JUSTICE 1 COMMITTEE

Tuesday 12 February 2002
(*Afternoon*)

Session 1

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JUSTICE 1 COMMITTEE
5th Meeting 2002, Session 1

CONVENER

*Christine Grahame (South of Scotland) (SNP)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Lord James Douglas-Hamilton (Lothians) (Con)
*Donald Gorrie (Central Scotland) (LD)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Dr Richard Simpson (Deputy Minister for Justice)
Mr Jim Wallace (Deputy First Minister and Minister for Justice)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

The Chamber

Scottish Parliament

Justice 1 Committee

Tuesday 12 February 2002

(*Afternoon*)

[THE CONVENER *opened the meeting at 13:48*]

Freedom of Information (Scotland) Bill: Stage 2

The Convener (Christine Grahame): Good afternoon and welcome to the fifth meeting in 2002 of the Justice 1 Committee. I remind all members to turn off mobile phones and pagers.

The only item on the agenda today is the stage 2 consideration of the Freedom of Information (Scotland) Bill.

Lord James Douglas-Hamilton (Lothians) (Con): On a point of order, convener. Amendment 138 was not framed quite as I had intended, so it will be withdrawn and amendment 139 will be substituted for it. I am grateful to the clerks for having helped me a great deal in that connection.

The Convener: All members should have a copy of the bill, the marshalled list of amendments and the suggested groupings. I draw members' attention to an announcement in the business bulletin for Thursday 31 January, which states that today the committee will not go beyond section 35. We may not get that far, but that is the target. We will pick up next week where we leave off this week, as we have some time in hand for stage 2.

I welcome Dr Richard Simpson, the Deputy Minister for Justice, who will take part in the meeting on behalf of the Executive until the Minister for Justice arrives at around 3 o'clock, when the baton will be handed on. If members are finding scrutiny of the bill heavy weather, we may take a short break—that is up to the committee.

Previously, I have allowed the member speaking to the lead amendment in a group to sum up. If another member has lodged an amendment and spoken to it, I will allow them to sum up on that amendment before inviting the member who moved the lead amendment to sum up overall. That was not the case last week. Any member who speaks to an amendment will have an opportunity to sum up, but the final summing up will be by the member who moved the lead amendment in the group. I think that I have made that as clear as mud, but we will see what happens as we proceed.

Section 10—Time for compliance

The Convener: The first amendment for debate is amendment 3, in the name of Lord James Douglas-Hamilton, which is grouped with amendments 131, 4, 132, 5, 6, 7 and 8.

Lord James Douglas-Hamilton: Amendment 4 is the paving amendment in this group. Under that amendment, all Scottish public authorities would have to respond to a request for information within 30 days, rather than the 20 days specified in section 10(1) of the bill. Under section 10(2) of the bill, the Keeper of the Records of Scotland has 30 days to respond to requests for information. If amendment 4 were agreed to, there would be no need for different time provisions to apply to the keeper and to other Scottish public authorities. Section 10(2) would become unnecessary and could be removed from the bill.

The bill recognises that in certain circumstances the time limit for responses to requests for information needs to be extended to the 30 days provided for under section 10(2). It would be better for the bill to contain one time limit that afforded bodies adequate time within which to respond to requests for information.

The Law Society of Scotland, on whose behalf I lodged most of these amendments, believes that 20 days may not be long enough for public authorities to respond to requests for information and that 30 days may be a more appropriate time limit. If a public authority requests an extension of the time limit to allow it to reply to a request, it should be able to identify the need for such an extension within 10 days. Under amendment 4, the authority would still have 20 days within which to comply with the provisions of the bill.

I can provide the committee with examples of situations in which a 20-day time limit might be insufficient. If a request for information were made in relation to waste and its impact on Edinburgh's world heritage site status, it would take some time for that information to be collected. The information would have to be collected from the waste management and environmental services departments of City of Edinburgh Council, as well as from bodies such as the Old Town Association, Edinburgh, the Central New Town Association of Edinburgh, the Edinburgh World Heritage Trust and the Cockburn Association—not to forget the Scottish Environment Protection Agency. Getting round all those organisations, collecting the information and producing it would take time.

Similarly, if a patient suffering from cancer were to request information about their treatment, that information would have to be collected from the health trust concerned and from the relevant drug company or companies. If the period for responding to such requests is too short, there is a

danger that more local authorities will apply for an extension of the time limit.

That is the purpose of amendment 4—to save local authorities from having to make too many requests for extensions. There would be a little more latitude in cases that could involve complexities and a number of organisations.

Amendment 132 concerns translation. If there are not enough interpreters, there should be a test of reasonableness for translations. Last week, the minister spoke about obscure languages. The bill should have clear terms and be beyond reasonable doubt. If a language is considered to be obscure—to use the minister's word—a test of reasonableness should be applied.

Amendment 8 would enable a Scottish public authority to apply to the Scottish information commissioner to vary the time for complying with a request. The Law Society took the view that there should be a general power of dispensation from time limits that could be exercised by the Scottish information commissioner upon application by the public authority. It was hoped that that would allow flexibility in the system and would prevent inadvertent breaches of arbitrary deadlines.

The key point that I want to make is that the system must be workable. I will not speak to the other amendments in the group as they are consequential amendments.

The Convener: You may speak to other amendments in the group, but at this point you may move only amendment 3.

Lord James Douglas-Hamilton: I would like to move amendment 4. Amendment 3 is consistent with amendment 4. Amendment 4 is the paving amendment. I feel less strongly about amendment 3.

The Convener: You cannot move amendment 4 at this point. Do you intend to move amendment 3, or do you want to wait until after the debate and then decide whether to move it?

Lord James Douglas-Hamilton: I would like to reserve my position. I would like to move all the amendments, but I want to hear what the minister says about amendment 132 before I decide whether to move it.

The Convener: Only amendment 3 can be moved at this point. I will invite you to move the other amendments as we reach them. Are you moving amendment 3? I will return to it.

Lord James Douglas-Hamilton: I move amendment 3, but it is a consequential amendment, not the paving amendment.

The Convener: Before I ask Michael Matheson to speak to amendment 8 and other amendments in the group, I should say that if amendment 3 is agreed to, I cannot call amendment 131, which would be pre-empted.

Lord James Douglas-Hamilton: I am not too worried about that.

The Convener: I invite Michael Matheson to speak to amendment 8 and the other amendments in the group.

Michael Matheson (Central Scotland) (SNP): I do not know whether I can say anything about amendment 8. Although it is in my name, Lord James Douglas-Hamilton spoke to it.

The Convener: That is fine.

Michael Matheson: I thought that you would have called me first to speak to my amendment.

The Convener: The normal procedure is that the member with the first amendment in the group speaks to that amendment and then speaks to the other amendments in the group, so that we do not jump about. You are the prime speaker to amendment 8.

Michael Matheson: There is concern that some public authorities may have difficulty—for genuine reasons—in complying with time limits. There is a requirement for latitude. If a public authority thought that there was a genuine reason to extend a time limit to provide information to the person who has requested it, they should be able to apply to the information commissioner for an extension. I mention the information commissioner because there must be a check. Public authorities should not be allowed to abuse the system. The information commissioner would be the best person to consider whether an extension to a time limit would be appropriate. Amendment 8 primarily seeks to provide a little flexibility in the system while ensuring that there is a proper check. The information commissioner would carry out that check him or herself.

14:00

Donald Gorrie (Central Scotland) (LD): I have quite a lot of sympathy with amendment 8. A public authority should have the right to ask for extra time. The commissioner is the right person to make that judgment.

Lord James raised a more general issue, about 20 or 30 days. He made the case that complex questions require more time. That is a fair argument. On the other hand, we heard the view—from people in the press particularly—that many issues that are important to people become unimportant if they are not pursued reasonably rapidly. A public authority that did not want an issue to be pursued could dilly-dally. If it were allowed to dilly-dally for 30 days, the issue would go off the boil. If the authority were able to delay for that long, that would be equivalent to its not

giving the information at all. There is something to be said for the way in which amendment 8 deals with the matter. We could stick to 20 days, but make it reasonable, in the case of any of the complex issues of which Lord James gave an example, for the public authority to speak to the commissioner and get a relaxation.

The Deputy Minister for Justice (Dr Richard Simpson): It might be helpful if I respond to this group of amendments in four parts, dealing with amendment 3, then amendments 4, 5, 6 and 7, then amendment 8, and finally amendments 131 and 132.

Amendment 3 deals with the Keeper of the Records of Scotland. I can understand that there may be concerns about the bill's appearing to relax the 20 working day response time levied on Scottish public authorities to respond to formal freedom of information requests. The bill does not do that, and as some members have observed there is widespread agreement that the time limit of 20 working days should be retained. Indeed, in the majority of circumstances, the keeper will be under the same obligation to respond to requests within 20 working days.

The special arrangements in section 10(2) give the keeper 30 working days to respond to requests and apply only in those circumstances when he is handling a request for a closed record, transferred to him from another Scottish public authority. The details of the arrangements are spelled out in sections 22(2) to 22(5). As it is the case in such circumstances that the transmitting authority, rather than the keeper, decides whether the information is exempt and whether the public interest test is satisfied, it is considered appropriate and necessary to provide the keeper with an additional period of time to respond to the applicant. That allows the transmitting authority time to consider the request in the same way that it would if it had received the request directly, and it will then allow the keeper to respond to the applicant. We consider it unreasonable in those circumstances not to extend the period within which the keeper is under a duty to respond to the applicant. However, I stress that that extended period would apply only in those limited circumstances that I have described. We therefore regard amendment 3 as inappropriate.

Amendments 4, 5, 6 and 7 would extend the response period for all authorities from 20 to 30 working days. There was very little call during the consultation exercises for an extension of that sort—or indeed of any other period—for authorities to respond to applicants. In fact, the time limits in the bill have been generally welcomed, designed as they are to ensure that applicants requesting information under FOI receive information timeously.

Lord James has argued that a response period of 20 working days would introduce an unreasonable burden on public authorities. We disagree. Most public authorities already deal with and will continue to deal with a large number of requests for information, which can be met within that period.

The response period for bodies covered by the current non-statutory code is 20 days. The same period will apply to the UK public authorities, subject to the Freedom of Information Act 2000. I note that the committee's stage 1 report indicated that, with the exception of one member, the committee was content with the 20 working day period. As drafted, section 10 provides that the Scottish ministers can make regulations to vary the time limits applying under the section, but not longer than the ultimate backstop of the 60th working day.

As for amendment 8, section 10 regulations may also

"prescribe different days in relation to different cases; and"—

this is the most important part—

"confer a discretion on the Scottish Information Commissioner."

