

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

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

OVERVIEW OF THE BILL

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

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

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

5. The key elements of the Bill:

¹ <http://www.scotland.gov.uk/About/FOI/6principles>

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

POLICY OBJECTIVES OF THE BILL

Communications with Her Majesty etc.

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

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

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

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

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

² <http://www.legislation.gov.uk/ukpga/2010/25/contents>

³ <http://www.legislation.gov.uk/ukpga/2000/36/contents>

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

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

Alternative approaches

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

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

Further provision as respects responses to request

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

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

17. The Bill proposes to add section 38 to those exemptions listed at section 18 of the 2002 Act, enabling a 'neither confirm nor deny' response to be issued where a request concerns

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

Information otherwise accessible

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

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

20. It has long been considered that the wording of section 25(3) lacks clarity. The point is reflected in an Opinion of the Court of Session⁴ and was also identified by the former Information Commissioner in his Special Report to the Scottish Parliament.

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

Historical records

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

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

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

⁴ <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>

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

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

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

Alternative approaches

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

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

Offence of altering etc. records with intent to prevent disclosure

30. It is an offence under section 65 of the 2002 Act to alter, deface, block, erase, destroy or conceal a record held by a public authority and subject to an information request, with intent to prevent disclosure. Such an offence, which is summary-only, must be prosecuted within six

months of commission due to section 136(1) of the Criminal Procedure (Scotland) Act 1995⁵ which specifies the time limit for certain offences.

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

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

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

Alternative approaches

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

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

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

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

⁵ <http://www.legislation.gov.uk/ukpga/1995/46/contents>

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

CONSULTATION

38. The Scottish Government is committed to operating as openly as possible in the interests of promoting transparent and accountable public administration. In 2009 the Scottish Government published its Improving Openness consultation⁶ inviting comment on proposals to reduce the period of time after which certain exemptions could not be applied. In consulting on such a reduction, the Scottish Government considered that since freedom of information legislation had come into force there had been a shift in culture among public authorities towards greater openness and accountability. Moreover, public expectations of being able to access more information earlier had significantly increased.

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

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

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

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

⁶ <http://www.scotland.gov.uk/Publications/2009/07/01094653/0>

responses⁷ to the Improving Openness consultation reflected strong support for reducing the 30-year time period, concerns were raised by various authorities in respect of certain exemptions and types of record, particularly when information was held in terms of confidence.

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

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

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

45. During the consultation period the then Information Commissioner published a special report ‘Informing the Future – the State of Freedom of Information in Scotland’⁸. While not a formal response to the consultation, the report was intended to inform debate on the Bill. The report included various recommendations aimed at developing transparency and openness in Scotland. While not all recommendations were of relevance to the Bill, the Scottish Government proposes to take forward in the Bill two of the proposals – in respect of sections 18 and 25 of the 2002 Act – as discussed above.

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

Impact on human rights

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

Impact on equal opportunities

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

⁷ <http://www.scotland.gov.uk/Publications/2009/11/26114548/0>

⁸ <http://www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReport2012.asp>

Impact on island and rural communities

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

Impact on sustainable development

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

Impact on local government and other Scottish public authorities

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

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

Impact on business

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

*This document relates to the Freedom of Information (Amendment) (Scotland) Bill (SP Bill 14)
as introduced in the Scottish Parliament on 30 May 2012*

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