

FREEDOM OF INFORMATION (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Freedom of Information (Scotland) Bill introduced in the Scottish Parliament on 27 September 2001. It has been prepared by the Scottish Administration to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Administration and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 36-EN.

POLICY OBJECTIVES OF THE BILL – GENERAL

2. The Scottish Executive is committed to introducing an effective Freedom of Information regime. The Executive believes that openness is central to a modern, mature and democratic society, and serves to strengthen government and empower people. Underpinning the Bill is a presumption of openness and a belief that better government is born of better scrutiny. The Bill is intended to support the development of a culture of greater openness throughout the Scottish public sector.

3. Within these broad aspirations, the policy objectives of the Bill are:

- to establish a legal right of access to information held by a broad range of Scottish public authorities;
- to balance this right with provisions protecting sensitive information;
- to establish a fully independent Scottish Information Commissioner to promote and enforce the Freedom of Information regime;
- to encourage the proactive disclosure of information by Scottish public authorities through a requirement to maintain a publication scheme; and
- to make provision for the application of the Freedom of Information regime to historical records.

CONSULTATION – GENERAL

4. Consultation on the proposals for a Scottish statutory Freedom of Information regime began on 25 November 1999 with the publication of the Executive's consultation document *An*

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Open Scotland. This set out the Scottish Executive's proposals for the introduction of a statutory Freedom of Information regime and views were invited from a broad range of interested bodies and groups, including all those public authorities which it was envisaged could be subject to a Scottish FOI regime.

5. During the consultation period, Scottish Executive officials met with a number of organisations to help inform their responses to the consultation. These included the Consumers' Association, the Campaign for Freedom of Information, Friends of the Earth Scotland, the Royal Society for the Protection of Birds, the Scottish Parliamentary Corporate Body and the Scottish Criminal Cases Review Commission. In addition, Executive officials from the Freedom of Information Unit and the Crown Office gave evidence on the proposals to the Scottish Parliament's Justice and Home Affairs Committee (as it was then called). A total of 119 responses were received from individual members of the public and from a wide variety of organisations including local authorities, trade unions, non-departmental public bodies, health bodies and environmental organisations.

6. A summary of responses was published on 25 May 2000. The proposals in *An Open Scotland* were broadly welcomed, particularly the harm test of "substantial prejudice" and a Scottish Information Commissioner to promote and enforce the scheme. A number of general issues and many points of detail were raised.

7. A draft Freedom of Information (Scotland) Bill was published on 1 March 2001 for public consultation and pre-legislative scrutiny. Copies were distributed widely, including to all those public authorities to be covered by the legislation and to all those who had responded to the initial consultation. The draft Bill was published with a commentary explaining the provisions and indicating where there remained areas of further work.

8. Again, to aid organisations in responding to the consultation and to engage with those with particular interests in the proposed legislation, Executive officials met with various organisations to explain the provisions of the draft Bill. These bodies included the Campaign for Freedom of Information in Scotland, Friends of the Earth Scotland, the Scottish Consumer Council, the Scottish Parliamentary Commissioner for Administration, the Health Service Commissioner for Scotland, and officials of the Scottish Parliament. Executive officials met with the 3 statutory equality organisations – the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission – to discuss how the draft Bill addressed the interests of those organisations. Executive officials participated in a seminar organised jointly by the Scottish Consumer Council and Campaign for Freedom of Information in Scotland, and in a seminar co-hosted by the National Archives of Scotland and COSLA. The Deputy First Minister and Executive officials appeared before the Scottish Parliament's Justice 1 Committee (as the former Justice and Home Affairs Committee is now called) as part of the Committee's pre-legislative scrutiny of the draft Bill.

9. A total of 209 responses to the draft Bill were received from a broad range of organisations and individuals, including a large number inspired by Friends of the Earth Scotland. As with *An Open Scotland*, respondents broadly welcomed the proposals and a number were pleased to note that their comments on the original proposals had been taken on board. A Summary of Responses is being drawn up and will be published in due course.

RIGHT TO INFORMATION (PART 1, SECTIONS 1-24)

10. Part 1 of the Bill sets out the general entitlement to information held by Scottish public authorities; the institutional coverage of the Bill; the right for public authorities to charge for the disclosure of information; the duty on public authorities to maintain publication schemes; and special provisions relating to records transferred to the Keeper. A significant proportion of the comments received during the Bill's development focused on the application arrangements and the proposed charging structures. Where any alternative approaches were considered, these are set out separately below.

The general right to information

11. If the Bill is to encourage a move towards more open and transparent working practices across the Scottish public sector, it is vital that the right of access is straightforward, easily understood and easily exercised. Section 1(1) sets out the general right of access provided by the Bill: "a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority". The right applies to information recorded in any form (section 70 provides a definition) and can be exercised by any individual or organisation world-wide. Consequently, any written request for information directed to a Scottish public authority will be considered an FOI request and it will be important that Scottish public authorities ensure their staff are fully aware of their responsibilities in relation to a request.

12. It is important that the application process is not overly burdensome or impractical for public authorities. The proposed application process is therefore characterised by a balance between the applicant's interests in a user-friendly right of access and the need to minimise the administrative burden on public authorities operating the regime. In common with other FOI regimes, an application must be in writing, to provide the public authority – and the applicant – with a record of the request, but applicants need only state their name and address, and describe the information requested. No reasons need to be given for the request.

13. An applicant will be able to express a preference that requested information be provided in a particular format, but an authority will only be obliged to give effect to this so far as is "reasonably practicable". A wide range of public authorities will be subject to the legislation, large and small, and the Executive did not consider that it would be appropriate to subject all these authorities to exactly the same duties and responsibilities as regards providing information in particular formats. What is reasonable for one authority will not necessarily be reasonable for another.

14. A public authority in receipt of a request will have 20 working days to respond to the applicant, although this period is extended where the authority need further information from the applicant in order to identify and locate the requested information. A public authority would not be required to disclose requested information in the following circumstances:

- where the public authority did not hold the information requested;
- where the information was exempt under a provision in Part 2 of the Bill;
- where the public authority considered the request vexatious;

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- where further information required by the public authority (provided it was a reasonable requirement) to enable it to identify and locate the requested information had not been received;
- where the applicant had not paid the fee requested for the information; or
- where the public authority estimated that the cost of complying with the request would exceed the upper cost threshold prescribed in regulations.

15. When refusing to disclose requested information, a public authority would provide the applicant with a “refusal notice”, setting out clearly the public authority’s reasons for non-disclosure *and* the applicant’s right of appeal. In this way, the Bill ensures that applicants are aware of their rights, and any failure by a public authority to set these out would result in the authority being in breach of its responsibilities under Part 1 of the Bill.

16. If dissatisfied with a response from a public authority to a request for information, an applicant can require the authority to review its actions and decisions in relation to that request. Internal review will give the public authority a chance to reconsider the initial decision and give the applicant an opportunity to put forward arguments for the public authority to consider (although there is no requirement on the applicant to do so). It will also give the authority an opportunity to monitor the quality of its initial decisions, and to identify and correct problems or inconsistencies in its decision-making processes.

17. As the review procedures set out in the Bill will apply to a broad and diverse range of public authorities, large and small, the Bill only sets out the key principles with which all reviews must comply:

- a requirement for review must be made within 20 working days of expiry of the public authority’s initial 20 working day deadline for responding to the original request (or within 20 working days of receipt of any fees notice or refusal notice issued after that deadline), although an authority retains the discretion to accept requirements for review outwith this period;
- a decision must be given within 20 working days of the requirement for review;
- a requirement for review can be withdrawn by the applicant at any time; and
- a public authority need not proceed to a decision if it considers the requirement for review to be vexatious.

18. In responding to an applicant following review, where an authority is upholding its initial decision and not disclosing the requested information, it will be required to give reasons *and* to set out clearly the applicant’s right of appeal to the Scottish Information Commissioner. Again, any failure by a public authority to set out these rights would result in the public authority breaching its responsibilities under the Bill.

19. It is also important to note that, under section 15, all public authorities are under a specific duty to assist applicants, and even potential applicants, to exercise their rights under the legislation, so far as it is reasonable to do so. This general duty is tied in specifically to the Code of Practice to be issued under section 60, which will assist public authorities in interpreting their

duties under the legislation. Where an authority, in relation to the provision of advice or assistance, conforms with this Code of Practice, it is taken to have complied with the duty to assist imposed by section 15.

Alternative approaches

20. Respondents to both consultation exercises (*An Open Scotland*, November 1999) and the draft Bill (March 2001) welcomed the establishment of a statutory right of access. Nevertheless, there were detailed comments on the approach taken and alternatives were suggested.

21. A number of respondents suggested that a “purpose clause” would help the Bill deliver culture change by ensuring that interpretation of all the provisions in the Bill reflected a wider policy of openness and a presumption in favour of disclosure. It has also been suggested that a purpose clause might provide material intended to explain the Bill’s effect. The Scottish Executive considered very carefully whether to include a “purpose clause” and has concluded that such a clause is neither appropriate nor necessary. The Executive’s FOI policy intentions are clear and the Bill is specifically designed to give exact effect to these – the inclusion of a clause setting out broader, and necessarily less precisely defined, policy objectives would upset the careful balance found in the Bill, and result in legislation with very uncertain effect. Of course, it is also quite foreseeable that a purpose clause inserted in the Bill could act to the detriment of an applicant, for example allowing an authority to argue that the provision of requested information was outside the legislation’s defined “purposes”.

