exemption basis.

9. Section 4 was amended at Stage 2 to ensure that the Scottish Ministers have sufficient powers to make orders containing provision for specified periods for different types of records in different cases, particularly in relation to the lifespan of exemptions under section 41(a) of the 2002 Act. This exemption is specifically identified in the amending provision.

10. The existing section 59(1) order-making power enables substitutions to be made about the number of years in the meaning of ‘historical record’ and that number cannot exceed 30 years. The new power also enables modification of the rules for what constitutes an ‘historical record’ with reference to specified time periods (though no specified time period can exceed 30 years).

11. In addition to a specified period beginning with the date on which a record is created, or a particular date in the calendar year following that date, in respect of section 41(a) a specified period can begin with the occurrence of an event other than the creation of a record, for example, the death of the relevant member of the Royal Family.

12. Section 4 is also amended to modify section 59(2) of the 2002 Act so as to allow an order under section 59(1) or (1ZA) to make the full range of ancillary provision. This is to ensure the smooth transition from one set of rules to another.

Choice of procedure

13. An order made under this power will be subject to the affirmative procedure in line with the procedure for orders under section 59(1), in order that the Parliament may be given the opportunity to consider any issues arising from modifying the definition of ‘historical record’.
Subordinate Legislation Committee

3rd Report, 2013 (Session 4)

Freedom of Information (Amendment)(Scotland) Bill as amended at stage 2
Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) subordinate legislation laid before the Parliament;

   (i) any Scottish Statutory Instrument not laid before the Parliament but classed as general according to its subject matter;

and, in particular, to determine whether the attention of Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Nigel Don (Convener)
Jim Eadie
Mike MacKenzie
Hanzala Malik
John Pentland
John Scott
Stewart Stevenson (Deputy Convener)

Committee Clerking Team:

Clerk to the Committee
Euan Donald
Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
Subordinate Legislation Committee

3rd Report, 2013 (Session 4)

Freedom of Information (Amendment) (Scotland) Bill as amended at stage 2

The Committee reports to the Parliament as follows—

1. At its meeting on 8 January 2013, the Subordinate Legislation Committee considered the delegated powers provisions in the Freedom of Information (Amendment) (Scotland) Bill¹, as amended at Stage 2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Scottish Government provided the Parliament with a supplementary delegated powers memorandum² on the new provisions in the Bill.

Delegated Powers Provisions

3. At Stage 1 of the Bill, the Committee reported that it did not need to draw the attention of the Parliament to the powers in sections 4 and 7.

4. Under Section 5(1) of the Freedom of Information (Scotland) Act 2002 Scottish Ministers can designate persons who appear to exercise functions of a public nature or are providing a service which is a function of a public authority as a Scottish Public Authority for the purposes of the Act. Section 1A of the amended Bill expands on this by requiring Ministers to consult any additional persons that they consider appropriate before making such an order.

5. Furthermore, the new section 7A requires Ministers to lay reports on the exercise of the section 5 power before the Parliament commencing before 30 June 2016 and at least every 3 years thereafter.

6. The Committee reports that it is satisfied in principle with the alterations to the consultation requirements prior to the exercise of powers under section 5(1) of the Freedom of Information (Scotland) Act 2002 made by section 1A of the Bill.


² Freedom of Information (Amendment) (Scotland) Bill Supplementary Delegated Powers Memorandum available at: http://www.scottish.parliament.uk/S4_Bills/Supplementary_DPM_-_FOI.pdf
7. Section 4 has been modified at stage 2 to add a new power to section 59 of the Freedom of Information (Scotland) Act 2002 to allow for modification, by order, of the meaning of ‘historical record’. The power has also been expanded to include the full range of ancillary powers.

8. The amended power continues to be subject to affirmative procedure.

9. The Committee reports that it is satisfied in principle with the power in section 4 of the Bill as amended at stage 2. Furthermore, the Committee is satisfied that the amended power in section 59 of the 2002 Act will continue to be subject to affirmative procedure.
Freedom of Information (Amendment) (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1A to 8 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Before section 1A

Elaine Murray

7 Before section 1A, insert—

<Information relating to functions of an authority

In section 3 (Scottish public authorities) of the FOI Act, after subsection (2) there is inserted—

“(2A) Subsection (2B) applies where, after the date on which this subsection comes into force, a Scottish public authority makes arrangements for another person (other than another Scottish public authority) to exercise any function of the authority or provide any service whose provision is a function of the authority.

(2B) Information relating to the exercise of the function or, as the case may be, provision of the service covered by the arrangements, and created by or in the possession of—

(a) the person with whom the arrangements are made, or

(b) any other person sub-contracted to provide the service or exercise the function or any part of it on behalf of the person,

is, for the purposes of subsection (2)(b), information held on behalf of the authority.

(2C) The arrangements must include provision to ensure the timely provision to the authority of information within the meaning of subsection (2B) where the authority receives a request for the information under section 1(1) of this Act.

(2D) In subsection (2A), “arrangements” includes—

(a) the establishment of a body for the purpose of exercising any function of the authority or providing any service whose provision is a function of the authority,

(b) contractual arrangements, but only where the total sum to be paid by the authority under the contract exceeds £1 million.”.>
Before section 1A, insert—

**Purposes of FOI Act**

Before section 1 of the FOI Act there is inserted—

“A1 Purposes

The purposes of this Act are, consistent with the Scottish Parliament’s founding principles of openness, accessibility and accountability—

(a) to increase progressively the availability of information held by Scottish public authorities in order—

(i) to enable more effective public participation in the making and administration of laws and policies,

(ii) to promote the accountability of Scottish public authorities, and

(iii) to facilitate the informed discussion of public affairs, and, in doing so, enhance respect for the law and promote good government, and

(b) to provide an enforceable right of access to information held by Scottish public authorities or persons providing services for them in accordance with the principle that information should be available to any person requesting it.”.

**Section 1A**

In section 1A, page 1, line 5, at end insert—

“( ) In section 5 (further power to designate Scottish public authorities) of the FOI Act, after subsection (2) there is inserted—

“(2A) In considering how to exercise the power under subsection (1) the Scottish Ministers must have particular regard to the desirability of providing access to information held by—

(a) any body that has been established by a Scottish public authority to exercise any functions or provide services on its behalf which is not a Scottish public authority within the meaning of section 3(1), and

(b) any person within the meaning of subsection (2)(b) where the total sum to be paid by the authority under the contract exceeds £1 million.”.

Consult members of the public.

In section 1A, page 1, line 11, after <persons,> insert—

“( ) consult members of the public.

In section 1A, page 1, line 17, leave out <30 June 2016> and insert <31 October 2015>
Elaine Murray

2 In section 1A, page 1, line 17, leave out <2016> and insert <2014>

Elaine Murray
Supported by: Nicola Sturgeon

3 In section 1A, page 1, line 18, leave out <3> and insert <2>

Elaine Murray

4 In section 1A, page 1, line 19, at end insert—
   <( ) The first report must either—
      (a) explain how the section 5 power has been exercised during the reporting period (and why), or
      (b) state that the Scottish Ministers will, within 3 months after the date the first report is laid, lay before the Parliament a draft of a statutory instrument containing an order exercising the section 5 power.>

Elaine Murray

5 In section 1A, page 1, line 20, leave out <A> and insert <Each subsequent>

Nicola Sturgeon

11 In section 1A, page 2, line 13, leave out <at least 3 years preceding> and insert <time from the date on which section 1A of the Freedom of Information (Amendment) (Scotland) Act 2013 comes into force until>

After section 1A

Iain Gray

14 After section 1A, insert—
   <Scottish public authorities
      In schedule 1 (Scottish public authorities) of the FOI Act, after paragraph 66 there is inserted—
      “The Glasgow Housing Association Ltd.”.>

After section 3

Paul Martin

12 After section 3, insert—
   <Functions of Commissioner
      In section 43 (general functions of Commissioner) of the FOI Act, after subsection (3) there is inserted—>
“(3A) The Commissioner must prepare, publish and update as necessary a list comprising those persons or bodies who are Scottish public authorities within the meaning of section 3(1).”>

Section 4

Nicola Sturgeon

13 In section 4, page 3, line 1, leave out <rule> and insert <enactment>
Freedom of Information (Amendment) (Scotland) Bill

Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated on the day of Stage 3 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Grouping of amendments

Note: The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

**Group 1: Information under arrangements made by Scottish public authorities**

7

**Group 2: Purposes of FOI Act**

9

**Group 3: Exercise of power to designate authorities**

8, 1

**Debate to end no later than 45 minutes after proceedings begin**

**Group 4: Reporting on power to designate authorities**

10, 2, 3, 4, 5, 11

*Notes on amendments in this group*

Amendment 10 pre-empts amendment 2

**Group 5: Scottish public authorities: Glasgow Housing Association**

14

**Group 6: Functions of Commissioner**

12
Group 7: Minor adjustment

13

Debate to end no later than 1 hour 20 minutes after proceedings begin
EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 2, No. 61 Session 4
Meeting of the Parliament
Wednesday 16 January 2013

Note: (DT) signifies a decision taken at Decision Time.

Business Motion: Joe FitzPatrick, on behalf of the Parliamentary Bureau, moved S4M-05377—that the Parliament agrees that, during stage 3 of the Freedom of Information (Amendment) (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the stage being called) or otherwise not in progress:

Groups 1 to 3: 45 minutes
Groups 4 to 7: 1 hour 20 minutes.

The motion was agreed to.

Freedom of Information (Amendment) (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to (without division): 3 and 13.

The following amendments were agreed to (by division)—
10 (For 63, Against 52, Abstentions 0)
11 (For 75, Against 40, Abstentions 0).

The following amendments were disagreed to (by division)—
7 (For 40, Against 74, Abstentions 0)
9 (For 40, Against 75, Abstentions 0)
8 (For 39, Against 75, Abstentions 0)
1 (For 50, Against 64, Abstentions 0)
4 (For 39, Against 75, Abstentions 0)
14 (For 41, Against 74, Abstentions 0)
12 (For 49, Against 64, Abstentions 0).

Amendment 2 was pre-empted.

Amendment 5 was not moved.

Freedom of Information (Amendment) (Scotland) Bill - Stage 3: The Cabinet Secretary for Infrastructure, Investment and Cities (Nicola Sturgeon) moved S4M-05362—that the Parliament agrees that the Freedom of Information (Amendment) (Scotland) Bill be passed.
After debate, the motion was agreed to (DT).
Scottish Parliament

Wednesday 16 January 2013

[The Deputy Presiding Officer opened the meeting at 14:00]

Business Motion

The Deputy Presiding Officer (John Scott):
The first item of business is consideration of business motion S4M-05377, in the name of Joe FitzPatrick, on behalf of the Parliamentary Bureau, setting out a timetable for stage 3 consideration of the Freedom of Information (Amendment) (Scotland) Bill.

Motion moved,

That the Parliament agrees that, during stage 3 of the Freedom of Information (Amendment) (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the stage being called) or otherwise not in progress:

Groups 1 to 3: 45 minutes
Groups 4 to 7: 1 hour 20 minutes.—[Joe FitzPatrick.]

Motion agreed to.
Freedom of Information (Amendment) (Scotland) Bill: Stage 3

14:40

The Deputy Presiding Officer (John Scott): The next item of business is stage 3 proceedings on the Freedom of Information (Amendment) (Scotland) Bill. For dealing with the amendments, members should have the bill as amended at stage 2, the marshalled list and the groupings. The division bell will sound and proceedings will be suspended for five minutes for the first division of the afternoon. The period of voting for the first division will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate. Members who wish to speak in the debate on any group of amendments should press their request-to-speak buttons as soon as possible after I call that group. Members should now refer to the marshalled list of amendments.

Before section 1A

The Deputy Presiding Officer: Group 1 relates to information under arrangements made by Scottish public authorities. Amendment 7, in the name of Elaine Murray, is the only amendment in the group.

