

Freedom of Information Reform (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's standing Orders, these Explanatory Notes are published to accompany the Freedom of Information Reform (Scotland) Bill, introduced in the Scottish Parliament on 2 June 2025.
2. The following accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 72–FM);
 - a Policy Memorandum (SP Bill 72–PM);
 - a Delegated Powers Memorandum (SP Bill 72–DPM);
 - statements on legislative competence made by the Presiding Officer and the Member in Charge of the Bill (SP Bill 72–LC).
3. These Explanatory Notes have been prepared by the office of Katy Clark MSP, the Member who introduced the Bill, 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.
4. 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. 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.

Overview and summary

5. The primary objectives of the Bill are to extend the Freedom of Information (Scotland) Act 2002 (the “FOI Act”) by amendments; to provide for the further expansion of the definition of Scottish public authority; to create new duties in respect of the proactive publication of information - including by introducing a new “Publication Code”- and to make further provisions regarding monitoring and enforcement of compliance with that Act, including by requiring Scottish public authorities to appoint an individual as “Freedom of information officer”. The Bill confers on the Scottish Information Commissioner the power to make provision for a code of practice regarding compliance with the duty of proactive publication.

This document relates to the Freedom of Information Reform (Scotland) Bill (SP Bill 72) as introduced in the Scottish Parliament on 2 June 2025

6. The Bill also repeals provisions of the Freedom of Information (Scotland) Act 2002 relating to publication schemes, model publication schemes, and where certain applications to the Scottish Information Commissioner are not possible.

7. The Bill is in 23 sections.

Commentary on sections

Section 1 – General entitlement

8. Section 1 introduces a duty on Scottish public authorities to apply a presumption in favour of disclosing information in response to an information request unless disclosure is prohibited by an absolute exemption.

Section 2 – Further powers to designate Scottish public authorities

9. Section 2 amends section 5 of the FOI Act in two ways. It adds a new subsection (6) which requires the Scottish Ministers to consider any proposal made by the Scottish Information Commissioner using their power under section 43(4) to “make proposals to the Scottish Ministers for the exercise by them of their functions under sections 4 and 5 of this Act”, when considering whether to use their existing powers under those sections of the FOI Act to specify a person as a Scottish public authority.

10. It further adds section 5A to confer a new power on the Scottish Parliament to add, by resolution, to the list of Scottish public authorities in schedule 1 of the FOI Act. Subsections (1) and (2) provides that the Parliament may only specify persons who can already be specified by the Scottish Ministers using their existing powers under sections 4 and 5 of the FOI Act. Subsection (5) requires the Scottish Parliament to take certain procedural steps before exercising this power. Subsections (6) to (9) make ancillary provision relating to the use of the power.

Section 3 – Publicly-owned companies

11. Section 3 amends section 6 of the FOI Act to extend the definition of a publicly-owned company to include any company that is wholly owned by the Scottish Ministers and other Scottish public authorities. This extends the scope of the existing definition to include joint ventures between public bodies and Scottish Ministers.

Section 4 – Public authorities to which Act has limited application

12. Section 4 excludes access to information held by a public authority designated by resolution if the information does not relate to the functions of a public nature or, if providing any service under a contract, the information does not relate to the service.

Section 5 – Reports on section 5 power

13. Section 5 amends section 7A of the FOI Act to require Scottish Ministers to consider the exercise of the section 5 power before complying with the existing requirement to report to the Parliament on its exercise. It further requires the Parliament, within twenty sitting days of the report being laid, to debate and vote on whether to approve the report.

Section 6 – Requesting information

14. Section 6 amends section 8 of the FOI Act to make clear that an information request can include an electronic address for correspondence.

Section 7 – Time for compliance

15. Section 7 amends section 10 of the FOI Act so that the deadline for a Scottish public authority to provide information under the FOI Act does not restart in circumstances where the authority requests more information from the requester in order to comply with their request, but instead is extended by excluding from the calculation of the time limit any time between the authority requesting more information and receiving that information. It further repeals the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016, which extended the statutory time limit for responding to information requests to up to 60 days for grant-aided and independent special schools.

Section 8 – Publication schemes and Model publication schemes

16. Section 8 repeals section 23 of the FOI Act, which requires Scottish public authorities to make publication schemes, and makes consequential modifications in relation to that repeal. Section 8 also repeals section 24 of the FOI Act, which confers on the Scottish Information Commissioner the power to make model publication schemes and makes consequential modifications in relation to that repeal.

Section 9 – Information provided to the Commissioner

17. Section 9 introduces into the FOI Act a new exemption as to when information must be provided to a requester in respect of information that has been obtained by the Scottish Information Commissioner for the purposes of an application for a decision made under section 47(1) of the FOI Act.