22. Many respondents were concerned that the Bill would not allow requests by phone-call or in person. In keeping with other FOI regimes, the Scottish Executive did not consider it appropriate or practical to *require* Scottish public authorities to accept FOI requests over the telephone. Applications in writing provide the public authority, as well as the applicant, with a useful record of what was requested and when, supporting, for example, the proper administration of appeals. It is important to note that the Bill does not preclude authorities dealing with enquiries over the telephone or in person. It is expected that many requests will continue to be dealt with in this way, and the Code of Practice to be issued under section 60 will set out clearly how public authorities are expected to handle telephone requests. (Public authorities may also have statutory obligations in terms of the Race Relations (Amendment) Act 2000 and the Disability Discrimination Act 1995 when dealing with those persons who are, for whatever reason, unable to put requests in writing). A number of statutory Freedom of Information regimes impose more formality and rigour in relation to applications than is proposed in the Bill (such as having to cite the Act and complete specific forms). Bearing in mind that all requests for information received in writing require to be considered as FOI requests, the Scottish Executive considers that the approach in the Bill adopts an appropriate, minimum degree of formality.

23. The inclusion of a provision allowing authorities not to provide information in relation to a request which they considered to be vexatious generated a range of comment. Some were concerned that the provision would be open to abuse by public authorities, enabling authorities to avoid considering “inconvenient” FOI requests. Others welcomed the provision, particularly given what they perceived as a lack of protection for public authorities from disruption by

vexatious applicants. On balance, the Executive considered the provision necessary to protect public authorities against applicants trying to disrupt the authority's work by way of nuisance requests. Experience overseas has demonstrated the impact such requests can have on a public authority, if protection is not provided for public authorities. However, should an applicant be concerned that an authority might be abusing the provision, he or she will be able to appeal to the Scottish Information Commissioner, who would be able to take a view on whether the public authority was complying properly with the terms of the Bill.

24. Some respondents considered it was unreasonable to require a public authority to respond to an applicant within 20 days; others felt it unreasonable to require the applicant to request a review within 20 days of the public authority's decision not to disclose. In developing these arrangements, it was considered vital that they are user-friendly, easy to understand, and, above all, quick – disputes should not be long drawn-out procedures. Accordingly, the Executive considered it right to retain the 20-day time limits, but amended the draft Bill to give Ministers the power to vary the time limits, should they prove impracticable in light of experience operating the legislation.

INSTITUTIONAL COVERAGE

25. The Bill will have wide application across the Scottish public sector. The different categories of body subject to the Bill's provisions are set out in section 3:

- a Scottish public authority listed in schedule 1;
- a body which “appears to the Scottish Ministers to exercise functions of a public nature” or which is providing “under contract made with a Scottish public authority, any service whose provision is a function of that authority” and has been designated by order (section 5); and
- a company wholly owned by a Scottish public authority (section 6).

26. A wide range of public authorities are covered by the entries in schedule 1, including the Scottish Ministers, the Scottish Parliament (and its Corporate Body), local authorities, non-Departmental public bodies (NDPBs), NHS bodies, the police, and further and higher education institutions. The Scottish Executive is covered by the term “The Scottish Ministers” and it is important to note that this term covers all the Departments of the Scottish Executive, as well as the following agencies:

- the Crown Office;
- the Fisheries Research Service;
- Historic Scotland;
- the Scottish Agricultural Science Agency;
- the Scottish Court Service;
- the Scottish Fisheries Protection Agency;
- the Scottish Public Pensions Agency;
- the Scottish Prison Service; and

- the Student Awards Agency for Scotland.

27. In common with FOI regimes world-wide, the Bill does not cover the courts or judicial bodies (including tribunals), but information about the administrative functions of these bodies will be available from other public authorities, for example the Scottish Court Service. The Bill includes, in section 4, powers for Ministers to make orders adding or removing bodies from schedule 1. Such orders would, for instance, be made where a new public authority is established or an existing body abolished.

28. A body which “appears to the Scottish Ministers to exercise functions of a public nature” or which is providing “under contract made with a Scottish public authority, any service whose provision is a function of that authority” can be designated as a Scottish public authority by order under section 5. It is intended that this provision will be used to bring within the scope of FOI private companies involved in significant work of a public nature, for example private companies involved in major PFI contracts. Under section 7, any order under section 5 would apply only to a company’s involvement in the work of a public nature, and consequently FOI would not apply to any other areas of the company’s business.

29. Section 5(5) provides that before any section 5 order is made, the Scottish Ministers must consult the company or other person concerned. The Scottish Executive recognise the need for proper scrutiny of companies delivering important public services, but are clear that companies should only be brought within the scope of FOI when it is appropriate to do so. As a result, detailed consideration will be taken before any section 5 order is made. Consideration will be given in due course as to which companies will be appropriate for designation under FOI. In addition, under section 6, a private company will automatically be subject to FOI if it is wholly-owned by a Scottish public authority listed in schedule 1, or by two or more such authorities.

Alternative approaches

30. A number of respondents to the consultation exercises commented upon the fact that the Bill will not cover UK Government Departments or cross-border public authorities (for example, the Forestry Commission) in relation to their activities in Scotland. This is a consequence of the devolution settlement. The Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 (SI 1999/1749) amended Schedule 5 to the Scotland Act with the result that the Parliament now has competence over the subject of “access to information” in relation to information held by the Scottish Parliament, the Scottish Administration, the Scottish Parliamentary Corporate Body and “any Scottish public authority with mixed functions or no reserved functions”. As a result, responsibility for FOI policy in relation to all other public authorities operating in Scotland was reserved to the UK Government, and these bodies are subject to the (UK) Freedom of Information Act 2000. Examples would be the Ministry of Defence and the Department for Work and Pensions. A key aspect of this part of the devolution settlement is that public authorities will only be subject to one FOI regime – UK or Scottish – and, consequently, will only be required to consider requests in the context of that regime, minimising the potential for confusion. Applicants will not need to cite an FOI Act when requesting information from UK or Scottish public bodies.

31. The amendment to Schedule 5 to the Scotland Act also expressly excludes information held in confidence by a Scottish public authority, having been supplied by a Minister of the Crown or by a government department. This means that it would be outwith competence for the Scottish Parliament to legislate with regard to access to such information. As a result, information passed in confidence by a department of the UK Government is not regarded as being held by a Scottish public authority for the purposes of this Bill and therefore cannot be accessed under it. Applications for this category of information could be directed to the originating department.

32. The approach taken to defining the coverage of the Bill is to list in schedule 1 those bodies subject to its provisions. It has been suggested that the coverage could have been defined by applying FOI to all bodies fitting a certain description – for example, the Human Rights Act 1998 applies to “public authorities”, defined so as to include “any person certain of whose functions are functions of a public nature”. The Scottish Executive did not consider this approach appropriate for FOI. A public authority’s responsibilities under FOI arise immediately and not just on receipt of a request – for example, establishing procedures for handling FOI requests and appeals or the production of an approved publication scheme. Consequently, it is important that public authorities are clear from the outset as to whether or not they are covered by the Bill and it was considered that a general description would not deliver the necessary certainty.

33. A number of respondents have suggested that the coverage of the Bill should be broadened to include Registered Social Landlords (RSLs), Social Inclusion Partnerships (SIPs) and other area regeneration partnerships, as well as the wider voluntary and community sectors. A basic objective of the Bill is to improve scrutiny of the Scottish public sector and consequently coverage of the Bill focuses on that sector. That is not to say that the important public function served by organisations such as RSLs and SIPs is not recognised, but, given the diversity of organisations in these sectors (in terms of both size and constitution), and even amongst bodies such as RSLs and SIPs, the Executive is firmly of the view that blanket coverage would be wholly inappropriate. However, the Bill does include provision in section 4 for Ministers to designate further public authorities and, if it is considered appropriate, bodies from these sectors can be brought within the scope of the Bill.

CHARGES FOR THE DISCLOSURE OF INFORMATION

34. While it is not intended that fees for supplying information under the Act should provide for full cost recovery, the Bill does include provision for fees to be charged by authorities to offset some of the cost incurred in processing more complicated applications. Section 9 provides Ministers with the power to issue regulations setting out the fees that can be charged by authorities for providing information in response to an FOI request. The Bill also provides that existing statutory fee schemes, and any charges for information set out in an authority’s publication scheme, would not be subject to the fees to be set in regulations under section 9.

35. The regulations will provide that the public authority can levy charges for the cost of locating and disclosing the information, as well as for incidental costs such as copying and postage. The public authority would not be able to charge for any costs involved in considering an application or any subsequent review. The Executive’s proposed approach to an FOI fees

regime, set out in the commentary attached to the draft Bill, was informed by the views it received on the three options for charging contained in *An Open Scotland*. However, the views received on the proposal attached to the draft Bill have confirmed again the Executive's view that balancing the competing interests of the applicant and the public authority, and accommodating small and large requests, is not straightforward. The Executive has indicated that it would be considering further the approach to an FOI fees regime, though, as section 9 is simply a provision enabling regulations on fees to be made, the final determination of the fees regime does not affect the content of the Bill.