Elaine Murray (Dumfriesshire) (Lab): In lodging all the amendments that I am presenting for Parliament's consideration today, I have attempted to reflect the Finance Committee's discussion of amendments that I lodged at stage 2. I have not resubmitted the same amendments, but my stage 3 amendments have the same purpose: to strengthen the amended act; to ensure that its provisions are used; and to ensure that past or future creation of arm's-length external organisations and the commissioning of large-scale contracts to provide services on behalf of public authorities do not diminish the public's right to know.

At stage 2, I introduced two amendments that dealt with the future creation of arm's-length bodies and major contracts undertaken on behalf of public bodies to the value of more than £1 million. Those amendments attempted to retain responsibility for freedom of information with the public body where the operation of functions had been given to ALEOs or transferred through major public sector contracts. Although committee members—and, indeed, the cabinet secretary—had sympathy for the intention of those amendments, they felt that the amendments as proposed would not achieve that intention and they were unclear on how the proposed
requirements would be enforced and what the terms of such arrangements would be.

Amendment 7 seeks to amend the original Freedom of Information (Scotland) Act 2002 by inserting into section 3, “Scottish public authorities”, a requirement to make arrangements regarding access to information relating to the exercise of functions that have been transferred out of the direct responsibility of an authority. The amendment would ensure that, when a public authority establishes a body or makes a contract to the value of more than £1 million for the purposes of exercising the authority’s functions or providing services on its behalf, the authority must make arrangements to ensure that it receives information in the possession of the body so established or the contractor if the authority receives a freedom of information request for that information. The requirement would not be retrospective but, after the bill’s enactment, public authorities, ALEOs and major public sector contractors would be required to have arrangements in place by which the authority could access information if requested to do so under freedom of information legislation.

At stage 2, the cabinet secretary raised concerns that the information referred to in my amendment on public sector contracts might include more than the performance of the contract and that there could be a conflict with the Public Records (Scotland) Act 2011. In my view, amendment 7 makes it clear that the information relates to the exercise of functions or the provision of services that would have been subject to FOI legislation had they continued to be undertaken directly by the public authority. Section 3(1)(b) of the Public Records (Scotland) Act 2011 provides that “records created by or on behalf of a contractor in carrying out the authority’s functions” are public records of that authority. That means that an authority’s records management plan must set out the arrangements for managing its contractors’ records as well as the records that are created by the authority. I believe that the approach adopted in my amendment 7 is similar, and I believe that the potential conflict between the amended FOI act and the Public Records (Scotland) Act 2011 is therefore resolved.

I know that the Scottish Information Commissioner has expressed support for the policy intention of amendment 7 but has questioned whether the value of the contract is inclusive or exclusive of VAT. In my view it clearly would be exclusive of VAT, as the value of a contract is the value to the contractor, not the value to the United Kingdom Treasury.

I move amendment 7.

14:45

Gavin Brown (Lothian) (Con): I am not convinced that amendment 7 is strictly necessary or desirable. I am not convinced that it is necessary because section 5 of the Freedom of Information (Scotland) Act 2002 gives the Government power to make an order that designates a body as subject to FOI. In my view, that is the appropriate means to do that. The fact that that has not been done in the period since the 2002 act was passed is neither here nor there. It is important that we see the mechanism being utilised and, for that reason, I do not think that amendment 7 is necessary.

With regard to the desirability of amendment 7, in the absence of a regulatory impact assessment I am slightly nervous about what impact it may have and I am slightly concerned that it could cut against the better regulation agenda.

For those reasons, we will not support amendment 7.

Willie Rennie (Mid Scotland and Fife) (LD): I support amendment 7, which is sensible. If we are trying to get a regime that follows the public pound, this is the way in which we should proceed. It seems to be a relatively simple, devolved way of operating that would mean that rather than relying on the retrospective section 5—which is worthy and should always be used—we could have a proactive scheme so that we could keep track of the public pound in the FOI regime. It is sensible, especially given the erosion of the FOI regime’s coverage, to which the Deputy First Minister has alluded, and I think that that is the way in which we should proceed.

The Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities (Nicola Sturgeon): Amendment 7 is similar in many respects to an amendment that Elaine Murray lodged at stage 2, although I appreciate that she has made some changes to reflect the discussions that took place then.

As I said at stage 2, I am not unsympathetic to the intention behind amendment 7. Certainly, consultation has shown that the public favour the public authority being the access point to information. However, my concerns about amendment 7 are very similar to the concerns that I had at stage 2: the amendment may have unintended or, indeed, unpredictable consequences.

Amendment 7 concerns any organisation that is “exercising any function of the authority or providing any service whose provision is a function of the authority”. Given the numerous organisations that that might include, it quickly becomes apparent that it would be unclear which organisations might be expected
to hold information on behalf of a particular public authority. It will become almost impossible for an authority to know what information it holds and that will become exacerbated when information is held further down the supply chain.

Administering the arrangements could place a burden on all public authorities, as well as an additional administrative burden on affected organisations. It would also place a considerable policing burden on the Scottish Information Commissioner.

Amendment 7 provides that the relevant information relates to

"the exercise of the function ... or ... provision of the service".

The meaning of that is unclear and imprecise. It leaves considerable potential for ambiguity and uncertainty as to what information may be within scope.

Of particular practical concern are the arrangements. I point out to members that “arrangements” is undefined in amendment 7. The arrangements “must include provision to ensure the timely provision to the authority” in the event of a request for information. That would apply down the supply chain and it would become increasingly difficult for the authority to comply with, as it has no direct control down that chain.

Dr Murray herself pointed to an issue around interpretation of the value of the contract. I heard what she said and it may be that she thinks that she knows what is meant by “£1 million” in amendment 7 but, with the greatest respect, I am not sure that that is sufficient if there is a lack of provision about what it means, with regard to the example that she used.

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): I am glad to hear that Nicola Sturgeon accepts the principle of amendment 7. If she is keen on the principle but not the detail, why did she not lodge an amendment of her own that could have embodied the substance of amendment 7 without some of the problems that she claims would arise from it?

Nicola Sturgeon: If Malcolm Chisholm is patient, he will hear me say more, in the course of the afternoon, about how the Government intends to ensure that the Freedom of Information (Scotland) Act 2002, as amended by the bill, stays up to speed with changes in how public services are delivered. I will say more about my intention to bring forward a section 5 order in early course, which I have already spoken about. In the context of later amendments, I will say more about how I foresee that applying to ALEOs, for example.

Having considered amendment 7, I do not believe that even an amended version of it would fulfill properly the laudable intentions that lie behind it. I therefore invite Dr Murray to withdraw the amendment.

I note the point that Gavin Brown makes fairly, that the changes that are proposed by the amendment have not been subject to consultation or the normal assessments that would be undertaken, despite the fact that the amendment would have very far-reaching implications.

As I said to Malcolm Chisholm, when we debate other amendments I will say more about the use of section 5. However, in all the circumstances and for all the reasons that I have outlined, I invite Dr Murray to withdraw amendment 7.

Elaine Murray: I believe that the cabinet secretary is making the interpretation of the amendment unnecessarily complicated. Public authorities already have mechanisms in place to deal with freedom of information requests and the amendment is not retrospective—it refers to ALEOs and contracts that will be made in the future. The public authorities making those arrangements already have systems in place, and the amendment will ensure that the systems continue once the functions have been transferred.

I press amendment 7.

The Deputy Presiding Officer: The question is, that amendment 7 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division. As it is the first division of the afternoon, I suspend the meeting for 5 minutes.

14:52

Meeting suspended.

14:57

On resuming—

The Deputy Presiding Officer (Elaine Smith): We move to the division on amendment 7.

For

Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McCulloch, Margaret (Central Scotland) (Lab)
 McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McManus, Gail (Dumfries) (SNP)
MacNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Urquhart, Jean (Highlands and Islands) (Ind)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Kilsyth) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Penlaw) (SNP)

Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Walker, Bill (Dunfermline) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 40, Against 74, Abstentions 0. Amendment 7 disagreed to.

The Deputy Presiding Officer: Group 2 is on the purposes of the FOI act. Amendment 9, in the name of Michael McMahon, is the only amendment in the group.

Michael McMahon (Uddingston and Bellshill) (Lab): The Finance Committee has been looking at a few bills recently and an inconsistency in the Government's approach to the use of a purpose clause in those bills has come to light during our deliberations. For example, when discussing the Land and Buildings Transaction Tax (Scotland) Bill, officials made clear the value of having a purpose clause in place in order to avoid misinterpretation of the bill's intent. However, in relation to the Freedom of Information (Amendment) (Scotland) Bill before us, we were told by the cabinet secretary at stage 2 that such a clause should be rejected, because adding such a clause

"could lead to the act being interpreted in a very different manner from the one in which Parliament originally intended it to be interpreted."—[Official Report, Finance Committee, 5 December 2012; c 1937.]

That was despite the fact that it was made clear in the consultation document on the original FOI act that the purpose of the law was to allow
information about our public services to be accessed by the public. How can that be misinterpreted?

The original consultation stated that the law should cover

"all Scottish public authorities and service providers".

The Scottish Government’s six principles also refer to FOI as

"an essential part of open democratic government and responsive public services."

However, that does not form part of the law, and the Government argues that to introduce clarity on the purpose of the 2002 act could have "unintended consequences" or

"change the fundamental ethos of the legislation".—[Official Report, Finance Committee, 5 December 2012; c 1936.]

How can it be the case that to introduce a purpose clause to state what the original act was intended to do can be said to change its fundamental ethos and be to the detriment of the bill and the use of FOI legislation?

Quite simply, the insertion of a purpose clause is needed because the Scottish Government’s consultation in 2010 and the evidence that we have had from various sources indicate that the law is not delivering what MSPs intended or what the public wanted. Therefore, we need to legislate explicitly so that we can uphold the enforceable right of the people of Scotland to access information. That is what was promised in 2002, but doubt has been raised about whether that is what we have. The inclusion in the Freedom of Information (Scotland) Act 2002 of the provisions that are proposed in amendment 9 would remove that doubt.

I move amendment 9.

15:00

Willie Rennie: I support Michael McMahon’s proposals.

I think that we have a problem. We could almost say that there is a crisis in the freedom of information regime. There is a lack of confidence among the public that the Scottish Government and its agencies are acting appropriately. In recent years, there have been a number of incidents in which the Government has withheld information unnecessarily and now there is suspicion among the public about whether the Government is fully embracing the freedom of information regime.

John Mason (Glasgow Shettleston) (SNP): Will the member give way?

Willie Rennie: No, not just now.

Kevin Dunion said that, at the time of its passage, the 2002 act was

"generally viewed as amongst the stronger access to information laws in the world."

However, he went on to say that

"Scotland's FOI regime is at risk of slipping behind other legislatures."

The purpose clause that is proposed in amendment 9 would set out clearly why the legislation is needed and would send a signal to public sector workers as well as ministers that they should be open and embrace openness, because that leads to better government.

I support amendment 9.

Gavin Brown: Some good arguments have been put forward by the Campaign for Freedom of Information in Scotland and by members, but I still have reservations about inserting a purpose clause in the original act through an amending act. Broadly, the 2002 act has performed fairly well, and I think that the bill’s provisions and some of the amendments that we are considering today will do enough to address the weaknesses of the original legislation.

There are genuine concerns about unforeseen consequences, and I note that when the 2002 act was passed, a formal decision was taken not to have a purpose clause. Having listened carefully to the arguments, particularly those that were made at stage 2, on balance I find myself unable to support amendment 9.

Nicola Sturgeon: As we have heard, amendment 9 advocates the insertion into the 2002 act of a purpose clause. I hope that even Michael McMahon would reflect on the fact that there may well be a fairly substantive difference between inserting a purpose clause into a bill at the outset and inserting a purpose clause into an act that has been in existence for eight years and which has been subject to interpretation over that time by the Scottish Information Commissioner and, on occasion, the courts.

The arguments against amendment 9 remain the same as they were when it was first proposed at stage 2. I do not believe that a purpose clause is required for the 2002 act to continue to deliver on its underlying principles. As a matter of good law making, if the act were failing to deliver on those principles—unlike Willie Rennie, I do not believe that that is the case—the proper way to address that would be through careful amendment of the act’s provisions rather than to try to overlay it with a purpose clause, the effect of which is deeply uncertain.