Section 10 – General functions of Commissioner

18. Section 10 amends the FOI Act to confer on the Scottish Information Commissioner a power to require any officer, employee or agent of a Scottish public authority to provide information to the Commissioner where this is required for the exercise of the Commissioner's functions under section 44 "practice recommendation",

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section 49 “an application” for review, section 50 “information notice” requiring specified information or section 51 “an enforcement notice”, of the FOI Act.

Section 11 – When application excluded

19. Section 11 repeals section 48(a) of the FOI Act to permit a requester to make an application to the Commissioner for a decision in relation to whether the Commissioner has complied with their duties under the FOI Act. Currently an application cannot be made in such cases.

Section 12 – Enforcement notices

20. Section 12 confers on the Scottish Information Commissioner the power to issue enforcement notices in respect of a failure by a Scottish public authority to comply with a provision of a code of practice issued under the FOI Act. It further amends section 51 of the FOI Act to require the Commissioner to consult the Keeper of the Records of Scotland before giving an enforcement notice in relation to compliance with a code of practice issued under section 61.

Section 13 – Exception from duty to comply with certain notices

21. Section 13 repeals section 52 of the FOI Act, which confers on the First Minister the power to override a decision of the Commissioner in cases where the Commissioner has issued a decision notice or enforcement notice to the Scottish Administration. It further makes consequential modifications in respect of that repeal.

Section 14 – Failure to comply with notice

22. Section 14 amends section 53(1) of the FOI Act to enable the Commissioner to refer a decision notice to the Court that imposes on a Scottish public authority, under section 49(6)(c) of the FOI Act, a deadline for taking steps specified in the decision notice. This allows the Court to deal with the authority in such circumstances as if it has committed a contempt of court.

Section 15 – Proactive publication duty and publication code

23. Section 15 amends the FOI Act to introduce a new section 60A and section 60B. The new section 60A imposes a duty on a Scottish public authority to take reasonable steps to organise the information that it holds in relation to its functions and make that information available to the public in an accessible form and manner. It further requires a Scottish authority to comply, in relation to that duty, with any code of practice issued by the Commissioner under section 60B and have due regard to how members of the public would be likely to access information the authority holds.

24. The new section 60B confers on the Scottish Information Commissioner the power to issue a code of practice in relation to the duty imposed by section 60A, that

must specify the categories of information that must be published, how it should be made available and searchable, and how long it should be made available for. Section 60B(3) requires the Commissioner to consult specified persons before issuing the code and provides that the Commissioner may not issue the code unless a draft has been laid before and approved by the Scottish Parliament.

Section 16 – Freedom of information officer

25. Section 16 adds to the FOI Act a new Part 6A (consisting of new sections 61A, 61B and 61C) to establish a new office of freedom of information officer within Scottish public authorities, similar to Data Protection Officers established under the Data Protection Act 2018. New section 61A requires Scottish public authorities to appoint a person as freedom of information officer and notify the Scottish Information Commissioner of that appointment. New section 61B imposes duties on a Scottish public authority in relation to ensuring the independence and resourcing of that officer. New section 61C specifies the role and duties of the freedom of information officer within the Scottish public authority.

Section 17 – Disclosure of information to Scottish Public Services Ombudsman, Information Commissioner or to Audit Scotland publication schemes

26. Section 17 amends section 63 of the FOI Act to add Audit Scotland to the list of public bodies to which the Scottish Information Commissioner may disclose information in specified circumstances under that section.

Section 18 – Offence of altering etc. records with intent to prevent disclosure

27. Section 18 amends section 65 of the FOI Act to extend the scope of the offence under that provision to circumstances where information is destroyed before any request for that information has been made, where that destruction is done with the intention of preventing the disclosure of that information. The penalty for this offence is the same as for the existing offences under section 65 of the FOI Act.

Section 19 – Time limit for proceedings

28. Section 19 amends section 65A of the FOI Act in order that the existing three-year time limit on the bringing of proceedings in respect of an offence under section 65 does not begin until the commencement of a criminal investigation, instead of beginning on the date on which the offence is committed.

Section 20 – Ancillary provision

29. This section allows the Scottish Ministers, by regulations, to make ‘standalone’ ancillary provision in relation to the Bill or any provision made under it. However, this ancillary provision does not extend to being able to modify Acts. This type of power is used to ensure that the Bill has its full intended effect.

Section 21 – Interpretation

30. This section defines the term “FOI Act” which is used in the Bill to mean the Freedom of Information (Scotland) Act 2002.

Section 22 – Commencement

31. Section 22 sets out when the provisions of the Bill will come into effect as a matter of law. It provides that the majority of provisions will automatically come into force on the day after the Bill receives Royal Assent. Remaining sections of the Bill will take effect on the day falling at the end of a period of 12 months beginning with the day of Royal Assent or, if earlier, in accordance with regulations made by the Scottish Ministers. Those regulations will require to be laid before the Scottish Parliament but will not otherwise be subject to any parliamentary procedure.

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