36. Under section 12, a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying would exceed an amount to be set out in regulations. These regulations may provide that, in such circumstances as they may specify, a public authority can aggregate the costs of related requests and if the cumulative cost of responding to these requests exceeds an upper threshold set in regulations, the authority need not provide the information. Such provisions recognise that it would not be appropriate for the Bill to introduce a right of access unfettered by the need to consider the impact on the day-to-day operations of public authorities. Experience overseas has demonstrated that an FOI scheme without any checks and balances in it has the potential to divert significantly the activities of public authorities, and the Executive is very clear about the need to make provision for safeguards for public authorities.

37. Section 12 has been the subject of comment during the Bill's development, with many concerned that it would enable authorities to avoid responding to a large number of applications for information about an issue of particular interest – in short, the more people that want the information, the less likely it would be that an authority would be required to provide it. We recognise this concern but are unequivocal that this is not the purpose of the provision. The Code of Practice issued under section 60 will provide guidance on how an authority will be expected to fulfil its obligations under the legislation. This guidance could, for instance, advise authorities that if they receive many applications for the same item of information it should, provided that it was not exempt, be made available publicly (such as on a web-site). This would provide access to the information and minimise the number of applications for the information the authority would otherwise receive.

38. Where an authority requests a fee for providing information, the applicant would be informed by way of a "fees notice" of the fee to be paid. The fee would be due to be paid within 3 months of the date of the notice and the public authority would not be required to provide the information until payment was received. An applicant will be entitled to require an authority to review any proposed fees, and, if still dissatisfied, to appeal to the Commissioner.

Alternative approaches

39. The Executive's proposals for charging were the subject of substantial comment during the development of the Bill, and alternative approaches were suggested.

40. It was suggested that the disclosure of information by public authorities should be free of charge to applicants. Whilst the Executive's charging proposals are not intended to provide full cost recovery, Ministers were clear in their view that authorities should be able to recover some

of the cost incurred in relation to more complicated applications. Clearly, the locating and copying of information will incur a cost for a public authority, and it was considered important that this was reflected in the Bill.

41. A number of respondents suggested that low income applicants should incur a lower charge for information; others suggested that commercial organisations should incur higher charges. The Executive examined such approaches, but considered them unworkable in practice – there would be nothing to stop an applicant who would incur a higher charge asking a third party, who would incur a lower charge, to apply on his or her behalf. Similarly, if commercial organisations were subject to higher charges, they could simply ask an individual within the organisation to apply, thereby avoiding the higher charge. Consequently, it was felt that anything other than a uniform charging system would be open to abuse and unworkable in practice.

PUBLICATION SCHEMES

42. In developing the Bill, the Executive has been very clear that the proactive disclosure of information by public authorities will be vital to the effectiveness of the FOI regime and the promotion of a culture of openness. The Bill therefore requires public authorities to specify the categories of information they publish or intend to publish in a “publication scheme”. The form which this scheme takes will depend upon the nature of work undertaken by the public authority. The scheme may be of a general nature, or may be more specific and identify particular items of information which the authority will publish within a set time-scale.

43. Given the broad range of public authorities covered, the Bill sets down only the general principles on the content and operation of publication schemes. Section 23 provides that a scheme must include details of the classes of information an authority publishes or intends to publish; the manner in which the information is, or is intended, to be published; and whether there is, or there is intended to be, any charge for the information. In addition, in considering the content of its publication scheme, the Bill requires a public authority to have regard to the public interest in the publication of reasons for decisions made by it and in allowing public access to information held by it (in particular to information which relates to the provision of services; or consists of facts, or analyses, on the basis of which decisions of importance to the public have been made by it).

44. An authority’s publication scheme requires the approval of the Scottish Information Commissioner and such approval can be revoked at any time. It is also envisaged that, under section 24, the Commissioner will work with public authorities in drawing up model publication schemes appropriate to groups of public authorities, or approve such schemes prepared by others (for example, by an association representing a group of public authorities).

45. As well as encouraging the proactive disclosure of information, the publication scheme arrangements are intended also to enable public authorities to preserve existing charging schemes for information, provided those charges are considered reasonable by the Commissioner. Many public authorities charge for the disclosure of particular information – for example, Historic Scotland charge for guidebooks for tourist attractions such as Edinburgh Castle – and it will not always be appropriate for these charges to be replaced by the FOI

charging regime. If the Commissioner approves the scheme, a public authority can continue to charge for the provision of information at existing levels.

Alternative approaches

46. Respondents to both consultation exercises welcomed the Executive's commitment to encouraging the proactive disclosure of information. No alternative approaches were suggested, but a number noted the importance of ensuring that effective guidance was made available to public authorities, particularly in relation to the initial development of schemes. As a result, the provision enabling the Commissioner, and other organisations, to draw up model schemes was also widely welcomed.

SPECIAL PROVISIONS RELATING TO RECORDS TRANSFERRED TO THE KEEPER

47. The Keeper of the Records of Scotland is included in schedule 1 to the Bill as a public authority and, as such, is responsible for responding to requests under the Bill for information created by him and his staff as part of their day-to-day business. Additionally, the Keeper is responsible for handling requests for information which he holds and which has been passed to him by other public authorities. Where the public authority has designated the transferred information as open, the Keeper will make this available to the public. Where the information is contained in a record which has been transferred by a public authority subject to the (UK) Freedom of Information Act and that authority has not designated the record as open, the information will be outwith the scope of the Bill (section 3(4)). Where a request relates to transferred records which a Scottish public authority has not designated as open, special provision is made by way of section 22 of the Bill.

48. Under this section, on receiving a request for information, the Keeper must send a copy of the request to the transmitting authority. It is then for the authority, rather than the Keeper, to decide whether the information is exempt and, if so, whether (under section 2) the public interest in maintaining the exemption outweighs that in disclosure. The authority must inform the Keeper of its decisions in such time as to allow the Keeper to comply with the timescale for responses set out in section 10. Recognising that the need for consultation with the transmitting authority may frustrate the Keeper's efforts to reply timeously, and taking account of the comments received from respondents to the consultation, section 10 allows the Keeper 30 rather than 20 working days to reply to a request where there is a need to involve a transmitting authority.

49. Section 22 also sets out special arrangements for the conduct of a review, where the original request related to a closed record transferred to the Keeper from a Scottish public authority. Where the matter giving rise to an applicant's dissatisfaction relates to a decision made by the transmitting public authority, it is for that authority, rather than the Keeper, to review the original decision. Thereafter, the authority should advise the Keeper of the outcome of the review in such time so as to allow the Keeper to respond to the applicant within the timescales set out in section 21. As before, the Keeper has been granted an extended timescale of 30 rather than 20 working days for his response.

Alternative approaches

50. In the consultation draft of the Bill, this section also provided for the handling of requests for closed records transferred to the Keeper from public authorities as defined in the Freedom of Information Act 2000, i.e. UK public authorities. However, the commentary which accompanied the draft Bill said that the interface between the Keeper and transferring authorities would be an area of further work. The Executive has examined carefully the options for dealing with closed records transferred to the Keeper by UK authorities and has concluded that these records should be considered outwith the scope of the Bill (section 3(4) refers).

51. Section 22(6) identifies one exception to the above, insofar as it extends the application of section 22 to records transferred to the Keeper by the Secretary of State for Scotland before 1 July 1999. This provision was necessary because it would have been undesirable to exclude from the scope of the Bill records created by the pre-devolution Scottish Office and transferred to the Keeper (and such records would not fall under the Freedom of Information Act 2000 as they are not held by a UK public body). The provision deems records transferred by the Secretary of State for Scotland, before 1 July 1999, to have been transferred by the Scottish Ministers. Closed records transferred by the Secretary of State for Scotland on or after 1 July 1999 (i.e. those transferred by the Scotland Office) are excluded from the Scottish Bill.

EXEMPT INFORMATION (PART 2, SECTIONS 25-41)

52. It is clear that the individual's right of access to information held by Scottish public authorities needs to be carefully balanced against the right to privacy and confidentiality, and the need to ensure that sensitive information is afforded appropriate protection so as not to undermine the effective operation of public services. Finding this balance is at the heart of all Freedom of Information regimes and the Bill delivers this by way of a limited number of tightly-drawn exemptions.

53. The following paragraphs explain the general approach in the Bill to exemptions and to the tests for disclosure which apply to these. Thereafter, a short commentary on each exemption is provided. The Bill's exemptions were the subject of varying degrees of comment during the Bill's development, with many attracting no comment whatsoever. However, others were the subject of significant comment, and where appropriate this is indicated, including details of any alternative approaches considered.

54. At this stage it might be helpful to note that the exemptions in the Bill do not preclude the disclosure of information by a public authority. If information is considered to fall within an exemption and, where relevant, it is not in the public interest to disclose that information, a public authority need not disclose that information, but the Bill does not *require* the authority to withhold it.

55. Part 5 of the Bill defines the arrangements for the "falling away" of exemptions with time. Certain exemptions will cease to apply when information reaches a specified age – at this point, the exemption would no longer apply and the information could not be withheld under that exemption. Those exemptions which apply in perpetuity can always be considered by a public authority, but the authority will need, for example, to take account of the likelihood that the

sensitivity attached to records may lessen with time. The following commentary indicates when particular exemptions cease to apply; where there is no such comment, it should be assumed that the exemption applies in perpetuity.