Whatever criticisms some people may make of the 2002 act—in particular, the one that can be made, with some justification, about the fact that
section 5 of the act has not yet been invoked to extend the act’s coverage—I do not believe that it can be argued with any credibility that there is any doubt about what the freedom of information legislation is designed to achieve.

The long title of the 2002 act states that it is an act to make
“provision for the disclosure of information held by Scottish public authorities or by persons providing services for them”.

Section 1(1) of the act states:
“A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.”

Therefore, in my view, the act’s intention and purpose are crystal clear.

It is also important to reflect on the 2002 report that was made by the lead committee when the original Freedom of Information (Scotland) Bill was progressing through Parliament. The report said that the committee was
“not persuaded of the need for a purpose clause”.

The 2002 act already makes information that relates to the provision of public services available to persons who request it, so I do not believe that the amendment is necessary or that it adds anything. Further, and perhaps more concerning, I believe that such an amendment, eight years into the life of an act of Parliament, could have unintended and unpredictable consequences.

It is not clear to me how amendment 9, if it were passed, would be measurable or workable in practice. Crucially, it is not clear what the legal effects of the amendment would be, for example, in relation to applying the existing conditions for disclosure and the operation of the current framework of exemptions. The commissioner and the courts would have to reconsider the meaning of all the provisions in the act against the new purpose clause. That would lead to great uncertainty for authorities and for the public who want to access information.

When the 2002 act was passed, its provisions were carefully considered by this Parliament and its committees and the purpose and the intentions of the provisions were clear. Amendment 9 would require reinterpretation of the act in light of the purpose and, as I have said, that would lead to uncertainty and unpredictability.

The law can always be improved. We are debating an amendment bill because we recognise that the law needs to be improved. However, I do not accept that there is any lack of clarity about the purpose of the 2002 act and therefore I do not consider that the amendment is necessary. In light of my comments about potential uncertainty, I do not believe that it is helpful or desirable either. I therefore invite Michael McMahon to withdraw amendment 9.

Michael McMahon: I do not believe that this is a particularly complex issue. It is more about principle than detail. The omission in 2002 of a purpose clause appears more and more to be a mistake. If we have the clarity that the cabinet secretary says that we have, why are more and more issues arising and being taken to the courts?

Public bodies take different approaches, despite performing similar functions. More and more cases are coming under dispute and whether a request for information meets the purpose of the 2002 act is continually being challenged. I and others believe that the purpose clause would help to clarify the intent behind the 2002 act and give clarity in determining whether a refusal to provide information falls outwith the purposes of that original act. I therefore urge members to support my amendment for that very simple purpose.

I press amendment 9.

The Deputy Presiding Officer: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfries and Galloway) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfries and Galloway) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Urquhart, Jean (Highlands and Islands) (Ind)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Alian, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)

Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Walker, Bill (Dunfermline) (Ind)
Watson, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 40, Against 75, Abstentions 0.
Amendment 9 disagreed to.

Section 1A—Designation of Authorities

The Deputy Presiding Officer: Group 3 is on exercise of power to designate authorities. [Interruption.] Could I have order in the chamber, please?

Amendment 8, in the name of Elaine Murray, is grouped with amendment 1.

Elaine Murray: Amendment 7 was intended to deal with arm’s-length organisations that might be created and major public sector contracts that might be entered into by public authorities in the future. Amendment 8 deals with those that have been created since the Freedom of Information (Scotland) Act 2002 was passed but have not been designated because ministers in successive Governments have not used their power under section 5 of the act.

When the 2002 act was passed, the then Minister for Justice, Jim Wallace, indicated that there would be early consultation on extension of the act to cover registered social landlords and major private finance initiative/public-private partnership contracts. Consultation was undertaken in 2006, but it was not followed by designation. A discussion paper was issued in 2008 but, again, there was no action. There was further extensive consultation, including a draft order, in 2010, but to date, the section 5 power has not been used. Perhaps the cabinet secretary will advise us today that it will be used shortly, but even that would not alter the validity of amendment 8.

Since the 2002 act was passed, housing stock has been transferred from local authorities to housing associations in Glasgow and in Dumfries and Galloway, to mention only two areas, a plethora of arm’s-length bodies have been established by public authorities to provide services on their behalf, and public authorities have entered into major contracts with private and third sector organisations to provide services on their behalf. In all those cases, the public’s right to
information under the act was lost on transfer of the function or service out of the direct control of the public authority. The public’s right to information has therefore diminished since the passing of the act in 2002.

Amendment 8 requires the Scottish ministers to give particular regard to the public’s access to information that is held by bodies that have been created by Scottish public authorities to exercise functions on their behalf or contractors that hold a contract with a value greater than £1 million to provide services on behalf of a Scottish public authority when considering how to exercise their section 5 power to designate Scottish public authorities. In other words, the amendment would specifically require ministers to consider designating such bodies or contractors and thereby to address the information deficit that has evolved since the 2002 act was passed. It would not force ministers to do that; it means that they would have to have particular regard to those bodies.

The amendment is perfectly reasonable, and I do not understand why it could not be acceptable, as it would not create any problems in the way that amendment 7 might have done. It simply requires the ministers to have particular regard to the bodies that are transferred out of the control of public authorities.

In relation to amendment 1, I lodged an amendment at stage 2 to replace the requirement to consult “other persons” whom ministers considered appropriate with a requirement to consult “members of the public and other interested parties”. The cabinet secretary advised that the phrase “such other persons as they consider appropriate” was a standard consultation obligation and that the phrase “other interested parties” was ill defined. There was uncertainty around the meaning of “interested” and the consequences if someone who had not been consulted asserted later that they had an interest and ought to have been consulted. However, at stage 2, the cabinet secretary made no comment on the inclusion of “members of the public”. I hope that that indicates that there was no objection to that part of the amendment.

Amendment 1 seeks to avoid those problems by retaining the standard consultation phrase and merely inserting a requirement to consult members of the public in addition to the persons specified in the amendment to section 5 of the 2000 act. As it stands, the amendment bill requires ministers to consult “every person to whom the order relates ... persons” who “represent such persons, and ... such other persons as they consider appropriate.”

The addition of “members of the public” makes it clear that persons who are not directly affected by the order but who might have a view on whether the Government should designate an authority using its section 5 power have the right to be consulted.

I move amendment 8.

Gavin Brown: Amendment 1 would add in the words “consult members of the public”.

A briefing note to the Finance Committee by the Scottish Information Commissioner at stage 2 said:

“I would therefore urge the Committee to consider how the current proposed wording will provide the necessary safeguards to ensure the general public, and those who represent them, will be appropriately represented in any future consultation.”

I think that that is fair and sensible, so I will support amendment 1, and I urge other members to do the same.

15:15

Willie Rennie: As I said earlier, the Deputy First Minister referred in a previous contribution to debate on the bill to the fact that there has been an erosion in the coverage of the freedom of information regime. She has tempted us numerous times that she will reveal later on when the list will be reviewed. There is great anticipation—certainly among Liberal Democrats—that that will be done quite soon.

The Scottish National Party has been in office for six years, and I do not think that we can wait too much longer to find out which of the other 130 ALEOs are going to be included in the freedom of information regime. When the Deputy First Minister makes that decision, I think that amendment 8 will assist her in making decisions about which ALEOs should be included, because it is really about public function and public funds. The Campaign for Freedom of Information has always focused on ensuring that we follow the public pound when considering freedom of information. I therefore think that what Elaine Murray proposes in her amendments is perfectly sensible, so I support amendments 8 and 1.

Nicola Sturgeon: Extending the coverage of the 2002 act is obviously a separate issue from this amendment bill, but it is clearly a matter that has been closely connected to the bill’s passage and it has featured in many of our discussions on the bill. The Government’s amendments to the bill
that were agreed at stage 2 sought to address concerns about the lack of use of the section 5 power to extend coverage. As a result, the bill as amended widens the scope of consultation on extension and introduces the requirement for Scottish ministers to report regularly to the Parliament on the use or otherwise of the power to extend coverage. The amendments in group 3 also relate to extension of coverage.

Amendment 8 seems to me to be unnecessary. I think that it adds confusion to the current requirements in section 5 of the act. I accept—this has been a common theme in what I have said on the issue—that the power in section 5 has been unused, but I do not believe that that means that section 5 is inadequate for the purposes of any Government that wants to extend the scope of freedom of information. I say directly to Willie Rennie that I do not consider that amendment 8 would help me in the considerations that I have had and will continue to have about the use of section 5. Everything that I need to consider the extension of coverage is in section 5 already.

At present, section 5 concerns organisations that appear to ministers to exercise functions of a public nature or which, under contract with a public authority, provide services that are a function of the public authority. The purpose of making a designation under section 5 is to provide access to information that is considered desirable. To that extent, amendment 8 would add nothing to the existing provision. However, it would have the effect of focusing attention on particular groups. The majority of bodies that fall within the scope of designation under section 5 will already be bodies established by authorities. Amendment 8 would therefore not add to the existing law.

Malcolm Chisholm: How can we be sure that bodies will be added as a result of the amendments that the cabinet secretary made to the bill in relation to reporting to Parliament? Further, how can we be sure about what kind of bodies—for example, ALEOs—may or may not be included?

Nicola Sturgeon: I think that the amendments that we have already made to the bill greatly add to the accountability of ministers to Parliament for ensuring that due consideration is given and that there is a regular reporting period. It will then be for the Parliament to hold ministers to account.

I have already said—Willie Rennie has referred to this a couple times in this debate—that coverage has been eroded by the creation of ALEOs. I will say something about that in particular for the next group of amendments. However, I do not accept that we can have an obligation on ministers that means that, come what may, every review will lead to bodies being added, because we would eventually get to a point at which there might be no bodies that are appropriate to add. Ministers have to retain the ability to make a judgment in that respect. Through the amendments that we have already made to the bill, we have increased the accountability of ministers and the obligation on them to explain themselves to Parliament regarding the decisions that they take.

To return to my comments about amendments 8 and 1, in relation to the provision of services, proposed section 5(2A)(b) in amendment 8 calls for a particular focus on larger contracts, suggesting that it is not desirable to include lower-value contracts. I do not think that that limitation is appropriate, because I believe that every case should be considered on its merits. I suggest that section 5 is already adequate to capture bodies that are providing public services, so a requirement to have particular regard to certain bodies does not add anything.

Confusingly, the language that is used in amendment 8 also varies slightly from the language that is used in section 5 by referring to the exercise of any functions or the provision of services on the authority’s behalf. The amendment contains no reference to functions being of a public nature, but there is reference to services, and that would contradict section 5(2)(a), and raise a question about whether it broadens the types of bodies that can be covered.

Identifying bodies

"where the total sum to be paid by the authority under the contract exceeds £1 million"

also seems to be somewhat arbitrary, particularly as some bodies might have multiple smaller contracts with an authority that would not be covered if none of them exceeded £1 million on their own, even if, taken together, they did exceed £1 million. I therefore urge Elaine Murray to withdraw amendment 8.

I turn briefly to amendment 1, which was considered at stage 2 and would require consultation to be with members of the public. I note in passing that that has always been the case with consultation to date—members of the public have always been consulted. I understand that there are concerns that the consultations on the extension of coverage that have been carried out to date have not sufficiently targeted consumers or service users in relation to the organisations proposed for coverage. However, I am not convinced that introducing a general requirement to consult members of the public would assist in satisfying those concerns. The purpose of the Government’s previously agreed amendment is to widen consultation on extension to include other persons who are considered to be appropriate. For
example, as stated in the explanatory notes, it would be appropriate to consult "those likely to use the services of a body proposed for coverage".

That will ensure that each consultation can target those who will be affected or interested, and that that includes members of the public. I know that there have been expressions of support for amendment 1 but, all things considered, it does not satisfy a clear policy objective and, therefore, in practice, I argue that it is unnecessary.

