Background

1. The Scottish Government has invited Scottish public bodies to respond to the above consultation to inform Scottish Ministers’ thinking on the principle of making most public sector records routinely available to the public after a period of 15 years by reducing the lifespan of certain exemptions in FOISA, which currently apply for 30 years. The Scottish Government has indicated its support of the reduction of the lifespan to 15 years and recently instructed the National Archives of Scotland (NAS) to make publicly available the majority of the historic Scottish Government files that it holds once the information is 15 years old.

2. The full consultation can be viewed on the Scottish Government website.

Timing

3. Replies to the consultation are required by 30 September 2009.

Discussion

4. FOISA provides a general entitlement for anyone to request information that is held by Scottish public authorities. The information must be provided unless certain conditions or exemptions apply.

5. Eight of the most frequently used exemptions in FOISA can be applied by a public body to withhold information until it is 30 years old; Scottish Ministers seek our view on reducing that period to 15 years. The 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

5. Section 57 of FOISA currently provides that records become “historical records” after 30 years. Section 58(1) then identifies the exemptions that cannot apply once the record has become a “historical record”. Under section 59 Scottish Ministers can amend by order the definition of a “historical record” contained in section 57 by reducing the time period to less than 30 years. The order cannot be selective about which of the exemptions it would apply to because it can alter only the definition of “historical record”. Therefore, all the above exemptions would be affected together and we cannot seek to vary the exemption terms.

6. The specific questions in the consultation are:

   i. Do you agree that the definition of “historical record” in section 57 of FOISA should be amended to reduce the lifespan of the exemptions listed above from 30 years to 15 years?

   ii. If you disagree with this proposal, what are your reasons for doing so?

   iii. Do you support a different lifespan, for example to reduce the lifespan of the exemptions to 20 years instead of 15? If so, why do you propose that period?

   iv. Please provide any other comments you may have on the proposals, in particular any practical examples of applying the exemptions to information after 15 years.

7. This paper recommends that the Scottish Parliamentary Corporate Body support the consultation by agreeing to reduce the period of time exemptions that is applied to our records by 15 years because:

   - It is in line with the principle of openness and transparency in public authorities in Scotland.

   - Freedom of information experience since 2005 indicates that the prime interest is in recently produced records of current activities of interest including events, expenses, costs and significant issues.

   - A low percentage of our records is retained beyond 15 years: strategic leadership team papers, operational management group papers, SPCB papers, art advisory group papers and Commonwealth Parliamentary Association papers.
Replies to individual freedom of information requests are not retained for a period any longer than that assigned to the actual records unless a review or appeal is required. Neither of these requirements would involve retaining records for 15 years.

The eight exemptions involved are all subject to the public interest test and it would be difficult for the SPCB to argue that it is in the public interest to withhold a document that is more than 15 years old.

SPICe has introduced a records retention schedule setting out strict controls for the management of records in each office, so there is minimal risk of any records being retained for longer than is necessary.

Our historical records are currently retained by the NAS and it would appear to be sensible to adopt the same process for opening our records as has the Scottish Government.

Resource Implications

8. There are no resource implications.

 Dependencies

9. There are no dependencies.

Equalities Implications

10. There are no equalities issues.

Publication Scheme

11. This paper should be published as it will underpin the reply provided to the consultation, which will be published.

Next Steps

12. Subject to support from group members, we will respond positively to the consultation and agree that the lifespan for the eight specified exemptions in FOISA be adjusted to cover a 15-year rather than a 30-year period.

Decision

13. OMG is invited to agree that we respond to the consultation as outlined above in support of the principle that earlier access to most information should be provided.

SPICe
September 2009