In other words, under the current circumstances the commissioner may be given, by regulation, discretion to vary the time period, although not beyond the 60th working day. The commissioner would be able to exercise his or her discretion in response to an application by a public authority or indeed at any time. Therefore, we consider amendment 8 to be unnecessary.

Finally, I appreciate the intention behind amendments 131 and 132, but I think that they misunderstand the legal obligations that apply to requests received for information to be provided in a language in which the information is not held at the time of the request. Essentially, there is no entitlement on the part of an authority to require a request to be in English and no legal requirement that requests must be submitted in English. However, there is no entitlement on the part of an applicant to request information in a language other than English or to have the information supplied in a language other than English. The test is whether, in the circumstances of any particular case, it is reasonable to expect the authority to have to reply in a language other than English. Those circumstances include the 20 working day deadline. On that basis, we consider amendment 132 unnecessary.

Lord James alluded to information being held by secondary authorities. If the information is being requested by a further authority and is not held by the first authority, the applicant's application to the second authority would have an additional 20

days. The question of where that information rests is a separate issue, which is made clear in the bill. Under section 15, the authorities would have a duty to assist and, in terms of the code of practice issued under section 60, would be required to go to those authorities believed to hold the information and assist the applicant with their request. The 20 day rule would apply equally to those authorities.

I recommend that the committee rejects amendments 3 to 8, 131 and 132.

Michael Matheson: The minister made reference to section 10(4) and the ability of Scottish ministers to confer a discretion on the information commissioner in relation to time limits. Is it intended that the regulations will allow the commissioner to extend the time limit not outwith 60 working days?

Dr Simpson: The important thing is that the primary legislation contains a power to confer such a discretion on the commissioner. If the commissioner's annual report indicates that more time is required in certain categories of cases, I see no reason why we would not issue regulations to confer that discretion on the commissioner if he or she so wished. We want to retain the flexibility to examine that on the advice given by the commissioner to the minister.

Michael Matheson: The only concern that I have about that system is that it requires a minister to take action as opposed to the information commissioner. In the early stages, particularly when the freedom of information regime is bedding down, some public authorities might be experiencing genuine problems. At that stage we may not have regulations for the commissioner to act upon. Would it be more appropriate for the commissioner to have those powers from the outset, in order to allow him to vary the time limit in genuine cases?

Dr Simpson: There is no evidence that authorities have experienced significant difficulties under the current code of conduct. I put on record my view that if cases arose in which such difficulties were evident, we would give the commissioner powers as rapidly as possible, in order to give him that flexibility. However, we do not expect such cases to arise.

Lord James Douglas-Hamilton: I listened carefully to the minister and I thank him for his comprehensive reply. I do not wish to press most of my amendments to a division, although I may return to them at a later stage. I will study the minister's comments carefully.

I feel strongly about amendment 8, as I believe that it contains an extremely important safeguard that should be written into the legislation. I am entitled to press amendment 8 because my name is on the marshalled list—

The Convener: Amendment 8 is actually in the name of Michael Matheson.

Lord James Douglas-Hamilton: Yes, but as my name is on the marshalled list as a supporter of amendment 8, I am entitled under standing orders to move it and to press it to a division.

The Convener: We are not moving anything just now. You have moved amendment 3 and we will come to the other amendments later, when it will be up to the member who lodged amendment 8 to decide whether to move it. If that member decides not to move it, another member may do so. I hope that that is clear. I should clarify the procedure for Michael Matheson. When someone moves an amendment, they should speak to all the other amendments in the same group, in order to avoid jumping from one group to another. It is up to members to decide whether amendments pre-empt—

Michael Matheson: I understand your point, convener, but, as a matter of courtesy, a member who has lodged an amendment should be given the first opportunity to put the case on that amendment. Other members who support that amendment should follow on after the member who lodged it has spoken to it.

The Convener: I accept your point, Michael. I have inherited this procedure—let me put it like that. If members are not content with the procedure, I am quite happy to change it to suit the committee.

Michael Matheson: I am not aware that the problem has arisen before.

The Convener: I need to have a little row on the side about this. I may be wrong, but that is my understanding of the way in which the procedure has been dealt with before. I have already changed the procedure—which is flexible; it is not set down—to allow members to sum up before the mover of the lead amendment in a group sums up. I am content to proceed in that way and to take guidance from the committee—I do not have a problem with that.

Lord James Douglas-Hamilton: On a point of order, convener, I think that I may have made a mistake. I should have left Michael Matheson to move amendment 8.

The Convener: Members are kissing and making up.

Lord James Douglas-Hamilton: Too many considerations are in play at once and I went on further than I should have done.

The Convener: Let us return to the work in hand. I am content to take guidance from the committee on how members want me to deal with

amendments.

Lord James has moved amendment 3. I offer him an opportunity to wind up on all the amendments in the group.

Lord James Douglas-Hamilton: I have wound up, convener. A man of few words has fewer to take back.

The Convener: Do you wish to press amendment 3?

Lord James Douglas-Hamilton: I have already indicated my view of amendment 8 and I will not press amendment 3 at this stage.

Amendment 3, by agreement, withdrawn.

Amendments 131, 4, 132 and 5 to 7 not moved.

Amendment 8 moved—[Michael Matheson].

The Convener: The question is, that amendment 8 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Douglas-Hamilton, Lord James (Lothians) (Con)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Matheson, Michael (Central Scotland) (SNP)

AGAINST

Jackson, Gordon (Glasgow Govan) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 8 agreed to.

Section 10, as amended, agreed to.

Section 11—Means of providing information

The Convener: Amendment 25 is grouped with amendment 33, which is in the name of Michael Matheson. I ask Lord James to use his discretion.

14:15

Lord James Douglas-Hamilton: I will not speak to amendment 33 other than to say that I am sympathetic to it. I will leave it to Michael Matheson.

Amendment 25 is consistent with the amendments on disability that were debated last week. Since that time, I have received a letter from the Disability Rights Commission, which says that

"these issues need to be addressed on the face of the Bill. This will provide clarity and ensure that authorities are clear of their responsibilities and disabled people of their rights. This inclusive approach will be very much in the spirit of the fourth CSG principle of the Scottish Parliament—the need to promote equal opportunities for all."

Crucially, amendment 25 deals with the right to receive the requested information in an accessible format. The bill has the potential to set a new standard on inclusive provision of information, as I mentioned at the committee's previous meeting. We believe that section 11 lacks sufficient clarity on the crucial matter of providing information to disabled people in their preferred format. We believe that amendment 25 would remove confusion and better achieve the aims of the bill.

I also wish to mention that Kate Maclean and Maureen Macmillan support the amendment.

I move amendment 25.

Michael Matheson: Amendment 33 is similar to amendment 25. Section 11 of the bill deals with applications for information to be received in certain formats. The main concern is that a disabled person might require the information in a format such as Braille or tape in order to overcome his or her disability. Although local authorities must provide those formats as far as is reasonable, they should act with regard to the Disability Discrimination Act 1995 to ensure that a disabled person is not discriminated against because it is more expensive to provide in a specialised format the information that he or she requests.

Amendment 33 seeks to ensure that when an authority is considering the format, and the cost of providing information in that format, it should keep in mind its obligations under the Disability Discrimination Act 1995.

Maureen Macmillan (Highlands and Islands) (Lab): As Lord James said, amendment 25 follows on from amendment 24, which was agreed to at the committee's previous meeting. Amendment 25 is also supported by Kate Maclean, who is the convener of the Equal Opportunities Committee. That committee was concerned that matters relating to disability were not covered by the bill. I support amendment 25 because it would place on authorities a duty to accept reasonable requests by disabled people as to the form in which information is presented to them. Amendment 25 rightly sends out a strong signal about how public authorities must deal with people who have disabilities.

Gordon Jackson (Glasgow Govan) (Lab): My difficulty is—I would be happy if anyone could help me with it—that I do not quite understand the need for amendment 25. At its previous meeting the committee made clear to the Executive its unanimous view on disability. We rather hope that the Executive got the message. We agreed on how to deal with requests for information at our previous meeting. I do not see what amendment 25 adds to the bill. That might be my fault.

I would be happy if James Douglas-Hamilton or Maureen Macmillan could help me. The bill says

that, if a person has a preference that is "reasonably practicable", the authority must accept it. Would not that include people who have disabilities? I understand that we should make particular provision for people who have disabilities, but I do not like simply to multiply the number of words in acts of Parliament. If everyone who expresses a preference is included, why add a reference to disability? I would be happy to have that explained. I am not minded to vote against amendment 25; it is just that I do not understand the need for it.

I will be interested to hear what the minister has to say about Michael Matheson's amendment 33. I like the idea of including a reference to the Disability Discrimination Act 1995 and I cannot see what harm it would do, but the minister might say that it would do no good because everyone is already obliged to adhere to the terms of that act. However, spelling that obligation out might be no bad thing.

I am sorry—I am wittering somewhat. I really do not quite know what this is all about.

The Convener: It is usually worth while wittering.

Gordon Jackson: I am hoping that everyone will help me.

Donald Gorrie: I am sure that my understanding of the matter is much less expert than Gordon Jackson's.

Gordon Jackson: I have no understanding of it.

Donald Gorrie: The bill contains the words

"so far as is reasonably practicable".

Amendment 25 would, in a sense, remove that. It mentions the preference being

"reasonable in relation to that disability".

However, amendment 25 would not allow a public authority to conceal—behind some alleged problem with practicability—its opposition to a request.

It is a marginal decision, but I feel that amendment 25 would strengthen the case of disabled people, as would amendment 33. They are both worth supporting.

Gordon Jackson: The debate is interesting for me because I still do not see that what Donald suggests is true. I accept that a reasonable request must be agreed to; however, if it is not "reasonably practicable" to agree to a request, the request cannot have been reasonable in the first place.

In all honesty—considering the legalistic meaning—I cannot see what amendment 25 would add to the bill. On the other hand, I cannot see what harm it would do, except that extra words are a bit of a waste.

The Convener: I ask the minister to comment before asking the movers of amendments 25 and 33 to respond.

Dr Simpson: I hope that the committee agrees that the bill is not discriminatory. There has been no suggestion of that in this committee's stage 1 report or in the reports of the Subordinate Legislation Committee and the Equal Opportunities Committee.

Amendment 25 raises what has been an important issue throughout the bill's development—the provision to disabled applicants of information in alternative formats. As I have done previously before the committee, I acknowledge the good intentions behind amendment 25. I agree that information should be readily available in other accessible formats. However, the Executive has serious legal and practical concerns about requiring the provision of information in the form that is requested by an applicant. I appreciate the importance that the committee places on this issue—the stage 1 report and last week's meeting demonstrated that. However, the Executive has serious misgivings.