Elaine Murray: The cabinet secretary said that amendment 8 would focus attention on particular groups—of course it would. The very intention of amendment 8 is to look at those groups where bodies have been transferred out of the control of public authorities and the Freedom of Information (Scotland) Act 2002 no longer applies to them, and large-scale public contracts. The amendment would not force ministers to designate such groups, but it asks ministers to give them particular consideration. I also believe that, within the terms of the rest of the amended act, it would also require ministers to report to Parliament what consideration they have given and why they have taken the decision to designate or not to do so. Amendment 8 does not exclude lower-value contracts. It would still be perfectly possible for ministers to consider multiple contracts; it just makes particular reference to those that might be of greater public concern and to which the public might not currently have access.

Amendment 1 is not the same as the amendment that I lodged at stage 2. At that stage, there was no discussion about the desirability or otherwise of consulting members of the public. I will press amendment 8.

The Deputy Presiding Officer: The question is, that amendment 8 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dudgale, Kezia (Lothian) (Lab)
Edie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Pertshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Edie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyl and Bute) (SNP)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Walker, Bill (Dunfermline) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 39, Against 75, Abstentions 0.

Amendment 8 disagreed to.

Amendment 1 moved—[Elaine Murray].

The Deputy Presiding Officer: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McIntosh, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Penitents) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)

15541  16 JANUARY 2013  15542

The division is: For 39, Against 75, Abstentions 0.

Amendment 8 disagreed to.

Amendment 1 moved—[Elaine Murray].

The Deputy Presiding Officer: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
An initial report in 2015 is a preferable approach, because it provides an adequate timeframe to allow proper and considered analysis of the key issues and, crucially, appropriate engagement with stakeholders, including people who are potentially affected by proposals for coverage. A persuasive point was made in committee at stage 2 by, I think, John Mason, and probably by other members, which was that the initial report should be issued during the current parliamentary session. A requirement for a reporting deadline of October 2015 addresses that concern and means that ministers of this Administration will be accountable for the use of the power to extend coverage.

I emphasise that the periodic reports, important though they will be, will in no way preclude the use of the power to extend coverage at any time in the reporting period. I can confirm that my officials have written to Scottish local authorities today to inform them that I plan to make the first-ever section 5 order as soon as is practicably possible. The initial order—I stress “initial”—will, in the first instance, extend coverage to bodies that are established or created by local authorities to deliver recreational, sporting, cultural and social facilities on their behalf.

I then plan to look at further extension, to ALEOs that carry out other functions. We did not consult on that, and I confirm that I intend to consult the Convention of Scottish Local Authorities, local authorities and other interested parties on bringing councils’ other arm’s-length external organisations that carry out public functions within the scope of FOI.

Prioritising ALEOs deals with the legitimate point about erosion that has been made. I am still considering other organisations that were previously consulted on and will report to Parliament on my decisions on that. However, I see no reason not to get on with the job of bringing within the ambit of the act first the cultural and sporting ALEOs and then other ALEOs, subject to consultation.

15:30

Gavin Brown: If things move as quickly as the cabinet secretary has just indicated they will, surely there will be something to report in June 2014.

Nicola Sturgeon: That may be the case. What I am saying is simply that a longer period of time would give me the opportunity to also consider further organisations. All things considered, a longer period for reporting makes sense. At the moment, that is set at 2016. By bringing it forward to 2015, we strike the right balance and ensure that there is sufficient time to properly consider not...
only the initial—I deliberately stress the word “initial”—order that I am talking about but also other considerations that I want time to make. Crucially, it means that I, or a subsequent minister in this Administration, will be accountable before the next Scottish Parliament elections. That strikes the right balance.

We are on common ground with regard to question 3 and, as I have already said, I am happy to support the amendment. Indeed, it would have been a Government amendment if Dr Murray had not lodged it first. I am happy to accept that a shorter reporting period of two years will help to achieve the policy objective, ensuring that regular consideration is given to the use of the power to extend coverage.

Meanwhile, amendment 4 would appear to force minister’s hands in requiring an order extending coverage to be laid within three months after the date of the first report, if no order to extend had been made by that point, although I have made clear my intentions to bring forward an order. My objection to amendment 4 is a principled one, as it would entirely remove ministerial discretion in relation to the timescale for the making of an extension order, which is inappropriate and unreasonable. The amendment is a blunt instrument to ensure that the power in section 5 is used by a certain date. As I have just noted, I intend to bring that forward this year, so I argue that the amendment is unnecessary.

It is important to be clear about the purpose of the reports. As I said earlier to Malcolm Chisholm, they are about ensuring the accountability of ministers to Parliament and are intended to provide an explanation on a regular basis of the use or otherwise of the power to extend the coverage of the act. They are distinct from the process of extension itself and should not serve as a trigger to force the laying of an order.

Amendment 5 makes consequential provision in relation to amendment 4. As I am inviting Elaine Murray not to move amendment 4, I invite her to withdraw amendment 5, too.

Amendment 11 is a change to the definition of the reporting period in section 1A. The amendment proposes an initial reporting period from commencement of the section to the date on which the first report is laid. Therefore, if members agree amendment 10, the initial report is likely to cover the period from spring this year to October 2015. If the existing period of three years were maintained but the earlier initial reporting date were agreed, the reporting period would become retrospective. As the current position is clear, and there has been no extension of coverage, that seems unnecessary.

It should also be noted that the bill allows for reports to include such additional information as Scottish ministers consider appropriate, which would allow for material predating the formal reporting period to be included.

I hope that members will welcome the announcement of the first ever section 5 order and support amendment 10. I ask Elaine Murray not to move the other amendments in the group.

I move amendment 10.

The Deputy Presiding Officer: I advise the chamber that we are extremely tight for time.

Elaine Murray: The bill, as lodged, suggests that the first report will be laid on 30 June 2016. At stage 2, I suggested that we bring that forward to 30 June this year, but the cabinet secretary felt that that was not appropriate because it would require the first report to be laid within two months. I understand that. My feeling is that that probably is a little bit too soon, but other members of the committee had some sympathy for the concerns that I expressed at stage 2. Indeed, John Mason suggested that we should perhaps consider a compromise of 2014 or 2015. I have opted for 2014, but that would still be 12 years after the 2002 act was passed. To be honest, given the announcement that the cabinet secretary has just made, I cannot see how that timescale would present any problems. By contrast, the Scottish Government’s amendment 10 moves the reporting period forward only nine months and seems to be overtaken by the announcement that Nicola Sturgeon has just made.

I am pleased that the cabinet secretary has accepted amendment 3. When we discussed in the committee the frequency of reporting, she said that three years felt about right to her, so I lodged amendment 3. I am pleased that she has altered her position and is now happy to have biannual reporting.

At stage 2, I lodged an amendment that was not able to be considered because it exceeded the financial limits and would therefore have required a financial memorandum. Amendments 4 and 5 are a simpler way of achieving the same thing.

Amendment 4 would require that, if the section 5 power has not been used by the time the first report on how and why it should, or should not, be exercised is laid before the Parliament, a draft statutory instrument must be laid before the Parliament within three months. Given what the cabinet secretary said, I do not see that that would create any problems for her, because the Government intends to do such a thing anyway. Amendment 4 addresses the concerns that the power has never been used by requiring that it be used within three months of the first report being laid.
Amendment 5 is dependent on amendment 4 and will not be moved if amendment 4 fails.

Willie Rennie: The cabinet secretary tempted us into believing that she would make a radical change today and announce a big expansion of the remit of the FOI regime. However, although she says that the expansion will start, we do not have any timing for when it will happen. It needs to be concluded by the start of the summer recess. If it is not, the Scottish National Party will have been six years in office without having implemented it. That is a great disappointment.

We also need to ensure that the changes go way beyond what the cabinet secretary currently plans. Her proposal is a timid response to a demand that has been coming for a long time. I admit that my party’s Administration did not implement such an expansion, but the SNP has been in office six years and has done nothing about it. We cannot wait any longer for the regime to change.

I support Elaine Murray’s proposals on timing and frequency of reporting. I am pleased that the cabinet secretary has conceded the change from three years to two years. Elaine Murray’s other proposals are sensible. I hope that the cabinet secretary will review what she has announced today and be much more ambitious than she currently plans to be.

John Mason: I speak in favour of amendment 10, which is an excellent move in the right direction.

Originally, there was no mention of bringing new parties under FOI at this stage, but there clearly was a public appetite and a campaign to do that. I was particularly concerned about the likes of Glasgow City Council being able to chop bits of themselves off as arm’s-length bodies and thereby reduce the scope of FOI, so I was pleased that the cabinet secretary agreed to a specific date for a review.

As has been mentioned, at stage 2 the Finance Committee questioned whether that date could be brought forward to before the next election. I am delighted that that will now happen and I welcome the cabinet secretary’s further commitment there.

Nicola Sturgeon: I do not have much to add, except to say that I recognise the appetite for further extension of coverage. Some people, including Willie Rennie, have made a point about erosion. I hoped that he would find it within himself to welcome the fact that I am dealing with that, but I am sure that the issue will continue to exercise Parliament in the months and years to come. I look forward to those discussions.

The Deputy Presiding Officer: I remind members that, if amendment 10 is agreed to, amendment 2 will be pre-empted.

The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beatson, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Pertshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Edie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Pertshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
The Deputy Presiding Officer: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)

Against

Bailie, Jim (Edinburgh Southern) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Campbell, Alenie (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eddie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabelle (Mid Scotland and Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Penicuik) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Sturgeon, Nicola (Glasgow Cathcart) (SNP)
Swinney, John (Perthshire North) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Walker, Bill (Dumfriesshire) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 39, Against 75, Abstentions 0.

Amendment 4 disagreed to.

Amendment 5 not moved.

Amendment 11 moved—[Nicola Sturgeon].

The Deputy Presiding Officer: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Nairn) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Penicuik) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Walker, Bill (Dumfriesshire) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)
Amendment 11 agreed to.

After section 1A

The Deputy Presiding Officer: Group 5 is on Scottish public authorities: Glasgow Housing Association. Amendment 14, in the name of Iain Gray, is the only amendment in the group.

15:45

Iain Gray (East Lothian) (Lab): The effect of amendment 14 is straightforward. It would simply extend the reach of freedom of information legislation to include Glasgow Housing Association by adding it to the schedule of Scottish public authorities that are so covered. The purpose of the amendment is, at least at the margins, to redeem the bill so that it does the thing that everyone expected that it was going to do, which is to extend FOISA into areas where pretty well everyone believes that it should go.

When the SNP formed a Government in 2007, it said that it was going to extend FOISA using section 5 powers. After three years, in 2010, it finally consulted on an extension, but it failed to act on the outcome, instead deciding to bring forward primary legislation. Surely, it was thought, that would be the vehicle for the extension of FOISA cover that the SNP had demanded in opposition and promised in government, yet, notwithstanding the cabinet secretary’s announcement a few moments ago, the bill fails to do the one thing that most people believe it should do, which is to extend the 2002 act. Amendment 14 would at least allow us to claim that the bill does that, if only to include one body—GHA.

I should say that I have no axe to grind with GHA. After all, as housing minister, I was instrumental in setting it up. I would rather have included all housing associations in the amendment, but the fact is that the 2010 consultation consulted only on GHA, so it is the only association that is ready for inclusion. Indeed, respondents were almost universally in favour of that extension. In any case, of the 15,000 council tenants who lost FOISA rights when council housing stock was transferred to housing associations, about 10,000 became GHA tenants, so it is well worth restoring at least their rights to information.

John Mason: Will the member just save time by admitting that he made a mistake with the transfer to GHA?

Iain Gray: The stock transfer to Glasgow Housing Association brought £1 billion of investment into housing in the city that Mr Mason purports to represent.

The 2010 consultation also consulted on the inclusion of other bodies, including contractors who build and maintain public facilities such as prisons, schools and hospitals. However, I did not include them in the amendment to avoid the argument that the costs involved would require a financial memorandum that is not before us.

GHA argues that, in general terms, it provides investment into housing that Mr Mason purports to represent.

8:15

The Deputy Presiding Officer: The result of the division is: For 75, Against 40, Abstentions 0.

Amendment 11 agreed to.