Content exemptions

56. In determining the disclosure of information subject to a “content” exemption, a public authority is required to consider two tests. Firstly, an authority would need to consider whether disclosure of the requested information would cause “**substantial prejudice**” to the interest protected by the exemption (“international relations” for instance) – if it would, then the information need not be disclosed. This test is known as “a harm test”, and the use of “substantial prejudice” is intended to make clear that information covered by a content exemption should be disclosed unless the prejudice caused would be real, actual and of significant substance. The decision to adopt a harm test of “substantial prejudice” is an important aspect of the Bill and has been widely welcomed.

57. Where the authority considers that substantial prejudice would result from disclosure of the requested information, it will still be required to apply the **public interest test** as set out in section 2(1)(b). Where the authority considers that the public interest in disclosing the information is not outweighed by that in maintaining the exemption (i.e. withholding the information), then the authority will be required to disclose the information. In other words, unless the public interest in withholding the information is greater, the information would be disclosed. Consideration of the public interest is a well established aspect of FOI regimes world-wide.

Class exemptions

58. There is a general presumption that information subject to a “class” exemption will not ordinarily be disclosed. Information is covered by a class exemption where it is considered that disclosure would normally result in substantial prejudice to the interest in question – in other words, it is deemed that the harm test is already satisfied.

59. Accordingly, an authority need only apply the public interest test set out in section 2(1)(b). Again, unless the public interest in withholding the information is greater, the information would be disclosed.

Absolute exemptions

60. The Bill contains a small number of exemptions for information where it would not be appropriate or sensible to require consideration to be given to the public interest test. These are referred to in section 2 of the Bill as “absolute” exemptions. These exemptions are 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, existing statutory bars on disclosure or the Data Protection Act 1998 (which deals with access to certain personal data).

Section 25 – Information otherwise available

61. This provision exempts information which is already reasonably obtainable (other than by requesting it under the Act), even if payment is required for accessing it. Given that this information is already available, this exemption is class-based and absolute. As a result, information made available in accordance with an existing statutory scheme or an authority's publication scheme does not fall subject to the provisions in the Bill (though an authority is required, for instance, to provide a timely response to an applicant to advise him or her that this exemption is being cited).

62. Disclosure would need to be made in accordance with the existing statutory provisions or the arrangements set out in an authority's publication scheme. Clearly, if the information is made available under an authority's publication scheme, the manner of publication will need to be agreed by the Commissioner – it is envisaged that this will enable authorities to retain existing methods of publication, where the Commissioner is satisfied that these are working well.

63. Section 25(2)(b)(ii) provides that information is to be taken as reasonably obtainable, and therefore exempt, if the Keeper of the Records of Scotland holds it and makes it available for inspection and (where practicable) copying by members of the public on request, whether free of charge or on payment. (In fact, the Keeper will apply his own charging regime given that this exemption means that the charging regime in regulations made under section 9 will not apply.) This subsection marks a change from the consultation draft of the Bill which specifically provided that historical records held by the Keeper could not be exempt information by virtue of this section.

64. The adjustment to the Bill to allow the citing of this exemption in these circumstances takes account of the comments received from a number of archival organisations. They argued that to require the Keeper – whose very business is providing public access to the records held in the National Archives of Scotland – to deal with every request in accordance with the full range of the FOI procedure was contrary to the intention of the Bill. The Executive was persuaded by this argument and expanded section 25 accordingly.

65. It should be noted that this provision does not affect the handling of requests for information which the Keeper has not made publicly available. Such requests will continue to be dealt with in accordance with the Bill's provisions. It should also be noted that even on those occasions when the section 25 exemption is invoked, the Keeper will still be required to provide a timely response to applicants advising them that this particular exemption applies.

Section 26 – Prohibitions on disclosure

66. This exemption covers information, the disclosure of which is prohibited by statute, or is incompatible with any European Community obligation, or would constitute, or be punishable as, a contempt of court. Accordingly, this exemption is class-based and absolute. A public authority citing this exemption to withhold information would be expected to state what enactment or regulation (etc.) prevented disclosure.

67. This section was the subject of some comment. It was suggested, including by the Campaign for Freedom of Information in Scotland and the Scottish Consumer Council, that the FOI legislation should automatically override existing statutory bars. Consequently, applications for information which is the subject of a statutory bar would be considered in the same way as any other application. However, the Executive was not persuaded that this was an appropriate approach – statutory bars are specifically enacted to govern the disclosure of particularly sensitive information. It was recognised that automatically disapplying existing statutory bars could have unforeseen consequences, which might frustrate the policy intentions underpinning the statutory bar, and result in the damaging disclosure of sensitive information. As a result, it was decided, in keeping with the approach adopted in other countries with comparable legislative frameworks, to leave existing statutory bars in place and, instead, include a specific power (in section 63) to amend or repeal existing statutory bars. Consideration will be given in due course as to which existing statutory bars would be appropriate for repeal or amendment.

Section 27 – Information intended for future publication

68. This provision exempts information which is due, and planned at the time of request, to be published by a public authority or any other person within 12 weeks of the request, provided that it is reasonable in the circumstances that the information should not be disclosed until the planned publication date. This is a class-based exemption and the requested information would need to be disclosed if, under the section 2 public interest test, it was considered in the public interest to do so.

69. The 12-week time period was included to prevent public authorities delaying unduly the provision of requested information on the basis that it was to be published at some undefined point in the future. The inclusion of the time limit was widely welcomed by respondents to the consultation on the draft Bill.

Section 28 – Relations within the United Kingdom

70. This is a content exemption, applying to information the disclosure of which would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom (defined as the UK Government and the devolved administrations). The exemption ceases to apply after 30 years.

Section 29 – Formulation of Scottish Administration policy etc.

71. This exemption covers information held by the Scottish Administration which relates to the formulation or development of government policy, Ministerial communications, the provision or the request for provision of advice from any of the Law Officers, or the operation of any Ministerial private office. Given the importance of protecting the candour of advice to Ministers and the free and frank exchange of views in policy discussions within the Scottish Administration, this is a class-based exemption. It is not an absolute exemption, hence the public interest test in section 2 would need to be considered. This exemption ceases to apply after 30 years.

72. In this section, “government policy” is defined as being, firstly, the policy of the Scottish Administration and, secondly (so far as information created before 1 July 1999 is concerned), the policy of the UK Government. This second part was added to the Bill because the Executive came to the view that it is correct to make special provision to deal with the large amount of information in the hands of the Administration about UK Government policy which is contained in files and other records inherited at devolution. Most of these files and records, so far as relating to policy development, will concern policy in devolved areas for which the Scottish Ministers are now responsible. As the information is held by the Administration, it falls under the scope of the Bill and it is appropriate to have available for this information the same exemption which applies to information relating to post-devolution government policy formulation.

73. The section makes specific provision for statistical and factual information which relates to the formulation of policy. Firstly, the Bill provides that once a policy decision has been taken, any statistical information used to provide an informed background to the taking of the decision cannot be considered exempt. Some commentators have noted that this provision applies only once a decision has been taken, and not before. However, while making it clear that statistical information used to support the taking of a decision is not exempt after a decision is taken, the provision does not preclude disclosure ahead of a decision being taken.

74. The Bill also provides that the Administration must, in relation to information exempt on the basis that it relates to the formulation or development of policy, have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision. The Executive recognises the public interest in scrutinising the decisions taken by it, hence this provision highlights the need to consider the public interest in disclosing factual information relating to decisions taken by the Executive.

75. A number of respondents to the consultation exercise on the draft Bill noted that this class exemption for government policy information would only be available to the Scottish Administration, whereas other public authorities would have to rely on section 30, a content exemption, to withhold information relating to internal discussions. This arrangement recognises the Executive’s responsibilities in governing Scotland in devolved policy areas, and in particular its responsibilities in relation to proposing legislation. Also, in keeping with approaches in other FOI regimes, it is considered essential to exempt information relating to the provision of candid, confidential advice to Ministers, Law Officers’ advice, Cabinet minutes, and other Ministerial correspondence.

Section 30 – Prejudice to effective conduct of public affairs

76. This exemption applies to all Scottish public authorities and covers information the disclosure of which would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers; inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation; or otherwise prejudice substantially the effective conduct of public affairs. The exemption ceases to apply after 30 years.

Section 31 – National security and defence

77. This section exempts information if exemption is required for the purpose of safeguarding national security, or if its disclosure would, or would be likely to, prejudice substantially the defence of the British Islands or the capability, effectiveness or security of any relevant forces (as defined in the section).

78. In relation to the national security part of this section, provision is also made for a certificate to be issued by a member of the Scottish Executive certifying conclusively that exemption is required for the purpose of safeguarding national security.

79. It is the Executive's policy intention to provide for appeals against such a certificate to be considered by a special national security panel of the Information Tribunal (as established by the Freedom of Information Act 2000). The arrangements will be along the lines of those found in section 60 of that Act. The route proposed to deliver this aspect of policy is an order under section 104 of the Scotland Act.

Section 32 – International relations

80. This exemption covers information the disclosure of which would, or would be likely to, prejudice substantially relations between the United Kingdom and other States, international organisations or international courts, or the promotion or protection of the interests of the United Kingdom abroad.