It is important to explain that

"so far as is reasonably practicable"—

which is the test that is set out in section 11—is stringent, well established and well understood, both in law and in practice. Only in the most extreme cases would information not be provided in the form that was requested. In such cases, it would by definition be unreasonable to require an authority to provide what was requested.

Amendment 25 would remove that test and replace it with what would, in effect, be an absolute duty—bearing in mind the circumstances of the applicant and the resources of the authority, which might be, as some authorities are, very small—to provide the information in the form that was requested, regardless of whether the request was reasonable.

It should be noted that an unqualified absolute duty would remove a public authority's ability to seek a compromise with the applicant. Some formats are expensive to produce and they might be beyond the resources of smaller authorities. In British sign language videos, for example, a person signs information to a camera. Such videos are hugely expensive to produce and an applicant could request a significant amount of information in that format. The bill, as drafted, will allow an authority to discuss such requests with an applicant and to settle on a format that is equally acceptable to the applicant.

Just as important, the law—and therefore the rights and responsibilities under it that relate to

people who have disabilities—is clearly set out in a single coherent piece of legislation: the Disability Discrimination Act 1995. There is good reason for setting out those obligations in a single piece of legislation because, if that is the case, authorities can be clear about their legal obligations.

Inserting piecemeal provisions in different legislation will act against the protection of the rights of people who have disabilities. Leaving provisions that deal with rights and responsibilities in relation to disabled people in a single act ensures that the provisions continue to be coherent, sensible and workable. Scattering provision across the statute book could work against the people whom amendment 25 seeks to support.

The insertion of amendment 25 in section 11 of the bill would imply that the DDA aspects relate particularly to section 11 and not to the rest of the bill. I am sure that the committee would not wish to have that included in the bill. I stress that the Executive considers amendment 25 to be extremely well intentioned, but inappropriate and unworkable.

Before I suggest how the Executive might address the committee's obvious concerns, I turn to amendment 33. We agree with what we believe to be the intention behind the amendment, which is that it is important that public authorities should be aware of their duties under the Disability Discrimination Act 1995. It is, however, beyond the powers of the Scottish Parliament to try to affect interpretation of the DDA, which seems to be the intention of amendment 33. The subject of the DDA is reserved.

The inclusion in section 11 of a reference to the DDA would be misleading, because the provisions of the DDA relate to the whole bill and not only to section 11. The Executive regards amendment 33 as unnecessary, misleading and inappropriate.

The concern that lies at the heart of amendments 25 and 33 is that authorities must recognise the imperative of ensuring that FOI rights are accessible to all. No practical or legal barriers should undermine disabled people's right of access. I appreciate that amendments 25 and 33 seek to address that concern, but they would do so in a manner that is not appropriate or workable in the context of the bill.

The Executive agrees, however, that it is important to take specific steps to ensure that authorities are aware of and understand their rights and obligations under the DDA. They must also be aware of and understand how the bill and the DDA will operate in tandem. I have spoken about the important role that guidance will play for the applicant and for authorities in supporting FOI. That has been the case in the implementation of the UK Freedom of Information Act 2000. Some of the guidance—including the two codes of practice—will be produced by the Government and some will be produced by the commissioner when he or she is appointed. In all likelihood, some will also be produced by organisations that have an interest in these matters.

We intend to develop further specific guidance for authorities that will administer the bill as enacted. We aim to set out practical guidance on rights and obligations under the Disability Discrimination Act 1995 and to give examples of best practice. Our thinking is at an early stage—we have focused so far on developing the bill and working up drafts of the two codes of practice. We have not yet worked up any detailed plans, nor have we developed guidance. It is important to involve outside bodies in that work, including groups that have a detailed knowledge of the Disability Discrimination Act 1995 and how it works.

Following the completion of stage 2, I intend to proceed with that work. I will be happy to write to the committee to keep it fully up to speed on how the work is progressing. In the meantime, however, it is vital that section 11 is retained as it stands. Although amendments 25 and 33 are well intentioned, there is no doubt that from a legal and practical perspective they are inappropriate, unnecessary, unsatisfactory and misleading. The amendments would serve to undermine the effective operation of the bill and, in law, to disturb the way in which FOI legislation must sit with the Disability Discrimination Act 1995. I understand that new case law might have to be developed. That could take time and might work against those who have disabilities.

I urge members to reflect on the matter, not to agree to the amendments and to accept my offer to write to the committee in due course to update it on our progress in developing, with others, practical guidance on the issue. I hope that members will not support amendments 25 and 33.

If, despite what I have said, members are minded to support amendments 25 and 33, I urge them not to do so at the moment and to allow me to set out the Executive's views in writing so that members will have longer to reflect on the matter. If it would be helpful, I am happy to meet the committee informally to discuss the matters further.

14:30

The Convener: That is an interesting suggestion. Michael Matheson will now respond on amendment 33 and Lord James Douglas-Hamilton will wind up.

Michael Matheson: The minister highlighted the

potential problem of the competing demands of FOI legislation and the Disability Discrimination Act 1995. That is the reason why I lodged amendment 33. The Disability Rights Commission drew the amendment up. The DRC wanted to ensure that when public authorities implement the provisions under section 11 of the Freedom of Information (Scotland) Bill, they are also minded of their responsibilities under the Disability Discrimination Act 1995. That should not be left in any doubt.

The minister also referred to the information commissioner and the way in which issues could be pursued if a disabled person felt that he or she was being discriminated against. To be perfectly honest, disabled people are fed up with going to commissioners and asking them to take up cases for them. They have been calling for years to have their rights enshrined in legislation. Amendment 33 was suggested by the DRC. The amendment's purpose is to ensure that when local or public authorities implement the provisions of the bill they do not—on the basis that they need not comply with the Disability Discrimination Act 1995—remove provision that they have made under that act. Given that section 11 allows public authorities some flexibility in deciding how to provide information, it is important that we make it clear in section 11 that they must also comply with the Disability Discrimination Act 1995.

Lord James Douglas-Hamilton: The DRC might have been the force behind amendment 33, but the Royal National Institute for the Blind Scotland contributed to the spirit of and thinking behind amendment 25. Donald Gorrie summed up admirably the meaning of amendment 25. Section 11(1) says that

"the authority must, so far as is reasonably practicable, give effect to"

the expressed preference. However, blind and deaf people often come up against obstacles. It is not unreasonable that extra effort should be made on behalf of disabled people, bearing in mind that there are many different forms of disability. If the Administration argues that that will put difficulties in its way, the answer is that the amendment uses the words:

"and the preference is reasonable".

The test that is to be applied is whether a request is reasonable. That is an important safeguard, so I see no reason why it should not be enshrined in legislation.

I regard disabled people's needs as the top priority. Those needs and requirements should be in the legislation. I press amendment 25.

The Convener: The question is, that amendment 25 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Douglas-Hamilton, Lord James (Lothians) (Con)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Matheson, Michael (Central Scotland) (SNP)

ABSTENTIONS

Jackson, Gordon (Glasgow Govan) (Lab)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 25 agreed to.

Amendment 33 moved—[Michael Matheson].

The Convener: The question is, that amendment 33 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Douglas-Hamilton, Lord James (Lothians) (Con)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Matheson, Michael (Central Scotland) (SNP)

AGAINST

Jackson, Gordon (Glasgow Govan) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 33 agreed to.

Section 11, as amended, agreed to.

Section 14—Vexatious or repeated questions

The Convener: Amendment 116, in the name of Donald Gorrie, is grouped with amendments 34, 61 and 117. I presume that, although there is no technical pre-emption, if amendment 116 is agreed to, amendments 34 and 61 will not be moved.

Donald Gorrie: Section 14 concerns vexatious requests. My views will be slightly affected by the outcome of the votes on section 12, because there is some overlap between the business of repeated requests and campaigns. If we view section 14 on its own, my amendments present the committee with the options to delete subsection (1) or subsection (2), or both, or to decide on a definition of "vexatious". Michael Matheson suggests a different definition in amendment 34.

I am unhappy about section 14, as it takes a view on the applicant's motive in seeking the information. Some people are annoying—their behaviour may annoy one—but they may not

intend to vex one; it is simply the way in which they do things.

The Convener: Some faces have just sprung to mind.

Donald Gorrie: Those people do not mean any harm, but they cause problems for other people. It is dangerous to take a view on someone's motives.

There are numerous examples at Westminster—where things have been going on longer than here—of MPs who have earned ridicule and obloquy from the powers that be because they have consistently pursued a nit-picking agenda. Tam Dalyell pursued the issue of the sinking of the General Belgrano, for example. Nevertheless, a lot of good, democratic things have been done by people who pursue an issue. The former Information Commissioner of Canada repeatedly opposed requests to include something about vexatious requests in the Canadian legislation, arguing that a minister or a jet-setting councillor would regard questions about his or her expenses as vexatious if somebody kept going on about them.

The concept of vexatious requests is not helpful; we should not take a view of somebody's motives. If someone is deliberating fouling up the works, or trying to do so, by continuing to ask questions, the bill has other ways of dealing with that. A number of sections deal with repeated requests and information that the applicant already has.

I do not see that section 14, about vexatious requests, is helpful. The bill comes from an excellent source and is full of excellent things. However, it has to take account of the innate sinfulness of mankind. There might be people who would use section 14 to prevent proper requests for information. The section has not been thought through properly and we should consider deleting it or narrowing it down.

I move amendment 116.

Michael Matheson: With amendment 34, I seek to do something similar to what Donald Gorrie seeks to do with amendment 61. There is concern—this was clear from the evidence that we took at stage 1—about how public authorities would interpret the idea of vexatious requests. If two or three people made a similar request in the course of 24 hours, a public authority could easily interpret that as a vexatious request.

We need to ensure that there is a definition of "vexatious". Some people will make constant trivial requests to try to cause problems for the public authority. They might make lots of requests to try to divert the public authority from undertaking its role. No one would condone such a practice. However, it is important that we have a definition and that is the purpose of amendment 34.

Gordon Jackson: I am not minded to support any of the amendments in this group, but they raise an issue for me. No doubt the minister will tell us what the word "vexatious" means. It has a distinct legal meaning and it does not mean any of the things that we have heard so far.