Iain Gray (East Lothian) (Lab): The effect of amendment 14 is straightforward. It would simply extend the reach of freedom of information to include Glasgow Housing Association by adding it to the schedule of Scottish public authorities that are so covered. The purpose of the amendment is, at least at the margins, to redeem the bill so that it does the thing that everyone expected that it was going to do, which is to extend FOISA into areas where pretty well everyone believes that it should go.

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GHA argues that, in general terms, it provides investment into housing that Mr Mason purports to represent.
demonstrated for it, and it is within the scope of even this limited bill.

I cannot see how anyone who is sincere in their commitment to transparency can fail to support amendment 14. Government support for it would be a powerful signal that the cabinet secretary is sincere in the promise that she has now made of swift progress on the FOI regime.

I move amendment 14.

The Deputy Presiding Officer: We are very short of time. I call Willie Rennie and ask him to be brief.

Willie Rennie: I support Iain Gray’s proposal. It is even more important than I thought it was because of the cabinet secretary’s earlier timid and limited announcement on the extension of FOI. The reversal—the extension of the FOI rights—will not repair the damage caused by the erosion of recent years. I believe that Iain Gray’s proposal will put some of that right, so I support it.

Nicola Sturgeon: I understand the intentions behind amendment 14. As Iain Gray has said, I have expressed sympathy for the proposal in the past, and no doubt I will do so again. However, I have to say that it is a bit rich for a member of the party that set up Glasgow Housing Association and failed to ensure that it was subject to FOI to come to the chamber now and lecture this Government.

I also say to Willie Rennie that it is a bit galling for a member of a party in a United Kingdom Government that is not releasing the devolution files under freedom of information to come here and lecture this Government on openness and transparency. The fact that this Government will be the first to introduce a section 5 order will not be lost on the public who are interested in this issue.

It might shock Iain Gray to hear this—and he might not hear it again for a long time—but I agree with him to a certain extent. It is important to ensure that tenants and indeed others can obtain information not just from GHA but from other registered social landlords. We now have the new Scottish housing charter, which provides a means for tenants and other customers to access information from all RSLs, not just GHA, and I want to see how the charter operates in practice before deciding whether GHA and other RSLs should be brought within the scope of the 2002 act. If, despite the charter, there is evidence of a need for further access to information, a section 5 order extending coverage will be brought forward. As a result, although I do not support amendment 14, I do not rule out extending coverage to GHA and other RSLs in future. However, we should allow time to consider whether the right information is being provided under the housing charter.

Finally, in inviting Iain Gray to withdraw amendment 14, I simply say to him that this Government’s actions on freedom of information speak much louder than the Opposition’s words.

Iain Gray: This Government usually speaks on FOISA in the courts when it is trying to resist rulings that it should release information.

If the cabinet secretary believes that her housing legislation gives GHA tenants access to the information that they could get under FOISA, what earthly reason does she have for not simply voting yes to amendment 14? Her choice is simple: she can demonstrate her sincerity and commitment to transparency, or she can choose to take the opportunity to try to refight a political fight that she lost 12 years ago.

I press amendment 14.

The Deputy Presiding Officer (Elaine Smith): The question is, that amendment 14 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eddie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scott, Tavish (Shetland Islands) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Urqhart, Jean (Highlands and Islands) (Ind)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dorman, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Penlants) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGirr, Jodie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)

Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Walker, Bill (Dunfermline) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division: For 41, Against 74, Abstentions 0.

Amendment 14 disagreed to.

After section 3

The Deputy Presiding Officer: Group 6 is on functions of the commissioner. Amendment 12, in the name of Paul Martin, is the only amendment in the group.

Paul Martin (Glasgow Provan) (Lab): Amendment 12 seeks to clarify the range of bodies that are covered by the 2002 act and which will be covered by the provisions in the legislation before us today by requiring the Scottish Information Commissioner to update and maintain a list of all organisations that are subject to the 2002 act. I note the commissioner’s comment that she already maintains a partial list, but I have to say that I find it unacceptable that the commissioner, of all people, should be placed in a position in which she is able to maintain only a partial list. If we are serious about improving the public’s experience of seeking information from the Information Commissioner and indeed from many of the Government bodies that have been referred to, it should not be beyond the Government to keep and update an accurate and comprehensive list.

I move amendment 12.

Nicola Sturgeon: I appreciate the intention behind amendment 12, but I understand that, as has already been referred to, the Scottish Information Commissioner has raised concerns about the difficulties and resource implications of keeping such a list fully up to date. As has already been noted, the commissioner endeavours to maintain information on bodies that are covered by the legislation to help individuals who want to know whether a particular body is covered. As I understand it, the commissioner’s main concern is that it would not be possible to guarantee that any list that was published was always fully accurate and up to date. As a result, unfortunately, I am not able to support the amendment, but I hope—indeed, I am sure—that the commissioner will continue to do whatever possible to clarify which bodies are covered by FOI.
Paul Martin: I have listened carefully to what the cabinet secretary has said, and I remain unconvinced. We should recognise that the maintenance and updating of a list cannot be the most challenging proposal to have been put before the Parliament. For example, we have passed legislation on a register of tarts, which I recognise may be somewhat different from the updating of a list, but a similar principle applies.

There are many other examples of Government bodies that are required to maintain lists. The Department for Environment, Food and Rural Affairs maintains the national lists of agriculture and vegetable crops, including amateur varieties. If it is good enough for DEFRA to face the challenge of maintaining such lists, surely it is not beyond the Scottish Information Commissioner to ensure that a comprehensive list is made available beyond the Scottish Information Commissioner to challenge of maintaining such lists, surely it is not beyond the Scottish Information Commissioner to ensure that a comprehensive list is made available to ensure that we improve the public’s experience of seeking to access public information.

I press amendment 12.

The Deputy Presiding Officer: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.
The Deputy Presiding Officer: The result of the division is: For 49, Against 64, Abstentions 0.

Amendment 12 disagreed to.

Section 4—Historical periods

The Deputy Presiding Officer: Group 7 relates to a minor adjustment. Amendment 13, in the name of the Nicola Sturgeon, is the only amendment in the group. I invite the cabinet secretary to speak to and move the amendment briefly.

Nicola Sturgeon: Amendment 13 will make a small, entirely technical change to section 4 to clarify that an order determining what records should be treated as historical records may make provision for the modification of any "enactment" rather than any "rule".

I move amendment 13.

Amendment 13 agreed to.

The Deputy Presiding Officer: That ends the consideration of amendments.
information not being disclosed due to alteration, destruction or concealment, for example. The bill will remove both those weaknesses, thus making the 2002 act stronger.

As a result of the bill, we will have a far more flexible order-making power that will allow for the lifespan of the 30-year exemptions to be considered and revised on an individual basis. Instead of all 30-year exemptions having to remain at 30 years in order to ensure continued protection for more sensitive information, it will now be possible to assess the merits of having reduced lifespans for individual exemptions while maintaining longer lifespans when those are required.

The Scottish Government will now consult key stakeholders and interested parties on a draft order under section 59 of the 2002 act. That consultation will include assessment of both the resources that might be required to implement revised lifespans and how quickly new arrangements can sensibly be introduced.

It will of course be a matter for individual public authorities to determine whether they adopt a proactive or reactive approach to earlier release. However, although I am conscious of potential—though limited—resource implications, I would absolutely encourage a proactive approach.

Since 2009, the Scottish Government has routinely released archived files at 15 years rather than 30 years. Indeed, just two weeks ago almost 400 Scottish Government files were opened under the terms of our 15-year rule policy, which made more information available to the Scottish people.

In that context it is more than regrettable that, as has been reported in the past week or two, the United Kingdom lags behind Scotland in making more information available earlier and is only just moving towards implementing a 20-year release policy. Of course, some of the files that may be of interest around the devolution referendum have not yet been released by the UK Government.

Nicola Sturgeon: I accept that to a point, but this Government has reviewed and released files that were under our control. I am not sure why the same process cannot be followed and the files released. Indeed, I am not sure why that could not have been done earlier. There is nothing to stop the release of those files, and I encourage that to be done so that people can have sight of files that are of great and legitimate interest to people in Scotland. I hope that Willie Rennie will back that and that we can reach consensus on the issue.

Since 2009, more than 12,000 files have been released under our early release initiative. That means—this echoes Jamie Hepburn’s point—that Scotland is significantly ahead of the rest of the UK in making public information available earlier.

Also as a result of the bill, the ability to prosecute those who commit an offence under the legislation is made fully effective. That sends a powerful signal to anyone who might seek deliberately to subvert the requirements of the 2002 act. I note with interest that recent post-legislative scrutiny at Westminster of the UK Freedom of Information Act 2000 has also recommended that similar changes be made to that act. I understand that the UK Government is now minded to extend the time that is available to the UK Information Commissioner to bring a prosecution to six months from the point at which the commissioner becomes aware of an offence, rather than six months from the point of the commission of the offence. That is another example of Scotland being ahead of the UK in ensuring that our legislation remains fully fit for purpose.

Neil Findlay (Lothian) (Lab): The cabinet secretary spoke earlier about the need for openness, and she now says that we can be ahead of the game. Would she support legislation to increase openness and transparency in lobbying, so that Scotland can be ahead of the game in that regard as well?

Nicola Sturgeon: I have read in the newspapers about what the member is proposing. When he produces concrete proposals we, as a Government and as individual members, will look carefully at those proposals and decide whether they should be supported. I agree with him in principle that we should encourage openness generally as well as openness and transparency in how we conduct our business in the Parliament, and I look forward to his producing those proposals in due course.
I have covered the two main aspects of the bill, but during its consideration other provisions aimed at strengthening the legislation have been included. I refer to the extension of coverage, which has been a central theme of our discussions. We are all aware—I have never tried to get away from this—that although there has been consultation on three separate occasions, the power to extend has not yet been used by this or any other Administration. I do not believe that that is a failing of the provision, but I accept that the intention behind it has not been fulfilled. That is why I have been pleased to accommodate amendments to the bill based on proposals from the Information Commissioner. Those amendments strengthen the legislation by widening the scope of consultation and requiring periodic reporting by ministers to the Parliament and the use of the power to extend coverage. They significantly increase ministerial accountability and mean that a renewed focus will be placed on ensuring that the coverage of the 2002 act reflects the ever-changing mechanisms of public service delivery as well as the entirely understandable ever-increasing demand for information.

A decision on the extension of coverage, which was consulted on in 2010, was deferred until the bill had completed its passage through Parliament. As I indicated earlier, I now intend to bring forward a section 5 order as soon as is practicably possible. An initial order will cover arm’s-length sport, leisure and culture bodies that are set up by local authorities. We have already consulted on the extension to those bodies.

The Scottish Government will also look at extending coverage to other arm’s-length organisations that are set up by local authorities and which are carrying out public functions on an authority’s behalf, particularly where there has been a demonstrable loss of rights. We will engage with the Convention of Scottish Local Authorities, local authorities, arm’s-length bodies and other interested stakeholders to consider the matter further.

I hope that members agree that that approach allows us to address the issue of erosion. As I said earlier, further consideration must be given to extension as opposed to erosion; I have also said that I am not ruling out extending coverage to other bodies in the future.

Gavin Brown (Lothian) (Con): Will the cabinet secretary take an intervention?

Nicola Sturgeon: Do I have time, Presiding Officer?

The Deputy Presiding Officer (John Scott): No, not much—but go ahead.

Gavin Brown: The cabinet secretary says that she will bring forward a section 5 order “as soon as is practicably possible”.

Can she give us an indication of where she thinks that we will be—for example, come the summer recess?

The Deputy Presiding Officer: Cabinet secretary, please keep your answer brief.

Nicola Sturgeon: I am happy to provide further information and I will provide the Finance Committee with precise timelines. I hope that, by the summer, the initial phase of the work that I have spoken about will have gone through Parliament and that the second stage of work on other arm’s-length external organisations will be well progressed.

I am getting the evil eye from the Presiding Officer, so to speak, so I conclude by saying that we have reached an important landmark for freedom of information. It is not the end of the journey, but it is an important milestone along the way.