81. This section also exempts information if it is confidential information obtained from other States or from an international organisation or court. This part is class-based to recognise the importance of respecting the confidentiality under which these organisations have passed on such information. To provide otherwise would have risked undermining the candour of exchanges, and potentially the information flow, between the United Kingdom and other States and international bodies.

Section 33 – Commercial interests and the economy

82. This exemption recognises the need to protect against the disclosure of particularly sensitive commercial information. There are two main types of commercial information: information which has an intrinsic commercial value dependent upon the maintenance of its confidentiality, and information which might not have such a value but whose disclosure might unreasonably disadvantage the person to whom it relates in the conduct of their lawful business. To address the first of these, the Bill provides that information will, as a class, be exempt if it constitutes a trade secret. The section 2 public interest test applies. This part of the exemption ceases to apply after 30 years.

83. To guard against the disclosure of the second type of commercial information described above – information whose disclosure would damage the commercial interests of an individual or business – the Bill includes a content exemption. Accordingly, if disclosure would cause “substantial prejudice” to the commercial interests of an individual or business, then that

information need not be disclosed, providing that there was no over-riding public interest in disclosure. Again, this exemption would cease to apply after 30 years.

84. Many public authorities involve the private sector in the delivery of public services, for example by way of PFI and PPP contracts, and are increasingly competing with private sector organisations in the provision of services. Given this, a number of public authorities noted in responding to the consultation on the draft Bill that this provision might not afford sufficient protection for commercially-sensitive information.

85. It is clear that public authorities are becoming increasingly involved with the private sector and the Scottish Executive understands and recognises these concerns. However, the Executive considers that an appropriate balance must be struck between the need to protect commercially sensitive information and the need to ensure that effective scrutiny can be conducted of the commercial activities of Scottish public authorities.

86. This section also exempts information if its disclosure would, or would be likely to, prejudice substantially the economic interests of the whole or part of the United Kingdom, or the financial interests of an administration in the United Kingdom (defined as the UK Government and the devolved administrations). This would protect information whose disclosure would prejudice substantially the ability of the Government to manage the economy.

Section 34 – Investigations by Scottish public authorities and proceedings arising out of such investigations

87. This exemption covers a range of information associated with investigations carried out by Scottish public authorities. Specifically, it exempts information which, at any time, has been used for the purposes of an investigation an authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence, an investigation which may lead to a report to the procurator fiscal in connection with possible criminal proceedings; and criminal proceedings instituted in consequence of such a report.

88. The exemption also specifically covers information held by a public authority for the purposes of an inquiry under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, although this part of the exemption ceases to apply after the conclusion of the proceedings. In addition, information is exempt if held by a public authority for the purposes of any other investigation to ascertain the cause of death of a person, provided the investigation is one an authority has a duty to carry out or is one for the purposes of making a report to the procurator fiscal (information covered would include death reports submitted by the police and post mortem reports). The section 2 public interest test applies. This particular part of the exemption would cease to apply after 100 years.

89. Subsection (3) exempts information relating to the obtaining of information from confidential sources, for example informants, where the information was obtained or recorded by the authority for the purposes of investigations (other than those in section 34(1)) conducted for any of the law enforcement purposes specified in section 35(2).

90. Section 34 also exempts information held by a public authority for the purposes of civil proceedings arising out of an investigation conducted by that public authority which falls within subsection (1) or (3) of that section.

Section 35 – Law enforcement

91. This section provides a content exemption for information whose disclosure would, or would be likely to, prejudice substantially such matters as: crime prevention or detection; the apprehension or prosecution of offenders; the administration of justice; the assessment or collection of tax; the operation of immigration controls; and the security of prisons. The exemption also covers information the disclosure of which would prejudice substantially civil proceedings in connection with a range of matters including ascertaining whether persons have failed to comply with the law or are responsible for improper conduct; ascertaining the cause of an accident; or securing the health, safety and welfare of persons at work. The exemption ceases to apply after 100 years.

Section 36 – Confidentiality

92. This exemption is in two parts, both of which would cease to apply after 30 years. The first part deals with information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings (essentially the equivalent in Scotland of information for which “legal professional privilege” may be claimed in England and Wales.)

93. The second part provides that information held by a public authority to which a legal duty of confidence attaches is absolutely exempt – consequently, an authority is not required to consider whether the information should be disclosed in the public interest. A number of respondents to the consultation on the draft Bill were concerned that this provision would allow public authorities to, in effect, remove information from the reach of the Bill. The Executive understands these concerns, but considers it appropriate to provide an absolute exemption for such information. It was recognised that if the Bill did not do so, this could have far-reaching implications for the law of confidence in Scotland as it pertains to public authorities. The provision is intended to support necessary obligations of confidence (for example, where the information would not have been provided to the authority otherwise), and it is expected that the Code of Practice to be issued under section 60 will emphasise that undue obligations of confidence should not be accepted.

Section 37– Court records, etc.

94. An exemption is provided for information which is contained in any document – lodged with, or placed in the custody of, a court for the purposes of proceedings; served on or by a Scottish public authority for the purposes of proceedings; or created by a court or its staff for the purposes of such proceedings; or which is contained in a document lodged with a person conducting an inquiry or an arbitration; and where a Scottish public authority holds the information solely because it is contained in such a document. The exemption ceases to apply after 30 years.

95. This exemption applies, therefore, to such information held by those authorities covered by the Bill. As has been noted earlier, courts – and hence information held by the courts – are not covered by the Bill.

Section 38 – Personal information

96. This exemption deals with three main categories of personal information: that falling under the Data Protection Act 1998; personal information contained in census records; and health records of the deceased.

97. In *An Open Scotland* the Executive proposed that all personal information would be excluded from the Bill except personal information held manually and not accessible under the Data Protection Act 1998. It was stated that the intention was to provide the citizen with exactly the same rights of access to personal information held by Scottish public authorities as those contained in the Freedom of Information Act 2000 as regards personal information held by UK public bodies. That is still the intention. In order to achieve this it is necessary to extend to information held by Scottish public authorities the effect of certain amendments to the Data Protection Act 1998 made by the Freedom of Information Act 2000. The present intention is that this will be done after the enactment of the Bill, through an order under section 104 of the Scotland Act 1998.

98. The Executive's objectives regarding access to personal information are:

- to include in the Bill a class (and absolute) exemption for any information which constitutes personal data relating to the person making the subject access request (as access to such information will be available under the Data Protection Act 1998); and
- to ensure that rights of subject access and provisions on data accuracy in the Data Protection Act 1998 are extended to **all** personal information held by Scottish public authorities, subject to certain exemptions and modifications.

99. There is a right of access under the Bill to third-party personal information, i.e. information not relating to the person making the request. The information will, however, be exempt if its disclosure contravenes the Data Protection Act 1998 or if the person to whom it relates does not have a right to know about it or a right of access to it under that Act.

100. At present, census records in Scotland held by the General Register Office for Scotland and dating from 1921 onwards are “protected” under the terms of section 8(2) to (7) of the Census Act 1920 (as amended by section 1 of the Census (Confidentiality) Act 1991). The Bill provides a general right of access to all information held by Scottish public authorities – against this background, it was thought necessary to exempt personal census information dating from the 1911 census onwards (section 37(1)(c)). This will underwrite the assurances of confidentiality that were given to those completing census returns. The exemption for personal census information is an absolute exemption, which ceases to apply after 100 years.

101. The Bill also provides for an amendment to section 8 of the Census Act 1920. This amendment will ensure that the release by the Registrar General for Scotland of census

information which is no longer exempt under section 37(1)(c), as read with section 58(2), of the Bill, will not be a criminal offence in terms of section 8.

102. The third category of information dealt with by section 38 exempts a deceased person's health record. Access rights to health records are available under the Data Protection Act 1998 (which provides for access by an individual to their own health records) and the Access to Health Records Act 1990 (which, in specified circumstances, provides access to the health records of deceased persons). This is an absolute exemption which ceases to apply 100 years after the creation of the record.

Section 39 – Health, safety and the environment

103. Section 39(1) exempts information if its disclosure would, or would be likely to, endanger the physical or mental health or the safety of an individual.

104. Section 39(2) deals with environmental information and exempts information if a Scottish public authority is required, by regulations made under section 62, to make it available to the public in accordance with the regulations, or would be so obliged but for any exemption contained in the regulations. Access to environmental information covered by these regulations will therefore be obtainable in the first instance under the regulations, but the information is not excluded from the scope of the Bill and the public interest test in section 2 of the Bill will therefore need to be considered in relation to any environmental information which is considered to be exempt (and cannot be obtained under the regulations). The commentary on section 62 of the Bill provides further details about the power to make regulations relating to environmental information.

Section 40 – Audit functions

105. The Bill exempts information if its disclosure would, or would be likely to, prejudice substantially the exercise of audit functions by any Scottish public authority or functions relating to the examination of the economy, efficiency and effectiveness with which Scottish public authorities use their resources. This exemption ceases to apply after 30 years.