Having said that, the word "vexatious" is a problem in the bill. The bill is supposed to be about freedom of information. It is supposed to be of use to the public, but if we were to ask 100 people on the street the technical meaning of the word "vexatious", I bet that not one of them would know the answer. We have an extremely technical word in the bill. I appreciate that that happens all the time, but I would certainly not like to sit here and define "vexatious". I know that the definition is not what Michael Matheson said it was, and I know that it is not some other things that I have heard.

We need a bit of clarity in what we are striking at. We are entitled to say that genuinely vexatious requests—which does not mean two or three people making the same request within 24 hours—should not be allowed. Perhaps we, as well as the public, need an understanding of what the word "vexatious" means.

Maureen Macmillan: I agree with Gordon Jackson. When we start to define "vexatious", we end up with other words that need to be defined. How do we define "trivial", for example, which was part of Michael Matheson's definition? We have to be clear about what "vexatious" means and I hope that the minister will give an explanation.

Lord James Douglas-Hamilton: When I was at the Scottish Office, there was a description of someone who wrote in complaining about the same matter time and again. If that person had received an answer but continued to write, they could be labelled a persistent complainer on the grounds that the officials should not be obliged to give the same answer repeatedly. I felt uneasy in case new evidence was brought up, but that resort was used occasionally, which was not unfair. "Vexatious" implies tiresome and that is a subjective judgment.

Section 14(1) gives an unfortunate impression to members of the public who seek information and who might be regarded as tiresome. "Vexatious" is not the most consumer-friendly word to use. I look forward to the minister's comments.

Paul Martin (Glasgow Springburn) (Lab): I await the minister's reply on the issue. Clarity is required about the word "vexatious". From my experience of health boards, people are advised regularly that a board will provide information. I do not want a situation in which organisations provide information, but say that the requests are vexatious in some way. Section 14 should not be a

mechanism by which a health board can provide information, but advise the applicant that it does not have to provide information because the request was in some way vexatious.

14:45

The Convener: That is a lot of questions.

Dr Simpson: It is interesting that we received no comments on section 14 during the consultation on the bill. Almost all the FOI schemes that we considered include provisions for vexatious and repeated requests. There is common agreement that terms such as "vexatious" should not be defined in the bill. Removing subsection (1) or subsection (2) would be inappropriate, or perhaps even irresponsible. It is unnecessary to attempt to define "vexatious", because the applicant will not have to make a judgment on whether a request is vexatious; the commissioner will make that judgment. Removing the provision would cause considerable confusion and be a damaging precedent.

Amendment 34 suggests that a vexatious request is trivial. What might be trivial to a public authority might not be trivial to an applicant. Donald Gorrie tried to make that point. Amendment 34 could provide public authorities with a new excuse with which to avoid responding to requests that they consider trivial. The Campaign for Freedom of Information does not support that and neither do we.

As I understand it, the term "vexatious" is well established in law and in administrative practice. The courts, administrative bodies and others, including ombudsmen, are familiar with the term. Therefore, the commissioner would be familiar with the term and its interpretation. The courts have a long history of interpreting the expression, and that history underpins statutory and other references to the term. In the context of the bill, and in keeping with the approach in comparable FOI regimes, it is correct to permit the commissioner to rely on and to apply that interpretation. If the commissioner errs in doing that, he or she will be open to challenge. Amendments 34 and 61 would deny the FOI regime the benefits of years of development of the concept.

The committee commented in its stage 1 report that the provision is necessary, but that the commissioner should be vigilant in ensuring that public authorities do not abuse it. We have no dispute with those comments. During the consultation phase, organisations such as Friends of the Earth Scotland did not raise concerns about the inclusion of a provision on vexatious requests.

The provision is commonplace in FOI schemes and an exemption for vexatious requests is contained in the non-statutory code of practice on access to Scottish Executive information. A similar provision is contained in the UK Freedom of Information Act 2000 and in the Irish Freedom of Information Act 1997. Indeed, the Irish information commissioner, Mr Murphy, issued the Irish authorities with specific guidance on the circumstances that he regards to be vexatious.

The concept of vexatious is present throughout the law and is subject to common-law interpretation. The concept is not confined to freedom of information legislation, but impacts across all legislation. Amendments 34 and 61 would create confusion and drive a wedge through the coherence of statute law. An attempt to create a statutory definition of "vexatious" would have to take account of the body of case law and administrative decisions and apply to all legislation.

I urge members to reject amendments 116, 34 and 61, on the basis that it would not be appropriate to remove subsection (1) or to define a vexatious request in the bill, although the guidance is another matter. I urge members to reject amendment 117 on the basis that the provision in subsection (2) is necessary to guard against repeated applications for the same material where an earlier application has been complied with and where there has not been a reasonable time period between requests.

The Convener: That was a long answer, but I still do not know what "vexatious" means. If the minister were to give some examples of case law that defines the term, we might understand the situation better.

Dr Simpson: I will consult my officials before answering, as I am not a lawyer.

We have relevant material with us, but I am not convinced that it answers the question adequately. The relevant terms are "habitual and unreasonable". The relevant situations are those in which an applicant does not believe that the information that they have received is adequate, although it meets the terms of the act. I suggest that we write to the committee with the examples that you have requested. I am concerned that we might end up inserting a provision that is at odds with the body of law in Scotland. I ask the committee to hold back on this matter and allow us to supply the examples that have been requested. The situation could be reviewed at stage 3 if the committee wished.

The Convener: I agree with your point. The situation is unfortunate however, as—if the argument that has been given is to be used—it would have been useful to see some simple examples.

Michael Matheson: I take on board what the

minister said about writing to us with some examples, but, given that we highlighted our concerns at stage 1, I would have thought that the information could have been ferreted out before today. It is disappointing that that has not happened.

Donald Gorrie: The minister's last statement was helpful. Members are confused about exactly what we are being asked to agree on. It might be reasonable to agree to pursue the matter at stage 3, after we have considered the examples that will be supplied.

One of the people who briefed me produced an English definition of the term that was produced recently by Lord Bingham, the Lord Chief Justice. However, I will not bore you with it.

I am concerned that this well-intentioned attempt to stop vexatious people vexing people could be used by an unscrupulous member of a public authority to stop legitimate but continual questions on one issue. The minister has to address that in his letter. However, in the light of his assurance, I seek leave to withdraw my amendment.

Amendment 116, by agreement, withdrawn.

Dr Simpson: I wondered whether we could change over ministers.

The Convener: I just want to finish off this group of amendments.

Amendments 34, 61 and 117 not moved.

Section 14 agreed to.

The Convener: There will now be a changeover of ministers. I welcome the Minister for Justice.

Sections 15 and 16 agreed to.

Section 17—Notice that information is not held

The Convener: Amendment 35 is in a group on its own.

Michael Matheson: As the bill stands, public authorities will have to give notice to an applicant if they do not have the information that has been requested. However, there is no obligation on authorities to advise the applicant whether they had that information and, if so, whether they passed it on to another public authority. The primary purpose of amendment 35 is to ensure that, if a public authority holds information that it decides to pass on to another authority, it will have to advise the applicant at that time that it no longer has that information and that the information has been passed on. That will allow the applicant to pursue the appropriate public authority for that information. That said, I am aware that the minister might refer to the codes of practice when he speaks to the amendment.

I move amendment 35.

The Deputy First Minister and Minister for Justice (Mr Jim Wallace): I understand Michael Matheson's intention behind amendment 35 and realise that the amendment is meant to be sympathetic towards applicants. However, I fear that it will not necessarily deliver the desired aims, or will do so only at an exceptional cost. The basic point behind the amendment is reasonable and seeks to ensure that authorities do not hold up their hands and say, "Nothing to do with us, guv." However, the committee has just agreed to section 15, which puts an obligation on a Scottish public authority

"so far as it is reasonable to expect it do so"

to

"provide advice and assistance to a person who … has made … a request for information to it."

Section 15(2) refers to a Scottish public authority

"which, in relation to the provision of advice and assistance, conforms with the code of practice issued under section 60".

In the working draft of the code of practice, which the committee has been given, paragraph 15 says:

"A request for information can be transferred only where the public authority in receipt of the request does not hold all the requested information … If the authority in receipt of the request does hold the requested information, it should process the request … If the request is for information, some of which is held by the authority and some of which is not, the provisions in respect of the transfer of requests in the Code only apply to that part of the request which relates to information which the authority does not hold."

Paragraph 16 of the draft code of practice says:

"Where a public authority receives a request for information which it does not hold, but which it believes is held by another public authority, it should consider whether to consult that authority with a view to ascertaining whether it does hold the information and, if so, whether it should transfer the request to it. In considering whether to consult another public authority, the authority in receipt of the request should consider whether the applicant would have any grounds to object. If the authority … concludes that an applicant would object, it should not consult the authority or transfer the request without the applicant's prior consent. Where the authority considers that the applicant's consent should be sought,"

the authority is required to try to obtain consent from the applicant.

The draft code of practice deals substantially with the question of information that might have been transferred or passed on or that the public authority might know, for some reason or other, to be in the hands of another public authority. I believe that the code and the duty that is contained in section 15 meet the basic desire that applicants should be given as much practical assistance as possible.

15:00

I fear that the effect of amendment 35 would be to create a substantial and unreasonable burden on public authorities' records management systems. Public authorities would have to maintain a record of all the information that they had ever destroyed—including electronic records that had been deleted from their computer systems—in the normal course of file management. I would not fancy the idea of keeping a record of every electronic record that I have deleted from my personal computer. Authorities might be required to list the text information that is deleted when work is being carried out on a draft document on one of their PCs. I am sure that that is not what Michael Matheson has in mind. Nevertheless, that is what the requirement would be.

The terms of amendment 35 are mandatory for public authorities. Public authorities would have to maintain a record of all the information that they had ever transferred to any other public body—irrespective of whether that body was a public authority—the date at which transfers took place and the format that the information was in when it was transferred. The bill will apply to all information that is held—it is retrospective. Amendment 35 does not make it clear to what extent public authorities would be required to detail information that they had destroyed or transferred prior to the bill coming into force. Some years ago, authorities had no expectation that such legislation would be introduced.

I fear that amendment 35 would result in a bureaucratic nightmare, although I am sure that that was not the intention. The intention—which is good—is substantially delivered by the combination of section 15 and the provisions in the draft code of practice, which the committee will have further opportunities to comment on.

Michael Matheson: My primary concern was that public authorities could start to shift information on a controversial issue from one authority to another to try to confuse someone. Although I do not imagine that public authorities would seek to do that, for the sake of the applicant it would be appropriate for the applicant to be informed. I am reassured by the comments that the minister has made on the draft code of practice, which state that, if a public authority that receives a request has held the information concerned, it should take appropriate action on that request.