16:10

Paul Martin (Glasgow Provan) (Lab): It is fair to recognise that this has been a robust debate in many respects. A consensual approach for the future has been offered. However, we should recognise that this is—we have made the point at stages 1 and 3—a missed opportunity to introduce more comprehensive freedom of information legislation and to improve on what was built in Parliament in 2002.

We are disappointed that the Government has used its majority to vote down all but one of the Labour amendments. It must be recognised that many of the amendments were lodged after significant consultation of external organisations, including the Campaign for Freedom of Information, the Scottish Trades Union Congress and Unison.

I had expected that many of the amendments, particularly the one that was lodged by Iain Gray, would have received support from Scottish National Party back benchers. In particular, I refer to Bob Doris, who is quoted on the SNP website as having said in 2009:

“The Glasgow Housing Association must come into line with FOI. An organisation of such significance to the public life of the city needs to be transparent and accountable, as other public bodies currently are.”

That is a pretty strong and comprehensive statement.

I am sure that John Mason has made similar comments. I do not know whether he wants the opportunity to respond, but I would welcome his
view on whether that remains his position, and why he voted against Iain Gray’s amendment.

**John Mason (Glasgow Shettleston) (SNP):** I certainly associate myself with Bob Doris’s comments and, at the right time, I absolutely want to see GHA covered by the legislation.

Does Paul Martin agree that the Government has given considerable ground, and that the bill that we will pass today is considerably different from the initial proposal?

**Paul Martin:** First, I confirm that the bill is considerably different from the 2002 act—it is only four pages long. [Interruption.] I am responding to John Mason’s question. If the Government were to interrogate the Freedom of Information (Amendment) (Scotland) Bill, that would take considerably less time than the 2002 act.

To be fair to GHA, we should recognise that—as Iain Gray said—it has complied with the spirit of FOI legislation, which I welcome. However, it is simply not good enough for the minister to advise members that the housing charter is in some way an able replacement for the FOI legislation. That is unacceptable. The minister should recognise that the housing charter and other voluntary schemes are not enforceable by law. That point has been made by a number of bodies, including the Campaign for Freedom of Information.

Elaine Murray lodged a number of perfectly reasonable amendments. Amendment 9 sought to ensure that arm’s-length external organisations are not used as a vehicle to deprive the public of their enforceable right to access information. I expected that many members would see that as a reasonable approach to ensuring that the public are not deprived—as has happened in the past—of that opportunity and their right to know, which is set out in the 2002 act.

To return to amendment 12, which is my amendment, I reiterate the point that maintaining and updating a register is hardly the Scottish Parliament’s Dyon moment. Every day, people in public bodies and private companies maintain registers. Such a proposal is hardly ground breaking.

**Jamie Hepburn (Cumbernauld and Kilsyth) (SNP):** When Mr Martin advanced his arguments for amendment 12, he made the point that the Scottish Information Commissioner already maintains a partial list. Does the fact that the commissioner is able to maintain only a partial list not underline the difficulties of maintaining a full list? If the commissioner were able to maintain a full list, I presume that the commissioner would be doing that now.

**Paul Martin:** If we are serious about delivering the FOI legislation that Parliament passed in 2002, we must be serious about providing comprehensive and accurate information. I say with the greatest respect to the Scottish Information Commissioner that it concerns me that she is providing information on her website that, technically, could perfectly possibly be inaccurate. We must ensure that the commissioner is provided with the necessary resources for her to provide accurate information.

In addition, I think that the potential costs have been overblown. Many organisations, some of which I have referred to today, provide comprehensive lists of the organisations for which they are responsible, so I see no reason why the commissioner could not emulate that.

I confirm that we will, despite our differences with the Government, support the bill at decision time, although we recognise that the minister continues to face significant challenges—particularly in respect of section 5 referrals under the 2002 act. We want to ensure that she delivers those, so we will give her the opportunity to do so by voting for the bill to be passed, at decision time.

16:16

**Gavin Brown (Lothian) (Con):** I find myself being somewhat less critical of the Government than the Labour Party has been, and than I anticipate the Liberal Democrats will be. In the main, the amended bill is superior to the one that was presented at the beginning of stage 1, with a notable exception—which is, of course, the fact that the royal exemption has been removed. When I listened to the cabinet secretary at stage 1, I thought that I had found a kindred spirit who was a fan of the royal exemption. Alas, she made the error of listening to the majority of the committee—apart from me—and decided to remove the royal exemption.

It is most important that we hear from the cabinet secretary in her closing speech and, in the coming days and weeks, detail on the extension of the FOI legislation’s coverage and, in particular, on use of the order-making power under section 5 of the 2002 act, which she mentioned. I think that she has a clear understanding—as members of all parties have—that there is disappointment out there that the power has not been used since the FOI regime started.

I acknowledge the cabinet secretary’s use of the wording “as soon as is practicably possible”, but I intervened on her to get a handle on what that means in practice. That might be seen as splitting hairs, but given the issue’s background and history, and the fact that complaints have come from various parts of Scotland about the
operation—or non-operation—of section 5 of the 2002 act, it is important that as much detail as possible be provided as quickly as possible about the initial stage, which she mentioned in her response to my intervention, and the second stage, to which she intends to progress. The more information that can be provided to the committee and made public, the better things will be for all concerned.

A number of amendments that were defeated would have strengthened the bill and made it a better package overall. Regardless of those amendments having been defeated, Conservative members will support the bill at 5 o’clock. The areas in which I thought a bit more work could have been done include the consultation process under section 5 of the 2002 act. I think that it was acknowledged by all that the initial definition was too narrow. The amendment that the cabinet secretary lodged at stage 2 was welcome; it definitely widened the consultation process. Despite that, Elaine Murray was right to point out the weakness that existed.

However, it was not just Elaine Murray—an Opposition member—who said that. As I pointed out, that was also the view of the Scottish Information Commissioner. At stage 2, having seen the minister’s amendment, the commissioner stated again:

“A weakness of the current provision is that it does not require consultation with the users of public services whose rights may be curtailed as a result of changes in public service delivery.”

I noted the cabinet secretary’s comment that consultations will involve members of the public, but given what the Scottish Information Commissioner has said and given that the amendment was not agreed to, it would be welcome if the cabinet secretary could outline in the coming days exactly how she intends to involve the general public, particularly in the initial consultation.

The other area that I felt could have been stronger relates to when the first report under section 5 of the 2002 act ought to be published, about which there was debate at committee. The initial proposal from Elaine Murray was that it be published in 2013, which I felt was too soon; I think that she acknowledged that it might be too soon. The bill initially mentioned 2016, but there was clear acknowledgement from the cabinet secretary that 2016 would be too late.

The position that Elaine Murray adopted in amendment 4 was a superior one. Agreement to that amendment would have given us a year and a half in which to report under the 2002 act’s section 5 order-making power. As I pointed out in an intervention, given what we heard about what the Government intends to do, there would be a great deal to report in a year and a half in terms of what the Government had done under section 5 of that act and in terms of progress. Amendment 4 is a missed opportunity.

I will be happy to return to those points in the closing speeches.

16:22

**Jamie Hepburn (Cumbernauld and Kilsyth)  (SNP):** Given that yesterday we heard the deputy leader of the Labour Party in Scotland deigning to say that this Parliament is “not a democratic place in the conventional sense” and that it is “a dictatorship”.—[Official Report, House of Commons, 15 January 2013; c 798.]

I sincerely thank the Parliamentary Bureau for finding the time to schedule a debate on the bill rather than passing it by diktat. Its generosity knows no bounds.

I welcome the bill because it builds on the Scottish Government’s good handling of freedom of information legislation and its commitment to build on the original act. If we look at the most recently available annual statistics, which are for 2011, information was released in the majority of cases in which it was requested—almost three quarters of cases. Of the 86 appeals to the Scottish Information Commissioner, some 70 per cent of decisions by the commissioner were wholly or partially in favour of the Scottish Government.

Also, 83 per cent of the responses that were provided to requests were issued on time. By any standard, that is a pretty good record. Indeed, it improved on previous years. In 2005, it took longer for requests to be answered and fewer decisions by the commissioner were in favour of the Scottish Government.

We have a good record and the Scottish Government has adopted a proactive approach to releasing information. It routinely releases files for public consumption 15 years earlier than it is statutorily obliged to release them. That has been touched on in the debate; I believe that others would do well to follow that example. Earlier this month, the UK Government refused to accept the Scottish Government’s position that files on devolution from 1997 should be released under the 15-year rule.

With the best will in the world towards Mr Rennie, I thought that his explanation was entirely unconvincing: to blame officials is poor cover for a poor decision.

**Roderick Campbell (North East Fife)  (SNP):** Does Jamie Hepburn accept that Mr Rennie’s explanation seems to be in marked contrast to the
position of the better together campaign in terms of its demands for more detail on the case for independence?

Jamie Hepburn: Yes, I accept that. Not only that, but I presume that we can now look forward to never hearing from Mr Rennie—whenever a decision is taken by a Scottish Government official—a demand that the Scottish Government adhere to a request for information from him.

The bill is good news. It will pave the way for more information to be made public earlier, thereby building on the Scottish Government's good practice that I touched on earlier.

I also think that we can now see that those who seek to circumvent FOI will be dealt with more severely under the legal framework, which will be very useful. Ministers will have to report back more regularly on use of the legislation, which is also good; to increase scrutiny by Parliament is a good thing.

The Scottish Government has, of course, listened to the committee's and stakeholders' concerns, which is a good approach. We have heard about the change in the position on the royal exemption. Notwithstanding Gavin Brown's disappointment, I think that most people would welcome the fact that the Scottish Government listened to the committee and the stakeholders who spoke to it.

We have also seen movement on when the Scottish Government will have to report back to Parliament on coverage of extension of the 2002 act. I hear that there is some disagreement about when that might happen, but we have seen movement from the Scottish Government's original position. Again, it is listening to the Finance Committee's concerns. All in all, that is a good approach that should be welcomed across the chamber.

I very much welcome the bill.

16:25

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): The bill is quite strange in a sense because, as introduced, it presented us with very little with which to disagree. I think that the only substantial point of disagreement on what was in the bill was to do with the royal exemption. The cabinet secretary gave way on that, so in a sense everybody agrees with everything that was in the original bill. On the whole, the substantive debate today and much of the debate previously has been about what is not in the bill. That debate will continue because, from Labour's point of view, what should be there is still not there.

The cabinet secretary made her headline announcement today, of course, and she presented it as the answer to all our questions and concerns. However, it is a fact that what she has announced today means that bringing new bodies under the freedom of information legislation will be entirely at the discretion of the Government of the day. That means that that will, at present, be at her discretion, given the SNP's parliamentary majority, which is precisely what our amendments tried to avoid.

The point that I made in an intervention on the cabinet secretary stands: everything that she has brought into the bill is about reports having to be published. There is no requirement whatsoever for any new bodies to be covered by freedom of information legislation. She has said that she will do that at her discretion—no doubt under the pressure that she has been under from the wider public and, indeed, her own back benchers, but that does not mean that any other minister in any future Administration would be under any obligation to introduce any new bodies.

The second point that I made in my second intervention about the cabinet secretary's objection to our specific amendments also stands, because there was nothing to stop her lodging other substantive amendments about ALEOs or any other bodies such as GHA, had she wished to do so, in order to correct our wording if she thought that it was technically wrong. The point about GHA that Iain Gray made was very interesting, because the cabinet secretary invoked the Scottish housing charter. In fact, good as that body is, there are still grounds for concern, because freedom of information means that the public decide what they will get and when they will get it. The charter means that it will remain entirely at the discretion of the housing authority to withhold or give information and to decide when it is released.

The principle that I put forward in the stage 1 debate remains: if a body takes taxpayers' money, it should follow FOI legislation. That is, of course, consistent with the long title of the bill that we debated all those years ago, which referred to "the disclosure of information held by Scottish public authorities or by persons providing services for them".

I believe that there is an issue in respect of article 10 of the European convention on human rights, which embodies the right to form an opinion. That involves getting information in order to be able to form an opinion. Quite a lot of European case law backs that up.