Section 41 – Communications with Her Majesty, etc. and honours

106. The Bill exempts information if it relates to communications with Her Majesty, other members of the Royal Family or the Royal Household; or relates to the exercise by Her Majesty of Her prerogative of honour. In relation to the former, the exemption ceases to apply after 30 years; in relation to the latter, the exemption ceases to apply after 60 years. In respect of information relating to honours, the exemption will ensure that recommendations, opinions and assessments of individuals for the award of an honour can be made with frankness and candour (a necessary element of the effective operation of the honours system).

THE SCOTTISH INFORMATION COMMISSIONER AND ENFORCEMENT (PARTS 3 & 4)

107. Parts 3 and 4 of the Bill set out the general functions of the Scottish Information Commissioner in relation to the administration of the FOI regime and the conduct of appeals made to the Commissioner. The general role of the Commissioner and the appeals procedure were not the subject of particular comment during the Bill's development, with most respondents welcoming the broad principles underpinning these parts of the Bill, most notably the independence of the Commissioner. Nevertheless, some aspects of detail did attract comment and, where appropriate, this is indicated, including details of any alternative approaches considered.

Appointment of the Commissioner

108. The Bill will establish a Scottish Information Commissioner as an independent office holder (and not subject to the direction or control of the Scottish Executive or of the Scottish Parliament) to promote and enforce the Scottish freedom of information legislation. The independence of the Commissioner is a fundamental aspect of the Bill, and was widely welcomed by all respondents to both consultation exercises. It was commented that this independence is central to the integrity of the office of the Commissioner, and to that of the Freedom of Information regime in general.

109. The appointment arrangements for the Commissioner are drawn on those established under the Scotland Act 1998 for the Auditor General for Scotland, where the appointment is made by Her Majesty on the nomination of the Parliament. The Bill sets out that the expenses of the Commissioner be paid by the Parliamentary corporation and that the Commissioner be accountable to Parliament both for the statutory functions of the office and also for ensuring efficient and appropriate use of the budget.

General functions of the Commissioner

110. To promote the observance by Scottish public authorities of the Act and the Codes of Practice issued by the Scottish Ministers, the Commissioner has a general duty to promote good practice by those authorities. If the Commissioner took the view that the practice of a Scottish public authority did not conform with a Code of Practice (for example, in relation to its procedures for dealing with requests for information) then he or she could recommend (by issuing a "practice recommendation" to the authority) the steps that should be taken to comply with the Code in question. In relation to conformity with the Code of Practice on the keeping, management and destruction of records, the Commissioner is required to consult the Keeper of the Records of Scotland before issuing a "practice recommendation".

111. It will also be important for the Commissioner to ensure that the public are aware of their new rights under this legislation, and the Commissioner will be responsible for wider promotion of the FOI regime. Consequently, the Commissioner is empowered to make available to the public information on the operation of the Act, on good practice and on other matters within the scope of the Commissioner's functions.

Reports

112. The Commissioner must lay before the Scottish Parliament an annual report setting out how he or she has exercised the powers and functions of that office, allowing the Parliament to satisfy itself that the regime, and the Commissioner, are operating in an appropriate manner. The Bill also empowers the Commissioner to lay reports on any other matters as he or she considers fit.

Consideration of an appeal by the Commissioner

113. The consideration of appeals will be a significant part of the Commissioner's role. The Bill (section 47) provides that any appeal must be made to the Commissioner in writing within six months of the date of the public authority's review decision (although this time-scale could be extended at the discretion of the Commissioner). There would be only 3 exceptional situations, set out in section 48, where appeals to the Commissioner would be excluded:

- where the original request was to the Commissioner and a decision following review had already been made by the Commissioner;
- where the request for review had been made to a Procurator Fiscal; or
- where the request for review had been made to the Lord Advocate, to the extent that the information is held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland.

114. Clearly, it would not be appropriate for the Commissioner to consider an appeal against a decision which he or she had made following review – consequently, it was considered necessary to exclude the right of appeal in this instance. The exclusion of the right of appeal in relation to decisions made by the Lord Advocate and procurators fiscal was the subject of some comment during the Bill's development. Many respondents highlighted the current interest in scrutiny of the Crown Office, particularly in relation to prosecution policies, and were concerned that the Commissioner did not have the capacity to review decisions on the disclosure of information taken by the Lord Advocate.

115. Under section 48 of the Scotland Act 1998, any decision taken by the Lord Advocate, as head of the systems of criminal prosecution and investigations of deaths in Scotland, is to be "taken by him independently of any other person". Consequently, it would not have been competent for the Bill to provide the Commissioner with powers to require disclosure of information held by the Lord Advocate – decisions as to the disclosure of information held by the Lord Advocate, as head of the systems of criminal prosecution and investigation of deaths in Scotland, can only be taken by the Lord Advocate. For example, the Scottish Parliament is itself precluded from requiring the production of any documents relating to the operation of the systems of criminal prosecution (section 27(3) of the Scotland Act).

116. Neither were Ministers persuaded that it would have been appropriate, had it been competent, to give the Commissioner powers to require disclosure by the Lord Advocate. Ministers considered it vital that the Bill did not undermine the effectiveness of law enforcement or undermine public confidence in the criminal justice system. Information is currently made

available to the prosecuting authorities on the understanding that it is confidential and is to be used solely for the purpose of a trial. There is a real concern that witnesses and victims may be deterred from providing information to the law enforcement agencies, if there is a possibility that such information (including their identity) could be disclosed in future. Premature disclosure of information of this nature can be particularly damaging, affecting, for example, the right of the accused to a fair trial or prejudicing the safety of witnesses and victims. Of course, these issues apply equally to information held by procurators fiscal.

117. The Scottish Executive understands the particular interest in information held by the prosecuting authorities, but considered that the right balance had to be found. It was vital that the role of the courts as sole forum for determining guilt was preserved and that the established disclosure regime regulated by the courts was not undermined. It was considered that any provision which allowed the Commissioner to require the disclosure of such information would create uncertainty and be detrimental to the effective operation of the criminal justice system. It was considered vital that the Lord Advocate and procurators fiscal retained their autonomy in deciding what information should be disclosed and it was thought that it would be inappropriate for the Commissioner to be given powers to overrule the Lord Advocate or Procurators Fiscal and require disclosure.

118. However, it is important to note the Lord Advocate and procurators fiscal are still subject to the terms of the Bill. The Crown Office will be required to process applications for information within the timescales set out in the Bill; will be required to administer a publication scheme, approved by the Commissioner, setting out the information which it will make available routinely; and will be expected to give due consideration to disclosure of information in the public interest. The Commissioner will only be excluded from considering an appeal of a decision (after review) by a procurator fiscal or the Lord Advocate, but can reasonably be expected to comment in annual reports on the Crown Office's general conduct under the Bill.

119. Section 49 provides that the Commissioner need not consider an appeal in the following circumstances: if the appellant has not gone through the review procedures or has made a late request; if the application for a decision was considered by the Commissioner to be frivolous or vexatious; or if the application had been withdrawn. If the Commissioner considers that the application for a decision is frivolous or vexatious, or appears to have been withdrawn or abandoned, then the Commissioner must notify the applicant to this effect within one month of receipt of the application (or such other period as is reasonable in the circumstances).

Conduct of an appeal by the Commissioner

120. If the Commissioner considers that an appeal is valid, he or she would give the public authority notice and invite its comments. The Bill contains a provision (section 49(4)) allowing the Commissioner to endeavour to effect a settlement between the applicant and public authority, so as to obviate the need for a substantive appeal decision to be issued. This is an important provision, intended to encourage mediation to arrive at an outcome satisfactory to the applicant and the public authority.

121. If the Commissioner proceeded to issue a substantive decision, he or she would be required to issue a "decision notice" to both parties within four months of receipt of the lodging

of the appeal or in such other time as is reasonable in the circumstances. Where the Commissioner decides that the authority has not dealt with a request for information in accordance with Part 1 of the Bill, the decision notice would specify (a) the provisions with which the public authority had failed to comply, (b) the steps to be taken by the public authority to so comply and (c) the time within which those steps must be taken. A decision notice would also contain details of the rights of appeal against the Commissioner's decision (further details of the right of appeal are set out below).

122. The Bill provides for the Commissioner to obtain from a public authority such information as is reasonably required for the purpose of considering an appeal received under section 47, determining an authority's compliance with the provisions of the Bill, or determining an authority's conformity with a code of practice issued under section 60 or 61. The Commissioner would serve an "information notice" specifying the information required, and the form in which it was to be provided. This notice would also specify the time within which the information should be supplied by the public authority.

123. If the Commissioner was satisfied that a public authority had failed to comply with a provision of Part 1 of the Bill (including not following the review procedures set out in that Part), he or she could serve an "enforcement notice" on the public authority. Such a notice would advise the authority of the provision concerned, require the public authority, within a specified time period, to take action to comply with the provision, and advise the authority of its rights of appeal.

Enforcement of decisions of the Scottish Information Commissioner

124. If a public authority failed to comply with an information, enforcement or decision notice, the Commissioner could certify such failure to the Court of Session. The Court could inquire into the matter and, after hearing witnesses or any statement made on behalf of the public authority, could deal with the authority as if it had committed a contempt of court.

125. The Bill also provides powers of entry and inspection exercisable by the Scottish Information Commissioner or any member of the Commissioner's staff (see schedule 3 for details). These powers would be available under a warrant issued by a sheriff who was satisfied that the Commissioner had reasonable grounds for suspecting that a public authority was not complying with the requirements in Part 1 of the Act or with a decision, information or enforcement notice; or was committing or had committed an offence by altering records so to prevent disclosure.