My concern was to avoid a potential loophole. A more unscrupulous public authority could try to hide information by passing it on to another authority. As I am reassured by the provisions in the draft code of practice, I will not press amendment 35.

Amendment 35, by agreement, withdrawn.

Section 17 agreed to.

Section 18—Further provision as respects responses to request

The Convener: Amendment 63 is in a group on its own.

Donald Gorrie: Amendment 63 deals with one of the key issues at stake, which is the fact that public authorities are allowed to refuse to say whether any information exists on a subject. Public authorities are refusing not only to give any information, but to say whether such information exists.

I am assured by people who know about such things that the English or UK—whatever the correct description is—Freedom of Information Act 2000 is better, in that it has a stronger test. For example, in England, a police force can refuse to admit that it has a document only if such an admission would prejudice crime prevention or some other vital issue—in other words, if the public interest in refusing to admit that the document exists outweighs the public interest in acknowledging that it is held.

There is a risk that an unscrupulous body, such as a quango or a local authority, might use the bill to conceal the fact that it had failed to do a health check on a proposed rubbish dump, for example. If somebody were to say, "Can I see the health check for the rubbish dump?" not only might the body not give it to them, but it might not say whether the information existed.

Amendment 63 would still allow a public authority not to tell an applicant whether the information requested existed if that was clearly in the public interest—that is, if the public interest of disclosing the information

"is outweighed by the public interest in refusing to do so".

The balance is in favour of giving the information.

The reason why the amendment has two paragraphs is that one deals with contents exemptions and the other deals with class exemptions. Paragraph (a) deals with relations within the United Kingdom, defence, international relations, law enforcement, health, safety and the environment, whereas paragraph (b) concerns policy formulation, national security, information obtained in confidence from other states, investigations and proceedings, communications with the royal family and honours. The two paragraphs drive at the same point: a public authority should have the right not to say whether information exists only in extreme circumstances.

For example, a property developer could ask all 32 councils whether they have been requested to

consider having a power station or some other big thing in their area. The developer could then narrow down the field through the answers and try to buy some ground to make a lot of money. There may be instances in which trawling information in that way is not in the public interest. Amendment 63 would still allow the information not to be disclosed. As it stands, the bill could be regarded by some of the less good public authorities as an invitation not to admit that information exists. That is dangerous.

I move amendment 63.

Lord James Douglas-Hamilton: I have a question for the minister. In what type of circumstances might an authority not wish to reveal whether information exists? Will he outline roughly the considerations that were behind the drafting of section 18?

Mr Wallace: I will pick up Lord James's points in my remarks. I understand the concerns that members have with section 18. Those concerns are largely unfounded, but there are differences between the bill and the UK Freedom of Information Act 2000. We ought to address those differences.

I was interested to hear Donald Gorrie comparing the UK act favourably with the bill. At the outset, the approach that we adopted was to try to make section 18 more restrictive and more limited in its application than the corresponding provision in the UK act, but we have not succeeded in doing that. I take on board the views of members and of the Campaign for Freedom of Information that the section may have a different effect from the one that was intended.

I will put section 18 in context. Such a provision is not uncommon in statutory freedom of information schemes. Donald Gorrie properly acknowledged that there could be circumstances in which it was appropriate. Lord James Douglas-Hamilton asked for examples—Donald Gorrie's example was reasonable. If a major development is going to take place, it would be possible to trawl around various local authorities to try to identify where a power station, for example, might be about to be sited, buy the land ahead of the development and make rich pickings. The provision might be equally appropriate in situations that relate to police operations, such as the investigation of fraud or a child abuse case, in which it would not be in anyone's interest for an authority to say one way or t'other whether an investigation was proceeding. Such a provision already exists in the UK Freedom of Information Act 2000 and in the Irish Freedom of Information Act 1997.

The committee's report indicated that some members were concerned that public authorities might in some way abuse the freedom of information scheme by using section 18 to pretend that information did not exist. I understand where those concerns are coming from. In some respects, amendment 35 raised the same concerns, which are that some public authorities might seek to subvert the whole intent of the bill.

Members should not forget the whole context of the bill. If an applicant is dissatisfied with a refusal response under section 18, they can require a review by the authority of its decision. If the applicant is still dissatisfied with the outcome of the review, they can appeal to the commissioner. We should not forget that the commissioner, who has broad powers to consider appeals, could require the authority to show reasonable grounds for its decision to issue a refusal notice under section 18. The public authority cannot simply decide not to say one way or t'other and then switch off or go back to sleep. The commissioner can require the authority to show that there have been reasonable grounds for a section 18 notice and can do so by including the issuing of an information notice under section 50.

If the commissioner suspects that there are improper or devious motives on the part of the authority, the commissioner can obtain a warrant to enter and examine all the information held. The powers that are set out in schedule 3 to the bill are considerable. They are meant to deter public authorities that think that they might be able to slide out of their obligations under the bill. If that deterrence is not enough, the commissioner is given sufficient powers to go in and find out what the truth really is.

Amendment 63 seeks to insert a harm test, or public interest test, to the application of section 18. As background, let me indicate that I fully recognise the intention behind amendment 63. However, I am not persuaded that the amendment as drafted would be quite right, as it does not fit the drafting of the bill's other sections. However, having received prior notice from Donald Gorrie about his concerns, I can say that the Executive is willing to consider adding to section 18 some criteria or further tests, so that the section can properly address members' concerns.

The amendment as drafted would not be appropriate, but it may be possible to import into section 18 some form of the test of reasonableness. We shall consider further the commissioner's role in issuing notices under the section. I recognise that genuine concerns have been raised. The bill already contains a number of safeguards that should seriously limit the opportunity for public authorities to slide out of their obligations, but I am willing to look again at the section. We shall examine whether a further test can be inserted to strengthen the role of the

commissioner in dealing with the responses that might arise from section 18. On that basis, I urge Donald Gorrie to withdraw his amendment.

Donald Gorrie: Thank you. That is helpful. The minister's consideration of the wording should take into account the need to discourage less desirable officials in public offices from saying, "Ho, ho. This is a get-out clause for us." We need to bear in mind the fact that some people are not as enthusiastic about freedom of information as I know the minister is. I welcome his flexibility on the issue and look forward to what he will propose at stage 3.

Amendment 63, by agreement, withdrawn.

Section 18 agreed to.

Section 19 agreed to.

Section 20—Requirement for review of refusal, etc

Amendment 26 moved—[Lord James Douglas-Hamilton]—and agreed to.

Amendment 118 not moved.

The Convener: Amendment 36 is grouped with amendment 37.

Michael Matheson: Amendments 36 and 37 refer to the provisions for a review where an applicant is dissatisfied with the way in which a public authority has dealt with their request for information. The bill allows the applicant to request a review, but concern was expressed in the evidence that we received at stage 1 that the time scale in the bill, which gives the applicant 20 days in which to lodge their request for a review, was too short. The basis for that concern is that many people who make genuine applications will not be fully aware of their right to request a review if they are dissatisfied with the way in which the public authority dealt with their request. The purpose of amendments 36 and 37 is to extend the time scale to 40 working days. I am pleased to note that the amendments have drawn the support of the Minister for Justice.

I move amendment 36.

15:15

Mr Wallace: In order to save time, I simply acknowledge that Mr Matheson beat me to the draw in lodging amendments 36 and 37. I believe that I indicated at stage 1 that we were willing to extend the time scale. I hope that the committee will back the amendments, which are in Michael Matheson's name but which are supported by me.

The Convener: There might be a volcanic moment if we do not.

Amendment 36 agreed to.

The Convener: Before we come to amendment 64, which is grouped with amendments 65 to 67, I suggest that we take a break for light refreshment at 3.30 pm for five minutes or so, because I know that the meeting has been quite hard going—I hope that you will forgive me, minister. I ask members to return promptly from that break to our chore.

Gordon Jackson: No.

The Convener: It is not a chore for Gordon Jackson.

Michael Matheson: It is great fun.

Before I move amendment 64, I will deal with amendment 67, as the other amendments in the group are, to an extent, consequential to amendment 67.

In the evidence that the committee received at stage 1, concerns were expressed about the absence of an obligation on public authorities to designate an information officer. In much of the evidence, the view was expressed that public authorities should have an obligation to appoint information officers. Amendment 67 would require public authorities to designate an information officer. That officer would have responsibility for ensuring that the public authority complies with the bill and he or she would have overall authority for dealing with the review mechanism. Local authorities and joint boards must already appoint monitoring officers under section 5 of the Local Government and Housing Act 1989. The person who is appointed as monitoring officer will automatically become the information officer, if amendment 67 is agreed to.

Appointing an officer to be responsible for compliance with the bill will provide the information commissioner with a direct point of contact in the public body. The information officer will also have responsibility for passing advice, training and instructions to staff within the authority. The post will create a locus for responsibility within the organisation, as the person appointed will be answerable to the information commissioner on behalf of the public authority.

I hope that the existence of an information officer will provide for consistency in decision making, particularly when a review is requested. I believe that, over time, the information officers will also become experts in freedom of information within public authorities. I hope that that in itself would help to change the culture and foster wider implementation of the regime that the bill seeks to introduce.

It is not unusual for legislation to require the appointment of a compliance officer. A number of pieces of legislation already do that, including the Money Laundering Regulations 1993, under which

an appropriate officer must be appointed.

In order to ensure that we achieve the culture of change that is necessary for the legislation to be successful, the appointment by a public authority of an individual who is responsible for the implementation of the bill would be extremely helpful.

Amendments 66, 65 and 64 seek to extend the provisions in relation to the information officer. They would ensure that the information officer is responsible for undertaking any review and that, if a review is requested, the information officer will deal with it.

I move amendment 64.

Donald Gorrie: The idea of each organisation having someone in charge of freedom of information issues is a good one. However, such an exercise would be different for Glasgow City Council from what it would be for a group of general practitioners, for example. I am not sure whether Michael Matheson's amendments are sufficiently flexible to allow for such differences. However, I think that the idea is a good one, so perhaps the minister will give an assurance that the appropriate guidance or code will stipulate that someone should be the main contact point for the public when freedom of information issues arise. That would be helpful.

Mr Wallace: I hope to be able to respond positively to the spirit of Michael Matheson's amendments. Donald Gorrie put his finger on the shortcomings of amendment 67, but he also asked that we say something about how we should address the question of who is in charge of dealing with freedom of information matters. That raises the wider issue of changing the culture and of arrangements within public authorities to deliver the bill in a way in which the committee would want it to be delivered.