I want to raise another point in the final minute of my speech. We are considering wider FOI issues. My point relates to how FOI is currently interpreted. The cabinet secretary should also address her attention to that. Before Christmas, I asked why a particular report from Healthcare
Improvement Scotland on inspection of acute care at Ninewells hospital had not been released. The health minister said—among other things—that Healthcare Improvement Scotland “may” publish such reports. It seems to me that that is absolutely wrong. That body and other public authorities must publish such reports.

My concern was increased when my colleague Jenny Marra received an email from Healthcare Improvement Scotland today that states that her FOI request about the report, which she placed in December, is not to be granted now but will be granted in March. However, the reality is that the inspection was in September, which was why she asked under FOI why the report had not been released. She is now told that it will be done in March.

I commend the cabinet secretary for setting up the inspections of acute care for older people, but I think that, like Jenny Marra, she should ask why the report has not been released.

16:30

John Mason (Glasgow Shettleston) (SNP): When we started considering the bill, a number of us identified two main problems with it—the first of which was the idea of a royal exemption. I think that the Finance Committee convener and Michael McMahon were especially concerned about that.

The second problem was that no new bodies had been added to the list of bodies for FOI coverage, which I, among others, was concerned about. The Finance Committee report highlighted those issues, and I think that the report was considered to be fair.

I commend the Government in general and Nicola Sturgeon in particular for listening to the committee and responding to those points. Specifically, the Government removed the royal exemption and agreed to consider additional organisations for FOI coverage. Originally, that was going to be done by June 2016, but as that date would be after the next parliamentary election, the date has been brought forward to October 2015. I accept that some people would like that date to be tomorrow and that others would like it to be yesterday, but there must be a certain amount of willingness to compromise, so the proposed date is acceptable. Those changes to the bill should not be underestimated. They have changed it from what I had considered to be a somewhat disappointing bill to a hugely improved one that is, as far as I am concerned, definitely acceptable.

We should pay tribute to the Campaign for Freedom of Information in Scotland, whose briefings and evidence have been extremely helpful. My judgment is that it has achieved probably 75 per cent of what it set out to achieve for the bill. Of course, it wanted to achieve 100 per cent, but we can all be grateful to it for the strong case that it made in the bill’s progress through Parliament.

The point has been made that if we were starting from scratch with brand-new FOI legislation, we might do things differently; in particular, such legislation might include a purpose section. I would certainly support such a section. I have supported such provision elsewhere—for example, for the bill that became the Equality Act 2010. I argued for a purpose section for the bill, but the Labour Party argued against it. However, in the case of this bill, we were amending existing legislation and not rewriting it, so I did not consider it appropriate to introduce major amendments that would, as the cabinet secretary said, have overlaid the bill rather than amended it.

The point was also made that mindsets, as well as the legislation, need to change and that it is not just about the law, but about getting people to think differently. I agree. There is still the assumption in some quarters, and perhaps even in Parliament, that information should be confidential unless there is good reason for it to be otherwise. However, I argue the exact opposite: information should not be confidential, unless there is good reason for it to be otherwise, which is why removal of the royal exemption is so symbolic and significant. Of course, not many cases may be affected by that provision, but it is a clear statement from Parliament that there must be a reason for confidentiality of information and that it must not be just because the information refers to a monarch, a Government or an MSP.

Michael McMahon (Uddingston and Bellshill) (Lab): Malcolm Chisholm believes that it was right to remove the royal exemption from the bill. However, had it not been taken out, would it have “overlaid” the bill or would it have “amended” it? If it would have amended the bill, surely a purpose section would have done the same thing?

John Mason: A purpose section would have been an amendment on a specific point. A purpose section would overlay or underlay a bill, which would have changed the bill and the Equality Act 2010 (Amendment) Bill at Westminster.

At the end of the day, we are debating how fast we should move on the bill’s provisions. I think that we all agree pretty well about the direction that we are going in, although some want to go faster while some, like Gavin Brown, want to go slower. However, I believe that the bill shows that we are moving forward.
Willie Rennie (Mid Scotland and Fife) (LD): I had high hopes for the cabinet secretary. I thought that the words that she uttered in the earlier debate on the bill indicated that she was listening and that she understood; that she was expressing sympathy about the erosion in freedom of information rights that we have seen over the past few years. However, her actions today did not match her words. I was disappointed by her timid response on coverage and unspecified time; Gavin Brown was right to identify that.

The SNP has had more than five years in power, and it has been two and a half years or more since the consultation on extending freedom of information rights over the bodies that were specified in section 5 of the 2002 act, but there has been very little action. I hope that the cabinet secretary comes forward with much more ambitious and bolder plans for extending those rights because, as she herself admitted, people’s rights have been eroded.

Documents such as the housing charter will just not be sufficient. The freedom of information regime is a tried and tested system that people understand and that they use well. The Government might not like it, but people do use the system. As a Liberal Democrat, I am certainly proud of it and of the fact that Jim Wallace, with the support of other members, pioneered and piloted the bill through Parliament. However, the principles that were established at that time have also been eroded and it is important for us to repair the damage. The cabinet secretary has a lot of work to do to convince us that the amended act represents not just lip service but real change, and that we will see those eroded rights being repaired.

The public are with it. The Information Commissioner has done a lot of polling and found that most people are in favour of extending coverage to housing associations, trusts, private sector companies who build and maintain local authority schools, hospitals, and prisons that are run by the private sector. The public is all in favour of those bodies being covered by FOI legislation, so if the cabinet secretary is to stay in step with public opinion she should make that change.

It is just not right that tenants in South Lanarkshire can access information about their council and their tenancy while tenants in Glasgow do not have the same rights. The vote on Iain Gray’s amendment was disappointing because the Government did not take the opportunity to send out a clear signal that the housing associations are going to be included. It could have also done that for schools and public-private partnership contractors because the public has a right to know. If the public pound is involved, the public should have the right to know how it is being spent. Keeping that secret does not chime with the FOI principles that were established by the 2002 act.

Malcolm Chisholm was right about article 10 of ECHR. The cabinet secretary needs to be careful about that because challenges have been made in the European Court of Human Rights.

Roderick Campbell: Will the member take an intervention?

Willie Rennie: Not just now.

If they are to make a decision and have freedom of expression, people have a right to information. The Government should be mindful of that.

Jamie Hepburn: Will the member give way?

The Deputy Presiding Officer: The member is in his final minute.

Willie Rennie: I am running out of time.

The Government also needs to be careful because its reputation on freedom of information has been damaged by going to court on at least two occasions over the legal advice on Scotland in the European Union and also over a local taxation system. Also, in the Ayrshire and Arran case, the FOI regime was seen to be valuable in making sure that we learnt the lessons from the deaths of patients.

Freedom of information has real value. It is not just some chattering class discussion; it is about people, their lives, and their rights. I hope that the cabinet secretary lives up to that ambition.
that FOI should be extended to housing associations, arm’s-length bodies and contractors in Government contracts. That is what the SNP argued in opposition, and when it came into government it said that it would make those changes. However, it took the Government until 2010 to carry out the consultation and then it introduced a bill that did not extend FOISA at all. The Government’s action on the bill does not live up to its rhetoric.

Nor do other day-to-day actions of the Government live up to its rhetoric. I am thinking about the court cases around local income tax or legal advice on the European Union, when the Government resisted the release of information despite the commissioner’s decision. I am reminded of the Professor Qvortrup controversy, when emails were released in stages so that the particularly difficult one came out just before or after Christmas. The Government’s actions are nothing to be proud of.

I must be honest and say that no Government or Administration finds FOI particularly easy. I acknowledge that the previous Scottish Executive failed to use section 5 to extend FOI coverage, although we said that it would be desirable to do so. I recall much high-flown rhetoric in 2001 and 2002 about having the best FOI legislation in the world, and I am not sure that we lived up to those aspirations. I thought that we would do. A member said that, given that I was instrumental in setting up GHA, I should have noticed that people were losing their FOI rights in the transfer. I did notice that, but I assumed that my Administration would extend FOI to housing associations. I have to acknowledge that that did not happen.

The point is that FOI legislation tests a Government’s moral fibre. No Government likes FOI. FOI is always inconvenient, but it is the right thing. I think that we failed the test today: we could have extended FOI but we missed the opportunity to do so. Today has also been an exercise in futility, because at some point FOI will be extended to the bodies that we have been talking about. The tide of history is running in the direction of more information being available to the public.

I think that the cabinet secretary realises that, which is why she made a concession and promised to use section 5. It is a pity that it looks as if she was dragged kicking and screaming to that position, when she could have extended FOI in the first instance and correctly claimed to be living up to her own rhetoric. The jury is still out on whether, in the long run, she will live up to her rhetoric on openness and transparency.

The Deputy Presiding Officer: We move to the wind-up speeches. I call Gavin Brown; you have up to four minutes—less would be more, please.

16:43

Gavin Brown: I will be happy to oblige, Presiding Officer.

I align myself with what John Mason said about the Campaign for Freedom of Information in Scotland. I do not agree with everything that the campaign says and I did not agree with all its proposed amendments, but it did an excellent job of informing the committee and the debate, and I agreed with a number of its suggestions.

I will talk about areas in which the bill could have been strengthened. I think that we missed a trick today in not agreeing to Paul Martin’s amendment 12, on functions of the commissioner. Mr Martin proposed that the commissioner should “prepare, publish and update as necessary a list comprising those persons or bodies who are Scottish public authorities”.

I thought that that was a fairly straightforward proposal, and I was happy to support it. Given that the amendment was not agreed to, I ask the cabinet secretary whether there is a way in which we can strengthen the partial list that currently exists. As a consequence of the vote on amendment 12, Mr Martin’s approach has not been put on the statute book, but is there a way of improving the list so that the objective that he sought to achieve can be achieved in practice? I hope that the cabinet secretary will address the matter, either in her closing speech or in the days to come.

I will bring my remarks to a close in a positive fashion because, as I said earlier, we will of course support the bill at decision time. I acknowledge that there are a number of big improvements in the bill. One is the move away from the three-year reporting period to a two-year reporting period. That is generally acknowledged to be fair, and I think that that was one of the few amendments that went through without a vote.

Section 5 of the bill, on time limits for proceedings, is extremely important, as the cabinet secretary said in her opening remarks. The change from six months after the commission of an offence to six months from when sufficient evidence of an offence comes to the knowledge of a prosecutor is crucial. There were potential investigations and prosecutions that did not go ahead simply because we ran out of time.

It was, possibly, inevitable that the previous arrangements would not work. If there are 20 working days to respond to a request, 40 working days to ask for a review if the response is felt to be unsatisfactory and 20 working days to review a response, that cuts a large slice out of the six-month period. The amendment that will be made by the bill that will no doubt be passed at decision
time makes the legislation far stronger and gives real teeth to the prosecution.

I welcome the intention of the cabinet secretary in relation to various points that she alluded to this afternoon. However, this Government and the cabinet secretary’s commitment to freedom of information will be judged almost entirely on what is done over the next few weeks and months, with particular reference to the section 5 order-making power. The Government will be judged by what it does, not by what it said today.

16:46

James Kelly (Rutherglen) (Lab): The bill, which the Labour Party will support at decision time, leaves us with measures that are not all that controversial. Of course, we will support measures that ensure that a more flexible approach is adopted to accessing information from historical periods. It makes good sense that, if information is already in the public domain, there is no need for a public authority to publish it. As the cabinet secretary said, if there are offences under the act, it makes sense to ensure that the period for amassing evidence and bringing a prosecution is brought into proper timelines, and the legislation does that.

The major controversy at stage 1 concerned the royal exemption, with many in the Parliament arguing that the public interest clause is sufficient. I am glad that the moderate and calm voice of Kenneth Gibson prevailed on the SNP benches and that the Government backtracked on its proposal.

Today’s debate has been instructive in terms of the approach that the SNP has taken. With regard to Michael McMahon’s amendment 9 at the start of the debate, I thought that—to use the cabinet secretary’s phrase—laying out a purpose at the start of the bill would be good lawmaking. In a situation in which the landscape has changed greatly since 2002 and there have been more disputes about freedom of information, some clarity on the legal process would have been useful.