126. Some respondents to the draft Bill consultation exercise were concerned that the Bill did not make provision concerning public authorities consistently in breach of their responsibilities under the legislation. Whilst the Scottish Executive anticipates that public authorities will conduct themselves in accordance with the legislation and would not expect authorities to refuse to take steps required by the Commissioner, the Bill does include redress in relation to non-compliant authorities which is deemed appropriate for freedom of information legislation.

Information sharing

127. The commentary on the draft Bill indicated that consideration would be given to adding provisions dealing with information-sharing between the Scottish Information Commissioner and the UK Information Commissioner (which could not be provided for in the UK FOI Act as the Scottish Commissioner did not exist) and between the Scottish Commissioner and the Scottish ombudsmen. In relation to information exchange with the UK Information Commissioner or with ombudsmen whose responsibilities relate to England and Wales, the intention is for provision to be made by way of an order under section 104 of the Scotland Act.

128. Issues in relation to information-sharing between the Scottish Commissioner and the Scottish ombudsmen also arise in the context of the Executive's proposed Ombudsman Bill, which will establish a new Scottish public sector ombudsman. Since the Ombudsman Bill is scheduled for introduction at a later date, it is intended to use that Bill to introduce the appropriate provisions.

Ministerial certificates

129. The Bill includes provision, in section 52, for the final decision on the disclosure of information covered by one of a limited number of the exemptions to be the subject of collective consideration by the Scottish Ministers. In these limited circumstances, a decision or enforcement notice given to the Scottish Administration could, in effect, be made void by a certificate issued to the Commissioner by the First Minister. If such a certificate were not issued within 30 working days of the giving of the Commissioner's notice, the notice would have effect. As soon as practicable after issuing a certificate, the First Minister would be required to lay a copy before the Parliament and, in relation to a decision notice, advise the person – to whose request for information the Commissioner's notice relates – of the reasons for the First Minister deciding to issue the certificate.

130. As set out in *An Open Scotland*, it is Executive policy that a decision to issue a certificate overriding a Commissioner's decision or enforcement notice is to be taken by collective decision of the Scottish Ministers. The approach in the Bill conferring on the First Minister – after consulting the other Members of the Executive – the function of issuing a certificate to the Commissioner delivers this policy insofar as it is possible to do within the terms of the Scotland Act. Specifically, section 52 of that Act deems that statutory functions of the Scottish Ministers shall be exercisable by any member of the Scottish Executive – hence, if the Bill had specified that a certificate would be issued by “the Scottish Ministers”, the function could be exercised by any Minister alone. Clearly, this would not satisfy the Executive's policy.

131. The inclusion of a provision for a Ministerial certificate overriding the Commissioner's decision was the subject of some detailed comment during the Bill's development, with many arguing that the provision was unnecessary. The Executive understands these arguments, but, given the strong powers of the Commissioner to order the disclosure of sensitive information, considered the provision appropriate and necessary. Whilst Ministerial vetoes are a common feature of many FOI regimes, the Executive recognises the concerns raised by such provisions and took a number of clear steps to emphasise unequivocally the seriousness with which the issuing of a Ministerial certificate should be considered. As is set out above, a certificate would

only be issued following consideration by the Scottish Cabinet and only after a decision was reached by the Commissioner (in Ireland, for instance, certificates are issued preventing their Commissioner considering an appeal). In New Zealand, since changing in 1987 from a scheme allowing certificates to be issued by individual Ministers to a collective veto, the power has not been exercised. The requirement to lay a copy of a certificate before the Scottish Parliament also makes clear the Executive's view that the issuing of a Ministerial certificate would not be taken lightly and would only be considered where it was absolutely necessary.

Further appeals

132. Whilst one of the primary roles of the Commissioner will be to act as final arbiter over appeals against the non-disclosure of information by public authorities, the Bill does provide, as is the case with other administrative decision-making processes, scope for appellants or public authorities to appeal to the Court of Session on a point of law (section 56).

133. Consideration was also given during the Bill's development to the inclusion of an additional stage of appeal, following consideration by the Commissioner, to an Information Tribunal. Views were invited on this proposal in *An Open Scotland*, and in light of the responses received, and in particular the widely-held view that to include an Information Tribunal would add an unnecessary layer of bureaucracy and possibly undermine the Commissioner's powers, the Executive did not consider the creation of an Information Tribunal necessary or appropriate.

HISTORICAL RECORDS (PART 5)

134. This Part of the Bill defines the arrangements for the falling away of exemptions with time. In other words, certain exemptions will cease to apply when information reaches a specified age. The majority of the exemptions fall away after 30 years and, as a drafting device, the Bill defines records which are over 30 years old as "historical records". A smaller number of exemptions fall away after 60 and 100 years while the remainder remain to be considered in perpetuity.

135. The arrangement whereby certain exemptions are always to be considered does not mean that records covered by these will remain exempt in perpetuity. Rather it is considered appropriate for consideration always to be given to exemptions for certain matters, such as the exemption for personal information, when deciding whether requested information should be disclosed. Consequently, a public authority receiving a request for "older" information can continue to consider exemptions which apply in perpetuity, but will need to consider, for example, whether any "harm" in disclosure has lessened over time.

136. It should be noted that the Bill does not put on a statutory footing the present operation of "closure periods" or "extended closure periods" (currently applied administratively in Scotland). The right of access provided in the Bill applies to information from its origination. Ultimately, whether information is disclosed will depend on whether an exemption applies and (where the public interest test in section 2 applies) whether it is considered that there is an overriding public interest in disclosure.

137. The Scottish Ministers may, by order, amend the time periods after which exemptions fall away, but not so that these may be made longer than those contained in the Bill.

CODES OF PRACTICE (PART 6)

138. There are two Codes of Practice which the Bill requires the Scottish Ministers to issue, both of which would be laid before the Scottish Parliament. Firstly, section 60 provides for the Scottish Ministers, after consultation with the Scottish Information Commissioner, to issue a Code of Practice providing guidance on how public authorities should discharge their duties in complying with the Bill. A number of the issues raised during the consultation on the draft Bill related to concerns about how Freedom of Information would operate in practice – issues which would be addressed in the Code of Practice issued under section 60 – rather than issues relating to the design or drafting of the Bill. For example, many respondents noted that the Bill did not allow for FOI requests to be made over the telephone and were concerned that this would allow public authorities simply to ignore these requests. As is noted earlier, this is certainly not the intention – the provision of advice and assistance, including how telephone enquiries should be handled, will be addressed in the Code of Practice under section 60.

139. The Code issued under section 60 will also address matters such as the transferring of requests to another public authority, consultations with third parties (persons other than the applicant who may be affected by the release of information), the procedures for dealing with complaints against refusal to disclose information, and the inclusion in contracts entered into by public authorities of terms relating to the disclosure of information. Given the broad variety of type and scale of public authority covered by the Bill, it was considered that these matters would be more appropriately dealt with by way of a Code of Practice.

140. Secondly, section 61 provides for the issue by the Scottish Ministers, after consultation with the Commissioner and the Keeper of the Records of Scotland, of a Code of Practice providing Scottish public authorities with guidance on the keeping, management and destruction of their records. This Code may also include guidance on the transfer of records to the Keeper of the Records of Scotland, on reviewing records before they are so transferred, and may be tailored so as to meet the requirements of different public authorities.

MISCELLANEOUS AND SUPPLEMENTAL (PART 7)

Environmental information

141. As indicated earlier, the Bill includes a class exemption for environmental information obtainable under the access rights to be afforded under regulations made by the Scottish Ministers. The regulations made under section 62 will implement the Aarhus Convention – a United Nations Economic Commission for Europe (UNECE) measure to which the United Kingdom and all other European Union Member States are signatories. The Convention deals with access to information, public participation in decision-making, and access to justice in environmental matters.

142. Having signed the Convention, the United Kingdom Government wishes to ratify the Convention as soon as possible. As the Convention goes further than the existing EC Environmental Information Regulations (EIRs) in some areas, and these are not sufficient to enable the United Kingdom to meet the requirements of the Convention, new regulations must be made. The Convention is not an EC instrument and, as a result, the power to make regulations under section 2(2) of the EC Act 1972 cannot be utilised – therefore, a new power to make regulations is required, and is included in the Bill. It should be noted that these regulations will implement only those provisions of the Aarhus Convention which relate to access to environmental information. The new Aarhus-compliant regulations would be required to provide for an Independent Supervisory Authority and this responsibility would rest with the Scottish Information Commissioner.

143. To give effect to the information provisions of the Convention, the Scottish Executive could have waited for European Community ratification, and implemented by means of regulations under section 2(2) of the EC Act 1972. However, to do so would have delayed Scottish (and hence UK) compliance with the Aarhus Convention. The alternative was to use the Scottish FOI Bill as a vehicle to implement the Aarhus provisions.

144. Once it was decided that it would be most appropriate to use the FOI Bill to implement the Aarhus Convention, two possible approaches were considered. Consideration was given to making the Bill fully Aarhus-compliant, which would have obviated the need for any secondary Environmental Information Regulations. However, it was concluded it would have been a very complex exercise to attempt to modify the right of access provided by the Bill to meet the requirements of the Convention, and that it could result in tensions within the Bill itself. Consequently, it was decided it would be more straightforward and appropriate to provide for a power in the Bill to introduce regulations compliant with the Convention.