As Donald Gorrie identified, the problem with amendment 67 is that it is a one-size-fits-all provision. If we compare Donald Gorrie's example of a group of GPs with the Scottish ministers, we see that one size does not fit all. In the case of a small group of GPs, the proposal could be onerous in the sense that the group was too small; for the Scottish ministers, it might be difficult for one officer to act as the point of contact—that would be an unreasonable burden to place on one person. Therefore, I cannot support amendment 67.

Let me indicate what is being done to address the issues that Michael Matheson raised. As I have said to the Parliament, there is an infrastructure sub-group of the freedom of information implementation group, which was established a year ago. The FOI implementation group has sent clear messages that public authorities should be considering carefully the issues that have been raised. The group noted:

> "How each public authority handles FOI requests will be for it to decide and will be dependent upon the structure, size and business of the authority concerned. Small authorities, for instance, are less likely to need to have a co-ordinator or focal point, as all requests may be dealt with at one point. From a 'changing the culture' perspective, it would be useful for someone at a senior level within the organisation to be responsible for ensuring that implementation of FOI is being treated seriously and that the authority has the structure required so that it can meet the challenge of FOI and comply with the requirements of the legislation. Again, this would only be appropriate for larger authorities where the 'culture change' will require such an impetus."

The group's papers on the subject are available on the Executive's website, if anyone wishes to go into more detail. The papers refer to the fact that the size of organisations will determine what structures are appropriate for dealing with freedom of information matters.

As I have indicated, the Scottish Executive and all its agencies are considered as one authority under the bill, so for all departments and agencies to be overseen by one FOI officer would not be sufficient.

We did not consider it appropriate to prescribe to authorities that they should appoint information officers or what those officers' functions should be. However, I note that the committee's stage 1 report recommended that the codes of practice should include provisions relating to nominated information officers. We would be happy to re-examine the codes of practice to see whether further guidance can be provided on structures. I emphasise that the implementation group is considering such issues. The group's work is open and can be examined and commented on. It may inform what is included in the codes. That is the way in which to consider what structures are required, particularly as we are dealing with public authorities that differ considerably in size and structure.

Michael Matheson: I welcome the minister's comments. If we do not have a gate-keeping mechanism for individuals applying for information to large public authorities in particular, that may lead to difficulties. It would be easy for an individual to contact a department that they think holds the information that they are seeking and to be referred on to someone else. There should be a gate-keeping mechanism that makes the process easier for applicants.

I am conscious of the onerous burden that amendment 67 might place on small public authorities. As the minister said, it may be possible to address the problem that I have identified through the codes of practice. If the bill is to be implemented successfully and we are to change

the culture, the legislation must be as user friendly as possible. If there were a clearly defined point of contact, that would go some way towards assisting us to change that culture and to encourage applications. On that basis, I request permission to withdraw amendment 64.

Amendment 64, by agreement, withdrawn.

Amendment 65 not moved.

Amendment 37 moved—[Michael Matheson]—and agreed to.

Section 20, as amended, agreed to.

Section 21—Review by Scottish public authority

Amendment 66 not moved.

Section 21 agreed to.

The Convener: I will stop at that point, to give the committee a bit of a break. We will reconvene at 3.35 pm—in eight minutes' time. I am sorry that the break is so short, but we are trying to get through a lot.

15:27

Meeting suspended.

15:37

On resuming—

After section 21

Amendment 67 not moved.

Section 22 agreed to.

Section 23—Publication schemes

The Convener: Amendment 68 is grouped with amendments 70 and 12.

Donald Gorrie: I have a slight problem in that I think that amendment 69 should be grouped with amendments 68 and 70. However, I will not quarrel with the people who decided the groupings.

I will speak to amendments 68 and 70, but I am most inclined to push amendment 69, if we are going for what golfers call a percentage game.

The Convener: Amendment 69 is in the next grouping.

Donald Gorrie: I will try to stick to the rules by speaking to amendments 68 and 70 and moving amendment 68.

The Convener: That is it, Donald.

Donald Gorrie: Amendments 68, 69 and 70 refer to section 23(3), which says:

"In adopting or reviewing its publication scheme the authority must have regard to the public interest in—"

after which some situations are listed. Amendment 68 suggests that it would be valuable for the publication scheme to include an explanation of the authority's internal guidance. The authority should publish the rules to which its officials must adhere. It would help the public and the officials if that internal guidance were published. I am encouraged by the fact, if my information is correct, that other freedom of information regimes, which the minister quotes against me when they agree with his viewpoint, mention the issue of internal guidance in their legislation. The issue would not cause a third world war to break out, but including internal guidance would be a useful little addition to the matters that the public authority must have regard to in the public interest.

Amendment 70 inserts the words

"the publication of information which has been disclosed under this Act".

That might involve a huge mountain of work. I am not sure whether the amendment is felicitously phrased. The idea is that a public authority should build up a logbook of available information. That would be helpful to future researchers, such as officials of a public authority or quango, who would be able to find out quickly what information was available. Amendment 70 is intended to be helpful in building up information that, I suppose, would cause work in the short term but save work in the long term.

I will be interested in what the minister will say about amendments 68 and 70, and about amendment 69 when we get to it.

I move amendment 68.

Michael Matheson: Amendment 12 is intended to provide continuity to what I think is the publication scheme's intention. Section 23(4) states:

"The authority must publish its publication scheme but may do so in such manner as it thinks fit."

Section 23(5)(a) states:

"The Commissioner may—

(a) when approving a publication scheme, provide that the approval expires at the end of a specified period."

Amendment 12 seeks to ensure that, prior to publishing its publication scheme, the public authority should consult the Scottish information commissioner, before the approval stage, so that he can give his view of the scheme. That would provide continuity between sections 23(4) and 23(5)(a). I hope that the minister will consider that appropriate.

Mr Wallace: As has been indicated, section 23 is an important section because it provides that a

public authority must have a publication scheme. Section 23(3) requires a public authority to have regard to the public interest in allowing public access to information held by it and the publication of reasons for decisions made by it. In particular, the authority is to have regard to including information that relates to the provision of services by that authority, and their cost or standards attained, and information that consists of facts and analyses underpinning important decisions taken by that authority.

It is not intended that the categories in subsection (3) should be exhaustive, but some of the key functions of a public authority are set down, including the provision of services, and the wording reflects the genuine interests that one would have in them—the cost, the standards and the underlying facts and analyses. The other important issue that is covered is the publication of the reasons for decisions that have been made.

On its own, there is arguably nothing wrong with Donald Gorrie's amendment 68. It may well be an important issue that one would expect a public authority to have regard to the public interest in deciding whether it should include internal guidance in its publication scheme. If additional items were to be added—which may not be thought to be so fundamental as those that are included in subsection (3)—there would be a danger that the position might be reversed and that the list could start to be regarded as exhaustive. If that were to happen, it could be perceived that if something was not included, it was never intended to be covered by that provision. I do not want a public authority that is trying to wriggle out of publishing some information to be able to say to the commissioner that, because the information is not listed in subsection (3), it cannot be expected to publish it.

15:45

The main purpose of publication schemes is to encourage the proactive disclosure of a wide range of information. In listing a number of specific items beyond those that are currently included—which are fundamental items of information relating to a public authority—we could run the risk of being counterproductive. The commissioner is responsible for approving publication schemes and will publish guidance to authorities on the content of those schemes, and the commissioner will decide whether a scheme that has been prepared in accordance with the guidance is to be approved.

The publication of prima facie information that has been disclosed under the bill may be a laudable concept, but it could run to tens of thousands of pieces of information and that would be impractical. I do not have anything against internal guidelines being published. However, adding to the list in subsection (3) might lead to another important piece of information that we believe ought to be in the public domain—or which, at least, should be considered to be placed in the public domain—not being published because we have specified too much in the bill.

It is unnecessary and inappropriate to add a requirement to consult the commissioner in the manner that is suggested in amendment 12, and determining the timing of a publication would create a significant extra burden on the commissioner, especially as we anticipate the commissioner's role as being to assist public authorities in preparing to implement the bill. We do not consider that the extra scrutiny that amendment 12 proposes would add any value to the process. Additionally, as Michael Matheson pointed out, there is already a requirement on authorities to publish their publication schemes, and the provisions of the bill require a publication scheme to gain the approval of the commissioner.

The commissioner can be expected to publish guidance on the content and timing of publication schemes and on the way in which they may be published. A publication scheme will have to go to the commissioner anyway, and if the commissioner is unhappy with anything about it, that can be swept up in dialogue or discussion—or whatever process the commissioner invents—with the public authority. Amendment 12 would simply impose another level of consultation, formalising the process whereby such issues would be considered anyway.

It may be helpful to the committee if I draw its attention to guidance that has been issued by the UK information commissioner, Mrs France, for UK public authorities. Last year, her office conducted a public consultation exercise on the approach to devising a publication scheme. It has recently published a summary of the responses to that consultation and is now issuing updated guidance to public authorities. I can refer members to several pilot public authority publication schemes that are already available on the internet, including those for the Public Record Office, the Medicines Control Agency and—perhaps of particular interest—the Ministry of Defence.

The Scottish information commissioner will want to determine their own approach, but I want the commissioner to have considerable flexibility. That flexibility could be hampered rather than helped by the amendments.

The Convener: I am not clear whether the minister spoke to amendment 12.

Mr Wallace: I said that amendment 12 is unnecessary and inappropriate as the proposed interaction between the commissioner and the

public authority in respect of the publication scheme would add a further tier of consultation and work that almost inherently would be involved in the dialogue between the commissioner and the authority.

Michael Matheson: I hear what the minister says, but section 23(4) of the bill states:

"The authority must publish its publication scheme but may do so in such manner as it thinks fit."

I understand that the commissioner must approve the scheme, but it would be appropriate for the information commissioner to receive a copy of the scheme prior to its publication. As the bill stands, the public authority could publish in a way that it thinks appropriate and then seek the information commissioner's approval. We should ensure that, before the scheme is published, the information commissioner has given their approval.

Mr Wallace: Michael Matheson may be confused about the chronology.

Michael Matheson: It seems quite obscure.

Mr Wallace: Section 23(1)(a) states that a Scottish public authority must

"adopt and maintain a scheme (in this Act referred to as a 'publication scheme') which relates to the publication of information by the authority and is approved by the Commissioner".

The publication scheme must be approved by the commissioner—it is not discretionary. Information must be published in accordance with that scheme and the scheme must be reviewed.