The debate around Iain Gray’s amendment to extend the legislation to GHA was interesting. As Paul Martin told us, Bob Doris—whom he quoted—and John Mason have expressed support for extending the FOI legislation to GHA but, during that debate, it was very much the silence of the SNP lambs.

John Mason: I have spoken quite a lot this afternoon. Does James Kelly accept that the amendments that the Government has brought forward are significant and have changed the bill?

James Kelly: As Malcolm Chisholm pointed out, many of the so-called changes that the Government intimated this afternoon concerned powers being invested in ministers. People are looking for real power in legislation not only so that FOI practitioners can be clear about what their duties are but so that the public can be clear about what freedom of information requests they can make.

The SNP’s approach to the bill underlines its approach to government. It was amusing to hear Nicola Sturgeon and Jamie Hepburn talk about the SNP Government’s good record on FOI when it spent £100,000 trying to block discussion on council tax plans.

Jamie Hepburn: Will James Kelly give way?

James Kelly: I am short of time, or I would let Jamie Hepburn in.

Jamie Hepburn: We did not make the law. Give way.

The Deputy Presiding Officer: The member is in his last minute.

James Kelly: Members should not tell us about the SNP Government’s good record—[Interruption.]

The Deputy Presiding Officer: Order.

James Kelly: The SNP Government wasted £12,000 of taxpayers’ money going to court about legal advice that was not available. What a waste of money that was.

We will support the bill at 5 o’clock, but there is no doubt that the bravehearts in the SNP have been faint-hearts this afternoon. It was a missed opportunity to deliver more openness and transparency.

16:51

Nicola Sturgeon: James Kelly might be well advised to look back at the Official Report of his speech and consider whether he wants to make use of any of the new procedures to correct the record. I will not dwell on that any further at the moment.

I thank everybody who contributed to today’s debate. It was lively, which is a good thing. We are debating an important subject.

In his usual cheery way, Paul Martin talked about missed opportunities. He wasted an opportunity to recognise that the Government listened to many of the comments that were made about the bill and responded accordingly.

John Mason and Jamie Hepburn were absolutely right to say that the bill is very different today from what it was on introduction. It is
different for a reason: the Government listened to the points that the committee made and proposed amendments as a result.

It is probably difficult to think back now and remember that, at introduction, the most controversial part of the bill was the royal exemption. That measure has not been debated today because it was removed by a Government that listens. Even those who think that we should go further should have the good grace to recognise that.

I am not sure that I could ever have lived up to Willie Rennie’s high ideals and principles, but I will always try. I simply say to him—and I say it seriously—that it is a pity that, although he preaches those high ideals, his party completely fails to practice them. I say to him seriously and sincerely that I find that deeply disappointing.

I turn to the main issue that has dominated not the bill but the debates around it: the extension of coverage. The bill was never intended to extend coverage because the power to do so exists in the 2002 act—that is the section 5 power about which we have spoken.

Malcolm Chisholm was right that the debate about the bill has focused more on what is not in it than what is in it, but I have to say that he made an uncharacteristically uncharitable speech. I know how honourable he is, so I am sure that, when he reads the Official Report, he will concede that it was uncharitably uncharitable. I did not say at any point that what I announced today about the use of the section 5 order was an answer to all the concerns that have been expressed. I said that it was a first step. I stressed the fact that the order about which I was talking was an initial order. Malcolm Chisholm and James Kelly made much of the ministerial discretion to decide whether to use the power to extend coverage. I simply say—particularly to Labour members—that that has always applied. The bill will not change that; the change in the bill is that the ministerial discretion will be the subject of greater accountability to the Parliament than has ever existed before. That is a positive step in the right direction.

Malcolm Chisholm: Will the cabinet secretary give way?

Nicola Sturgeon: I hope that Malcolm Chisholm will be more characteristically charitable in his intervention.

Malcolm Chisholm: I will be charitable in the sense that I recognise and welcome the fact that the cabinet secretary will introduce a section 5 order. However, the point is that that is at her discretion. If she had accepted our amendments, that would no longer have been at the Government’s discretion, because legislation would have required certain bodies to be included.

Nicola Sturgeon: The point that I make to Labour members—including people such as Malcolm Chisholm, who were ministers in the previous Administration—is that the power has always been subject to ministerial discretion. That discretion will now be the subject of more accountability than has ever been the case before and I hoped that Malcolm Chisholm would welcome that.

I concede—as I have conceded before—that, when we look back at the debates on the original bill, it is clear that expectation was high that the power to extend coverage would be used early and regularly. That has not happened. As Gavin Brown was right to say, that has caused disappointment, which I recognise and want to address.

However, it is a bit rich for those whose parties did not extend coverage when they were in government—and for those whose parties are now in government but are not ensuring that UK freedom of information legislation goes even as far as that in Scotland—to criticise the Scottish Government, which intends to make a section 5 order for the first time. I would have thought that those who want freedom of information coverage to be extended would welcome that.

As I said earlier, in developing proposals for future orders—and in discussion with stakeholders and interested parties—I will adopt a staged, function-based approach that prioritises areas in which rights to information have been lost following the transfer of a function or service from a public authority. I do not rule out going further. As I said, I will give that due consideration. However, I do not think that that consideration should hold up the action that I have talked about today in relation to ALEOs.

Iain Gray: Will the cabinet secretary give way?

Nicola Sturgeon: I will give way if the member can be brief.

Iain Gray: I am interested in the prioritisation of ALEOs. I understand the principle that is behind that and I support it, but I worry that there are other significant bodies, extending coverage to which has been consulted on. Why cannot those bodies, such as contractors that are building and running prisons, be included in the early order?

Nicola Sturgeon: I have said that I am considering that. When we debated one such body earlier, I said why I was not announcing such a measure.

The Parliament will continue to debate the issue. As I said to Malcolm Chisholm, because of the changes that we have made in the bill, there
will be much greater accountability for the use of or failure to use the power.

I hope that members will support the bill, as all the parties have said that they will. It is another important step along the road of embedding a culture of openness and transparency. There are more steps to take, including the secondary legislation that will flow from the bill, but I hope that members are assured of our commitment in taking those steps in the months and years that are ahead.

With those comments, I am pleased to commend the Freedom of Information (Amendment) (Scotland) Bill to the Parliament.
# Freedom of Information (Amendment) (Scotland) Bill

[AS PASSED]

## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1A</td>
<td>Designation of authorities</td>
</tr>
<tr>
<td>2</td>
<td>Refusal notice</td>
</tr>
<tr>
<td>3</td>
<td>Accessible information</td>
</tr>
<tr>
<td>4</td>
<td>Historical periods</td>
</tr>
<tr>
<td>5</td>
<td>Time limit for proceedings</td>
</tr>
<tr>
<td>6</td>
<td>References to the FOI Act</td>
</tr>
<tr>
<td>7</td>
<td>Commencement</td>
</tr>
<tr>
<td>8</td>
<td>Short title</td>
</tr>
</tbody>
</table>
ACCOMPANYING DOCUMENTS
Amendments to the Bill since the previous version are indicated by sideling in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

Freedom of Information (Amendment) (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to amend provisions of the Freedom of Information (Scotland) Act 2002 relating to the designation of authorities, the effect of various exemptions and the time limit for certain proceedings.

Amendments

1A Designation of authorities

(1) In section 5 (further power to designate Scottish public authorities) of the FOI Act, for subsection (5) there is substituted—

“(5) Before making an order under subsection (1), the Scottish Ministers must—

(a) consult—

(i) every person to whom the order relates, or

(ii) persons appearing to them to represent such persons, and

(b) also consult such other persons as they consider appropriate.”.

(2) After section 7 of the FOI Act there is inserted—

“7A Reports on section 5 power

(1) In accordance with this section, the Scottish Ministers must lay before the Parliament reports about the exercise of the section 5 power.

(2) The first report is to be laid on or before 31 October 2015.

(3) Each subsequent report is to be laid no later than 2 years after the date on which the previous report is laid.

(4) A report must—

(a) state whether the section 5 power has been exercised during the reporting period, and

(b) as the case may be—
(i) explain how the power has been exercised during the reporting period (and why), or
(ii) give the reason for leaving the power unexercised during the reporting period.

(5) A report may—

(a) summarise any response to a consultation carried out during the reporting period as regards the exercise of the section 5 power,
(b) indicate any intention to exercise the power in the future,
(c) include such additional information as the Scottish Ministers consider appropriate.

(6) In this section—

“reporting period” means—

(a) in the case of the first report, period of time from the date on which section 1A of the Freedom of Information (Amendment) (Scotland) Act 2013 comes into force until the date on which the first report is laid,
(b) in the case of a subsequent report, period of time from the date on which the previous report is laid until the date on which the subsequent report is laid,

“section 5 power” means order-making power conferred by section 5(1).”.

2 Refusal notice
In section 18 (further provision as respects responses to request) of the FOI Act, in subsection (1), after the words “sections 28 to 35,” there is inserted “38,”.

3 Accessible information
In section 25 (information otherwise accessible) of the FOI Act, for subsection (3) there is substituted—

“(3) For the purposes of subsection (1), information is to be taken to be reasonably obtainable if—

(a) it is available—

(i) on request from the Scottish public authority which holds it, and
(ii) in accordance with the authority’s publication scheme, and
(b) any associated payment required by the authority is specified in or determined under the scheme.”.

4 Historical periods
(1) In section 59 (power to vary periods mentioned in sections 57 and 58) of the FOI Act—

(a) in subsection (1), the words “subsection (1) of section 57 or” are repealed,
(b) after subsection (1) there is inserted—
“(1ZA) The Scottish Ministers may by order—
(a) make provision modifying any enactment in accordance with which a record becomes a “historical record” for the purposes of this Part, and
(b) do so by amending this Part or otherwise.

(1ZB) Provision by virtue of subsection (1ZA) may (in particular) state that a record becomes such a “historical record”—
(a) in relation to the exemption under section 41(a), at the end of—
(i) a specified period (not exceeding 30 years) beginning with the date on which the record is created or a particular date in the calendar year following that date, or
(ii) a specified period (not exceeding 30 years) beginning with the occurrence of an event apart from the creation of the record,
(b) in relation to any other exemption under Part 2, at the end of a specified period (not exceeding 30 years) beginning with the date on which the record is created or a particular date in the calendar year following that date.

(1A) An order under subsection (1) or (1ZA) may make different provision for—
(a) records of different descriptions,
(b) exemptions of different kinds,
(c) different purposes in other respects.”,

(c) in subsection (2)—
(i) after the words “subsection (1)” there is inserted “or (1ZA)”,
(ii) for the words “transitional provisions and savings” there is substituted “supplemental, incidental, consequential, transitional, transitory or saving provision”.

(2) In section 72 (orders and regulations) of the FOI Act, after the words “59(1)” in subsection (2)(b) there is inserted “or (1ZA)”.

5 Time limit for proceedings

After section 65 of the FOI Act there is inserted—

“65A Time limit for proceedings

(1) Proceedings for an offence under section 65(1) may be commenced within the period of 6 months beginning with the date on which evidence that the prosecutor believes is sufficient to justify the proceedings came to the prosecutor’s knowledge.

(2) No such proceedings may be commenced more than 3 years—
(a) after the commission of the offence, or
(b) in the case of a continuous contravention, after the last date on which the offence was committed.

(3) In the case of a continuous contravention, the complaint may specify the entire period during which the offence was committed.
(4) A certificate signed by or on behalf of the prosecutor stating the date on which the evidence referred to in subsection (1) came to the prosecutor’s knowledge is conclusive as to that fact (and such a certificate purporting to be so signed is to be regarded as being so signed unless the contrary is proved).

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

General

6 References to the FOI Act

In this Act, “the FOI Act” means the Freedom of Information (Scotland) Act 2002.

7 Commencement

(1) Section 6, this section and section 8 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may include transitional, transitory or saving provision.

8 Short title

The short title of this Act is the Freedom of Information (Amendment) (Scotland) Act 2013.
Freedom of Information (Amendment) (Scotland) Bill

[AS PASSED]


Introduced by: Bruce Crawford
On: 30 May 2012
Supported By: Brian Adam
Bill type: Government Bill