145. In practice, access to environmental information held by Scottish public authorities will be available first under the Environmental Information Regulations rather than under the Bill. However, the freedom of information regime would continue to have effect, by placing a duty on public authorities to disclose information, which might be exempt under the EIRs, where it would be in the public interest to do so.

146. A number of respondents to the consultation exercise on the draft Bill, most notably Friends of the Earth Scotland, were concerned that the Bill only included provision to implement Article 4 of the Convention, relating to access to environmental information. In particular, respondents were concerned that the Bill did not include powers to implement Article 5, dealing with the dissemination of environmental information to the public. It was not considered necessary to include a power to implement this part of the Convention, as it can simply be delivered administratively (indeed, many requirements of the Convention are already being delivered in this way). In addition, it is intended that much of Article 5 will be covered in the revised Directive on Freedom of Access to Environmental Information, currently proceeding through the European legislative process. Consequently, it was not considered necessary or appropriate to extend the powers in the Bill beyond those necessary for the implementation of Article 4.

Power to amend or repeal statutory bars

147. As described earlier, there will be an exemption for information whose disclosure is prohibited by or under an enactment. Under section 63 of the Bill the Scottish Ministers would be able by order to repeal or amend such an enactment, so far as it relates to a Scottish public authority, if they decided that it was unduly or unnecessarily prohibitive with regard to the disclosure of information.

Commencement

148. The Bill specifies that all provisions of the legislation (apart from sections 69, 72 and 73 which would come into force on Royal Assent) will come into force 5 years after Royal Assent or on such day before the end of that period as the Scottish Ministers may by order appoint. Until such time as all provisions are in force, annual reports will require to be made to the Scottish Parliament by the Scottish Ministers on the progress towards full commencement.

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

Impact on human rights

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

150. The Convention creates no free-standing right to be able to access information in the hands of public bodies. As regards information which may fall to be disclosed in terms of the Bill, the main Convention provision which is of relevance is Article 8 (right to respect for private and family life). The Executive considers that the terms of the Bill in general, and the terms of section 38 (personal information) in particular, are consistent with the principles set out in Article 8.

Impact on equal opportunities

151. Although the Bill and its provision of an enforceable statutory right of access to information held by Scottish public authorities cannot, and should not, be considered a vehicle to address equality issues, the Bill does contain aspects which will support the Executive's commitment on equality issues.

152. The right of access provided by the Bill should be and will be 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.

153. Furthermore, the Bill should not be considered in isolation from existing statutory obligations in relation to equal opportunities. Public authorities have relevant statutory

obligations under the Race Relations (Amendment) Act 2000 (the RRAA) and the Disability Discrimination Act 1995 (the DDA). The RRAA places a general duty on public authorities to work towards the elimination of unlawful discrimination and promote equality of opportunity and good relations between people of different racial groups. The Commission on Racial Equality produces codes of practice to provide practical guidance to public authorities on how to fulfil that duty. The DDA places similar duties with regard to discrimination against those with disabilities. Public authorities would be obliged to deal with FOI requests in the same way as they discharge any of their other functions in accordance with relevant statutory duties. For example, where a local authority decides to disseminate information in an area with a high proportion of residents from a particular ethnic community, that council may be obliged, under existing equality legislation, to consider translating the information into the language of that community.

154. As part of the consultation process on the draft Bill, the Executive held constructive discussions with the statutory equality bodies – the Commission for Racial Equality (CRE), the Equal Opportunities Commission (EOC) and the Disability Rights Commission (DRC). These bodies recognised that the Bill should not be regarded as a vehicle to address equality issues, but rather should be considered alongside equality legislation. The Executive noted that the Bill should be considered as part of a package – to include the Code of Practice issued under section 60, the charging regulations and any subsequent guidance issued by the Scottish Information Commissioner – and that it is neither necessary, nor appropriate, that issues relating to the promotion of equality be dealt with on the face of the Bill.

155. The legal right of access provided by the Bill is, in keeping with most freedom of information regimes, to information held. In this respect, the Bill does not introduce a requirement on a Scottish public authority to provide information it does not hold, nor require the authority to provide information in a format in which it is not held. However, section 11 of the Bill provides that an applicant may express a preference to receive the requested information in a particular format, and a Scottish public authority will be required to give effect to this preference, so far as is reasonably practicable. In determining what is reasonably practicable in this regard, the authority may have regard to all the circumstances, including cost. Where the authority determines that it is not reasonably practicable to give effect to the preference, it must notify the applicant of the reasons for that determination.

156. The Bill also establishes, in section 15, a duty on Scottish public authorities to provide advice and assistance to a person who proposes to make, or has made, a request for information to it, insofar as it is reasonable to expect it to do so. A Code of Practice will be issued, under section 60, which will provide guidance on how authorities should operate the legislation. A Scottish public authority which, in relation to the provision of advice or assistance to applicants, conforms to this Code of Practice will be regarded as complying with the duty to assist.

157. Whilst an authority might reach the conclusion that it would not be reasonably practicable to provide the information in the format requested, it will be under a duty to assist the applicant, insofar as it is reasonable so to do, to identify alternative means to provide the information.

158. The Executive recognises that there may be persons who wish to make a request for information, and have such a request considered in accordance with the Bill's provisions, but

who, for whatever reason, are unable to submit a request in the method specified in section 8. Paragraph 22 of this memorandum explains why it is considered appropriate that requests under the Bill should be put in writing to the public authority. However, the Bill does not preclude authorities responding to persons making inquiries by telephone or in person – indeed this will continue. Moreover, the duty under section 15 of the Bill will oblige an authority to assist applicants, and potential applicants, exercise their rights under the Bill.

159. An authority is also required, under section 23 of the Bill, to produce a publication scheme which must specify the classes of information that the authority publishes, or intends to publish, and the manner in which that information is, or will be, published. It can be envisaged that publication schemes will identify the information which an authority makes, or intends to make, available in alternative formats.

Impact on island and rural communities

160. Residents in island or rural communities will benefit from the right of access to information in the same way as residents in other parts of Scotland, and, as such, the right of access is independent of the location of the applicant. Moreover, the Bill does not repeal or amend any existing statutory arrangements for providing access to information, but rather it provides a general right of access to all information held by a very broad range of Scottish public authorities. The Bill therefore augments existing arrangements. For example, an existing right of access might provide only a right to inspect certain information, but section 11 of the Bill permits an applicant to request that a copy of information be supplied (and this has to be provided unless it is not reasonably practicable to do so). This could, for instance, mean that residents in island or rural communities may not need to travel to inspect information to which they wish to have access.

Impact on sustainable development

161. The Bill will have no negative impact on sustainable development.

162. The office of the Scottish Information Commissioner will be encouraged to follow good environmental management practice. Information being made available on the internet or supplied to an applicant in electronic format should reduce the use of paper. The provisions in the Bill may also reduce the need for applicants to travel to inspect information.

Impact on local government and other Scottish public authorities

163. Many Scottish public authorities already handle requests for copies of information or requests to inspect records. Obligations may be placed on them through statute or they may be subject to discretionary access regimes. Local authorities, for example, are subject to a number of statutes governing access to information, including the Local Government (Scotland) Act 1973 and the Local Government (Access to Information) Act 1985. They are also guided by discretionary codes of conduct including the COSLA Code of Openness in Local Government and Public Performance Reporting under Best Value (which, whilst not providing rights of access to information *per se*, is promoting greater dissemination of information that is

meaningful and relevant to local stakeholders). Health Trusts, general practitioners and others have been subject to the Access to Health Records Act 1990, although this has to a great extent been replaced by the Data Protection Act 1998, to which all public authorities are subject. Many public authorities will be subject to the Environmental Information Regulations 1992. Bodies within the Scottish Administration are subject to the Code of Practice on Access to Scottish Executive Information.

164. Consequently, many Scottish public authorities will be experienced in handling requests for information, and will have mechanisms in place to process these and make information available.

165. To support the Scottish public sector prepare for the implementation of the Freedom of Information legislation, the Executive has convened a Freedom of Information Implementation Group. This Group includes representation from across the Executive and the wider public sector (including the local authority, health and education sectors), and is tasked with ensuring that all necessary measures are put in place such that the Scottish FOI legislation may be implemented smoothly and consistently across the Scottish public sector.

Impact on business

166. There are no regulatory implications for business arising directly from the Bill. Information held by public authorities about business will be exempt from disclosure under the Act if disclosure would, or would be likely to, prejudice substantially the commercial interests of any person.

167. However, the Bill contains an order making power in section 5 under which the Scottish Ministers may bring private sector bodies within its scope, if, and to the extent that, they are exercising public functions or are providing under contract with a Scottish public authority services whose provision is a function of that authority. Before any such order is made, the Scottish Ministers will be required to consult the body in question and a Regulatory Impact Assessment will be carried out.

This memorandum relates to the Freedom of Information (Scotland) Bill (SP Bill 36) as introduced in the Scottish Parliament on 27 September 2001

FREEDOM OF INFORMATION (SCOTLAND) BILL

POLICY MEMORANDUM

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