Section 23(5) is almost supplementary to section 23(1)(a). When an authority submits its scheme to the commissioner for approval, the commissioner, in giving approval, can

"provide that the approval expires at the end of a specified period"

—that it is time limited—or can give notice revoking approval at any time. Section 23(4) does not apply until the publication scheme has been approved by the commissioner. In other words, the commissioner will be engaged before section 23(4). I hope that that reassures Michael Matheson. If he thinks that the publication scheme will go into the public domain and the commissioner will then look at it, I can see where he is coming from. However, things will happen the other way round.

Michael Matheson: If the sequence of events in section 23(4) and section 23(5) is considered—

Mr Wallace: The important point is that section 23(1) sets out that the publication scheme must be approved by the commissioner. That precedes everything else.

Donald Gorrie: I find the minister's argument reasonably convincing. There is a fairly standard argument that if some things are on a list, it is implied that things that are not on that list are unimportant. If the minister assures me that, through a code or guidance given to or by the commissioner, internal guidance will be included in what public authorities should put forward for their publication schemes, I will be happy not to press amendment 68 or amendment 70. I am keener on amendment 69. We will see what to do when we discuss that amendment.

Amendment 68, by agreement, withdrawn.

The Convener: I call amendment 69, in the name of Donald Gorrie, which is grouped with amendment 90.

Donald Gorrie: The two amendments are identical but go in different parts of the bill.

In the consultation document, "An Open Scotland", the Executive stated that

"the operation of the Act will be monitored and an annual report laid before the Scottish Parliament."

I argue that the monitoring of the operation of the act would include the sort of information requested under the amendment. It is not enough simply to itemise, as the commissioner no doubt would, the appeals to the commissioner. We have to see how the bill works on the ground.

Amendment 69 might have defects in wording—I will listen to those arguments with interest—but it does not ask for figures relating to the numbers of items that have been approved as, arguably, the collection of those numbers would be a big administrative task. What it asks for is information about the number of items that have been refused, the reasons for refusals, the fees that have been charged and the outcomes of the commissioner's reviews. Each public authority would give the basic figures that would be of interest to the local people and those figures would be aggregated in the figures that were produced in the report to the Parliament. Information of that sort is relevant and should be provided in order to meet the promise made in "An Open Scotland".

I move amendment 69.

Mr Wallace: I have no objection in principle to the intention behind these amendments. However, there is a view that it would not be appropriate to amend the bill in the manner proposed. I will not repeat the arguments that I made in relation to amendment 68, but they cover these amendments as well, as the amendments would come into the bill at almost exactly the same place as amendment 68. Amendment 69 does not require the public authority to give a monitoring report but only to have regard to the public interest when producing that report.

We should not lose sight of the importance of the commissioner in the approval of publication schemes. The commissioner will publish the guidance to the authorities as to the content of the publication schemes and will decide whether a scheme has been prepared in accordance with such guidance. In the light of those facts, amendment 69 is specific and could be seen to prejudge what will eventually be decided to be appropriate for the monitoring of the act.

Amendment 90 relates to what would be in the code of practice that would be issued under section 60. We are prepared to take note of the committee's views and consider including a reference to monitoring requirements. We accept that monitoring of the operation of statutory freedom of information will be necessary and that the sensible place to refer to it is in section 60. That will ensure that appropriate items are taken into account, whether they are the specific items that Donald Gorrie would like to be included in his proposed statistical publication or other items.

As Donald Gorrie pointed out, there is already a requirement for the commissioner to submit an annual report to Parliament. That will no doubt include details of appeals activity, but I take Donald Gorrie's point that the layer below that concerns refusals and reviews. It might be that a refusal never gets to the stage of an appeal as the applicant might think that an appeal is not worth the candle. However, the place to make provision for that and deal with the detail of that issue is in the code of practice.

For example, consideration would have to be given to the extent to which we wish to place a burden on all authorities, large and small, to collect statistics. The commissioner might take the view that it would not be appropriate for differing sizes of authorities to have to submit the same level of information. Further, instances in which applicants were directed to information that was available to the public could be counted as being a refusal under that act. Would they be included in the information that we are talking about? There are a number of issues to tease out.

I am not against the purpose of Donald Gorrie's amendments. At some point in the process, the issues, particularly those relating to whether the information includes the specific items that the amendment calls for or other items and whether the obligation applies to all public authorities, will be teased out, perhaps in the code of practice. I am willing to give thought to the matter—as I hope will be the commissioner—and to investigate bringing forward an amendment to section 60, which is where amendment 90 comes in, to make reference to the collection of statistics for monitoring purposes. Admittedly, it may not contain the level of detail that Donald Gorrie sets out in amendment 90, but reference will be made somewhere in the bill to the fact that some statistical information should be made available and will relate it to the code of practice.

The Convener: We often have concerns when we ask for information in parliamentary questions and we are told that the information is not held centrally. I do not think that anything is currently in the codes of practice about that.

16:00

Mr Wallace: That is right. I am certainly willing to investigate bringing forward an amendment. The code of practice will then have to take that into account. The provision is not currently in section 60, which is why it is not in the draft code, but obviously if it was in section 60 it would have to be in the draft code. It could also be in the code without being in section 60. If it gives the committee more reassurance, we would be willing to find wording to put into section 60 to cover some sort of statistical monitoring.

The Convener: It will be useful to have the provision in the codes of practice, because those will be used in a practical way by the public authorities.

Donald Gorrie: I agree with the minister that section 60 is a better section than section 23 in which to have this provision. We were trying both ways. In the light of the minister's argument, I am happy to withdraw amendment 69 and, in due course, will not move amendment 90, so long as the minister remembers his promise to include something in the bill and more detail in the code.

Mr Wallace: I do not think I will be allowed to forget that.

Donald Gorrie: I make those comments now, because we will vote on amendment 90 without any further discussion and I want to make that clear.

The Convener: Can we deal with that when we get to it, so that the convener does not get confused?

Donald Gorrie: I withdraw amendment 69.

The Convener: If anyone no longer wishes to move an amendment, it is open to someone else in the committee to move it, so the fact that you have decided not to move it does not necessarily mean that it will go by default.

Amendment 69, by agreement, withdrawn.

Amendments 70 and 12 not moved.

Section 23 agreed to.

Sections 24 and 25 agreed to.

Section 26—Prohibitions on disclosure

The Convener: Amendment 38 is grouped with amendment 46.

Michael Matheson: Section 26(a) states:

"Information is exempt information if its disclosure by a Scottish public authority … is prohibited by or under an enactment".

I am of the view that if a matter deserves to be subject to non-disclosure, it will be protected under the various exemptions in part 2. If it does not deserve to be covered by one of those exemptions, I see no obvious purpose in it continuing to be exempt information on the basis of another piece of legislation, which could be in serious conflict with the provisions of the bill. Will the minister shed some light on what other statutory exemptions exist and how the Executive intends to address such issues?

Amendment 38 would provide a right of access to take precedence over any statutory provisions for non-disclosure. I understand that that is the position under section 27(5) of the Data Protection Act 1998 and regulation 3(7) of the Environmental Information Regulations 1992. For the sake of continuity, I would have thought that the same provision should be made in the Freedom of Information (Scotland) Bill.

Amendment 46 is consequential on amendment 38.

I move amendment 38.

Gordon Jackson: I would be interested to hear from the minister what concrete steps, short of enactment, he has in mind. Can he give us an example of an enactment—hypothetical or otherwise—that would not be specifically exempted from the provisions of the bill but which it would be in the public interest to have exempted? I ask the minister to put some flesh on that.

The Convener: It is always worth asking.

Mr Wallace: There are a number of statutory bars that prohibit the disclosure of certain information. Those exist for valid reasons and, indeed, are contained in other pieces of legislation. We believe that it would not be appropriate to legislate in a manner that would allow the Freedom of Information (Scotland) Bill automatically to override other pieces of legislation, on the basis that the harm test and the public interest test might protect sensitive information. Access to particular categories of information is specifically regulated, for good reasons. To disturb that regime in a sweeping manner would be inappropriate.

The example that I can offer comes from a piece of legislation with which Gordon Jackson is even more familiar than I am—section 194J of the Criminal Procedure (Scotland) Act 1995, which I am sure will immediately ring a bell. That section places strict conditions on the disclosure of information collected by the Scottish Criminal Cases Review Commission in the course of an investigation into the appropriateness of a conviction. The 1995 act specifies the circumstances in which it would and would not be appropriate for the SCCRC to disclose information. The provisions are not arbitrary, but were considered very carefully when the SCCRC was established. The legislation was tailored very specifically to the operation of the Scottish Criminal Cases Review Commission. I do not think that it would be appropriate for the Freedom of Information (Scotland) Bill simply to override that carefully constructed package.

Many of the statutory bars set carefully developed and relevant criteria for the disclosure of information. Adoption legislation, for example, sets out criteria for access to records. Some statutory bars, such as section 33 of the Human Fertilisation and Embryology Act 1990, relate to reserved matters. Others may be the result of our implementation of international obligations. We must be mindful of competency issues. If we were to make this act override all other enactments, we could run into serious competency problems. We must also be absolutely confident that we want to override all other enactments. As I have made clear, statutory bars on the disclosure of information are not put in place arbitrarily. They exist for good reason.

Some statutory prohibitions have been on the statute book for some time and may have become moribund, no longer serving the purpose for which they were originally intended. That is why section 63 specifically includes a power to amend or repeal existing statutory bars on a case-by-case basis. Section 63 allows for necessary flexibility to make the specific amendments or repeals that may be required. We will consider whether to undertake a review of statutory bars. At present, we have no particular statutes in mind for amendment or repeal, but we are aware that the UK Government has been reviewing statutory bars and we may be able to build on the work that it has done. If members know of any statutory bars that they think it would be appropriate to repeal, I would be happy to receive details, which would be considered in a review.

In its stage 1 report, the committee did not make any reference to the provision that we are discussing. However, I understand from officials that the Subordinate Legislation Committee accepted the Executive's explanation of how section 63 of the bill would operate in conjunction with section 26.

Michael Matheson referred to the claim by the Campaign for Freedom of Information that the Data Protection Act 1998 and the Environmental Information Regulations 1992 contain provisions that override statutory bars. It is important to put that in context. The Data Protection Act 1998 implemented a European Community directive that had direct effect and therefore trumped any of our national laws. It was a similar case with regulation 3(7) of the Environmental Information Regulations 1992, which implemented European Council directive 90/313/EEC on freedom of access to information on the environment.

The Scottish Parliament simply does not have the power to override reserved legislation like the Data Protection Act 1998 or international obligations. In any event, one must remember that the right to information in the two cases that I have cited is a right to access specific information, where the override is thought to be appropriate. In the case of the Data Protection Act 1998, the override applies only to the right of a subject to access subject data—that is, you can access information about yourself—and even then the right is not unfettered. The override does not apply to all other information that has to be processed lawfully under the act. In the case of the Environmental Information Regulations 1992, the override applies only to environmental information in certain circumstances.

I urge the committee to reject amendments 38 and 46. To take the automatic approach would not only raise issues of competency, it would disturb arrangements that have been carefully constructed for good reasons. It should be borne in mind that there is provision in the bill to amend or repeal existing statutory bars on a case-by-case basis.

Michael Matheson: The primary intention of amendments 38 and 46 was to probe which enactments section 26 refers to.

The Convener: We know that you are a prober, Michael.

Michael Matheson: The minister's comments were helpful, and on that basis I seek to withdraw amendment 38.

Amendment 38, by agreement, withdrawn.

Section 26 agreed to.

Section 27—Information intended for future publication

The Convener: Amendment 39 is in a group of its own.

Michael Matheson: Amendment 39 seeks to remove the exemption on information that was to be published within 12 weeks if publication is postponed beyond that period. It is reasonable for information to be exempt when it is to be published within a short period of time, but it is not reasonable for the information to continue to be exempt if publication is postponed. As we know, sometimes things can be postponed indefinitely. Amendment 39 seeks to impose a requirement on public authorities to publish information if it is no longer to be published in the near future—the present time scale of 12 weeks.

I move amendment 39.

Gordon Jackson: If somebody asked for information that the authority meant to publish in 10 weeks' time, but the person did not get the information and the authority then postponed publication for 10 years, would that just be too bad, as long as it was done in good faith? Is that what Michael Matheson is worried about?

Michael Matheson: That is my concern.

Mr Wallace: There are a number of points. I start by making a confession. If my memory serves me correctly, the UK Freedom of Information Act 2000 just says that information is exempt if there is an intent to publish it in the future, whether on a specified date or not. To stop that becoming too much of a loophole, we added a reference to a period of 12 weeks, in an effort to time-limit publication. At the time, we were widely applauded for taking a step that had not been taken in the UK legislation. However, it is fair to say—and Michael Matheson has hit on this—that adding that helpful provision to the bill raises its own issues, namely what happens if an authority does not then publish the information within 12 weeks. It has been suggested that an authority should be obliged to publish the information at the end of the 12-week period, regardless of the reasons for the delay in publication. Others have suggested that, if information is not published within 12 weeks, an authority should be obliged to fulfil requests.

I agree that the issue has to be considered. An authority might be able to abuse section 27 and withhold information indefinitely—Gordon Jackson raised that point. An authority might delay publication, saying that it had started out with good intentions but the information cannot be made available. An authority could play the section 27 card and extend the 12-week period again and again. We have considered those issues in depth and I spent some time discussing the matter when I met Friends of the Earth.

16:15

I am clear that the provisions in section 27 do not allow authorities a loophole. I want to explain how section 27 is intended to operate. Before I do so, I will comment on amendment 39. The amendment would not allow the authority to cite

the 12-week exemption more than once. I agree that, in practice, we would not expect authorities to do so legitimately on a regular basis, but I am not sure that anyone—hand on heart—could say that it would never happen. It is not inconceivable that an authority could have serious problems at the printers, which could lead to a delay. The provisions in Michael Matheson's amendment 39 would mean that a reason could not be given for not publishing immediately. An authority might have to try to publish the information. In those circumstances, it would not be inappropriate to cite the exemption again. For that reason alone, the Executive does not wish to support amendment 39.

I recognise that there is concern about abuse. Section 27 would operate as follows. The authority, on receipt of an application, would say that, as the information was scheduled for publication within 12 weeks, it would not disclose the information. The important aspect of section 27 in relation to the issues that have been raised is paragraph (c). It is important to note that future publication does not mean that the exemption automatically applies. The provision will apply only if

"it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a)."

I stress that point. The 12-week period might not provide the authority with cover if that is not "reasonable".

It follows that an authority could not legitimately repeatedly cite the exemption in order to withhold information indefinitely. If an authority tried to do so, members should remember that, after the review, there is an appeal to the commissioner. I do not think that a public authority that tried regularly to play the section 27 card would meet the reasonableness test when the commissioner applied it in the review.

The provisions in section 27 are intended to act as a backstop and do not exist in UK legislation. I hope that people believe, as I do, that the provisions are sufficient to stop section 27 being used by recalcitrant authorities. Because it could have the unfortunate consequence of requiring information to be made available immediately, when there might be a continuing, quite bona fide reason for it not to be disclosed, I ask Michael Matheson not to press amendment 39. The reasonableness test and the fact that the commissioner will oversee any authority that tries to slide out of its responsibilities should act as sufficient safeguards.

Gordon Jackson: I understand what the minister has said and it is helpful. However, what happens if a person makes a request and the request is refused for the 12-week reason? If the refusal is deemed to be reasonable, the person cannot go to the commissioner in week three and ask the commissioner to tell the authority to hand over the information immediately, as the authority has until week 12 to release the information. The local authority has satisfied the provisions of paragraph (c). Until the 12-week period is up, the person cannot win. That means that the request becomes exhausted—it has been made, it has been refused, the person has not appealed the decision, or, if they have appealed to the commissioner, the person has lost the appeal because the 12-week period was deemed to be reasonable. The request is therefore dead. If the authority does not publish the information, what happens next? If the information is not published, there is no live request on which to appeal.

Mr Wallace: There are two ways of addressing the matter, either of which would be reasonable. First, an applicant could, after week 12, ask, "Where's my information?" The body in question might reply, "We still don't have it and we're not giving you it," and make them wait another 12 weeks. In that case, the person would technically have made another request and, if necessary, could appeal. Alternatively, if the information is not made available on the given date after 12 weeks, when the applicant was told it would be available, the applicant could take the matter to the information commissioner. Either way, people could invoke the authority of the commissioner pretty quickly. If the public authority in question had not supplied the information by that stage, it would be failing in its duties under the bill, so the applicant could make their appeal to the commissioner.

I hope that the committee will agree that it is better to specify the 12-week period in the bill, because that gives a trigger point, after which issues can be investigated. It keeps public authorities under pressure. That would not be achieved by wording that indicated an unspecified future date.

I add that the exemption in section 27 applies only if the information is being held with a view to its being published. The provision is not meant to offer a delaying tactic. It applies only when the authority in question has a publication date in mind; it is not possible simply to postpone the evil day, as it were, for 12 weeks.

I fully understand where Michael Matheson is coming from, but my concern is that his amendment 39 could lead to an unworkable situation. I believe that, through the reasonableness test and the avenue that is open to the commissioner, the bill contains sufficient safeguards against authorities that try to use the 12-week period as a means of avoiding their obligations under the legislation.

Donald Gorrie: I want to respond to part of the point that Gordon Jackson made. If I put in a request for information and the authority said that it would publish that information within 12 weeks, and I told the commissioner that that was all complete lies on the authority's part, because the authority had no intention of publishing it, would that be legitimate grounds for an appeal?

Mr Wallace: Yes, it certainly would be. The information must be held with a view to publishing it; if the authority has no intention of publishing it, the exemption would not apply. The authority might say, for example, that it was going to publish information only after 10 weeks. However, the information might relate to a critical event and a delay of 10 weeks might mean that publication happened after the event. It would not be reasonable to hold on to the information in that case. I cannot immediately think of an example of that, but 10 weeks down the line might be too late to get the information concerned.

I am not necessarily saying that the information commissioner would agree, but such a situation would give grounds for an applicant to approach the commissioner to invoke section 27(c) and ask whether it was reasonable that the local council, which knew that the critical date for coming to a decision was, say, 25 March, said that it would not publish critical information concerning it until 1 April—even though that date came within the 12 weeks and there was an intent to publish. I will not prejudge what the commissioner would say in such circumstances, but I think that there would be an argument that the reasonableness test could be raised with them.

The Convener: Should a local authority abuse the provision, what is the sanction against it?

Mr Wallace: Direction from the information commissioner. The authority would not be complying with the legislation.

The Convener: Would the sanction and the fact that the authority had abused or not obtempered the provision be in the public domain? Would it be a matter of naming and shaming the authority?

Mr Wallace: That would be for the information commissioner to decide.

If a person went to the commissioner with an issue and the commissioner determined that there was a case for the information to be released, the first step would be for the commissioner to mediate a settlement. There is also the threat to name and shame and, ultimately, to require the information to be released. Enforcement notices can compel that. Various stages lead up to enforcement notices. They are a pretty drastic sanction, but the option exists. We should not lose sight of the fact that the structure of the bill makes it a reality that the right is enforced. The commissioner might wish to take steps before issuing an order, such as naming and shaming or negotiating to get the information disclosed, but the ability to issue an order is a backstop.

The Convener: We will return to the substance of amendment 39. Michael Matheson will sum up.

Michael Matheson: The minister has explained that including the 12-week period in the bill differs from the UK legislation. Specifying 12 weeks is helpful. That should be recognised, even though the 12-week period creates potential problems.

Although the minister said that he was concerned that amendment 39 would place an obligation on the public authority to publish the information, I framed the amendment in that fashion to tip the balance in favour of disclosure. After 12 weeks—some three months—it is reasonable to expect the public authority to disclose the matter. Amendment 39 was framed with that specific purpose in mind. It goes to the very heart of the bill—the balance between disclosure and non-disclosure, and how the bill should manage that.

It is helpful that the minister has given an interpretation of section 27, because it is somewhat unclear. If the public authority does not publish the information after the 12-week period, I suspect that the mechanism open to the individual applicant who made the request would be to make a further application and, at the same time more or less, to appeal automatically to the commissioner. That does not necessarily represent a balance in favour of the applicant and disclosure.

I accept that there are checks and balances that should catch any public authority that seeks to abuse the system. On that basis, I seek to withdraw amendment 39.

Amendment 39, by agreement, withdrawn.

Section 27 agreed to.

Section 28 agreed to.

The Convener: We could move on to section 29, but I am aware that I indicated that we would finish at 4.30 pm. I am prepared to take the committee's guidance on whether to go on to section 29, which is quite lengthy. The number of amendments to section 29 alone gives me an idea of the time that it will take. Do members wish to proceed?

Michael Matheson: I do not seek to be awkward, but I must leave sharply because I have another meeting to attend.

The Convener: I am content to stop now. In fairness, I did say 4.30 pm and people make other arrangements. We have made reasonable progress.

I thank the minister. We will meet again. We will resume with section 29 on Tuesday 26 February at 1.45 pm in committee room 2. The deadline for lodging amendments for the next marshalled list is 2 o'clock on Friday 22 February.

Meeting closed at 16:28.

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