

Explanatory Notes to Freedom of Information (Scotland) Act 2002

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FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT - AN OVERVIEW

3. The Act:
 - provides a right of access to information held by Scottish public authorities;
 - creates exemptions from the duty to disclose information; and
 - establishes the arrangements for enforcement and appeal.
4. The Act is in seven Parts.

Part 1 - Access to information held by Scottish public authorities

5. This Part:

- provides for the general right of access to information held by Scottish public authorities and specifies the conditions which need to be fulfilled before an authority is obliged to comply with a request;
- describes the effect of the exemptions in Part 2 on the obligations under section1;
- describes the application of the public interest test(section2);
- provides for the Act to cover the authorities, persons or office-holders specified in schedule1 and publicly-owned companies and includes a power to specify further persons as public authorities for the purpose of the Act;
- allows Scottish public authorities to charge fees in accordance with regulations made by the Scottish Ministers;
- provides for time limits for complying with a request;
- makes special provision relating to records transferred to the Keeper etc.;

* requires Scottish public authorities to provide advice and assistance to applicants;

- requires Scottish public authorities to state the basis for refusal of a request; and
- requires Scottish public authorities to adopt and maintain a publication scheme and to publish information in accordance with it.

Part 2 - Exempt information

6. This Part sets out the circumstances in which information is "exempt information" for the purposes of the Act. Some of the exemptions apply to a class of information; others rely on the application of a test of substantial prejudice or other consequences of disclosure.

Part 3 - The Scottish Information Commissioner

7. This Part creates the office of "Scottish Information Commissioner" (the Commissioner). It places a duty on the Commissioner to promote good practice and Scottish public authorities' compliance with the Act, their publication schemes and codes of practice. The Commissioner is also obliged, where he or she considers it expedient, to disseminate information to the public about the operation of the freedom of information (FOI) regime. The Commissioner is permitted to charge fees for services provided. This Part also enables the Commissioner to make "practice recommendations" specifying what a Scottish public authority should do to comply with the codes of practice, and requires the Commissioner to lay annual reports before the Scottish Parliament.

Part 4 - Enforcement

8. This Part sets out arrangements for an applicant, who is not satisfied with the response of a Scottish public authority to a request for information, to apply to the Commissioner for a decision on whether the authority has acted in accordance with the provisions of the Act. Subject to certain conditions, the Commissioner is under a duty to reach a decision. The Commissioner is also given powers to mediate between parties to an appeal.

9. This Part also describes the investigative and enforcement powers of the Commissioner. The Commissioner's powers of entry and inspection are set out in schedule 3. This Part confirms that the Act does not give rise to any right of compensation from a Scottish public authority for breach of statutory duty. However, judicial review or appeal to the Court of Session on a point of law may still be available. This Part also provides for the circumstances in which a certificate may be issued by the First Minister, after consulting the other Scottish Ministers, in respect of a decision notice or enforcement notice issued by the Commissioner regarding the disclosure of exempt information. The effect of such a certificate is that the Scottish Administration need not comply with the Commissioner's notice.

Part 5 - Historical records

10. This Part defines certain exemptions which will cease to apply when information reaches a specified age. Records would cease to be exempt after certain specified periods, with the majority of the exemptions falling away after 30 years. For the purposes of this Part, records that are over 30 years old are described as "historical records". A smaller number of exemptions fall away after 60 and 100 years, while the remainder remain to be considered in perpetuity. This Part also describes how the Scottish Ministers may amend the time periods.

Part 6 - Codes of practice

11. This Part requires the Scottish Ministers to issue a code of practice providing guidance to Scottish public authorities on how they should fulfil their functions under the Act, including the practices which authorities should follow when dealing with requests for information. It also requires the Scottish Ministers to issue a code of practice providing guidance to Scottish public authorities on the keeping, management and destruction of their records.

Part 7 - Miscellaneous and supplemental

12. This Part:

- provides a power to make regulations relating to environmental information;
- provides for the disclosure of information by the Commissioner to the Scottish Public Services Ombudsman and the UK Information Commissioner;
- provides a power to repeal or amend existing statutory bars to disclosure;
- creates an offence of altering etc. records with intent to frustrate a right of access;
- saves existing powers of Scottish public authorities to disclose information;
- makes provision in respect of defamation;
- provides as to prosecutions in cases involving the Scottish Parliament, the Scottish Administration and the Scottish Parliamentary Corporate Body;
- amends the Public Records (Scotland) Act 1937;
- adds the Commissioner to the list of persons liable to investigation under the Scottish Public Services Ombudsman Act 2002; and
- details procedures for the giving of notices under this Act.

13. Part 7 also sets out the commencement provisions for the Act. During the period between Royal Assent and the date all the provisions have come into effect, the Scottish Ministers must make annual reports to the Parliament on progress towards full commencement.

THE ACT - SECTION BY SECTION

Part 1 - Access to information held by Scottish public authorities

Section 1 - General entitlement

14. This section confers a general right of access to information held by a Scottish public authority (the authority).

15. A person making a request for information to a Scottish public authority is referred to as the applicant. If the information requested is held by that authority, then the applicant is entitled to be given it by the authority. Provisions limiting an authority's obligations under this section appear in section 1(3), in sections 2, 9, 12 and 14, and in Part 2 ("exempt information"). Sections 9, 12 and 14 relate to the nature of the request itself and the circumstances in which an authority is not obliged to comply with it. The provisions in section 1(3) and in section 2, which refers to Part 2, relate to the nature of the information requested.

16. Section 1(3) enables the authority to request any further information necessary in order to identify and locate the information. Section 8 of the Act requires that an applicant describe the information requested, and, although the Act does not prescribe the way in which this must be done, it is in an applicant's interest to describe the information requested in as much detail as possible to assist the authority to be able to identify and locate it. The applicant is not required to cite the Act in submitting a request for information.

17. The information communicated to an applicant is to be the information held by an authority at the time the request is received, except that an authority is allowed to make any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information. This is intended to support day-to-day records management arrangements. Requested information is not to be destroyed unless it would not be reasonably practicable to prevent such destruction from occurring.

Section 2 - Effect of exemptions

18. This section sets out the circumstances where the general entitlement to obtain information will apply to information which is exempt by virtue of a provision in Part 2. Section 2 deals with the application of the public interest test to such information.

19. The general entitlement to information which is exempt by virtue of any provision of Part 2 applies only to the extent that the provision does not confer absolute exemption and to the extent that, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption. If the public interest in maintaining the exemption outweighs that in disclosing the information, the information need not be disclosed.

20. Where a provision confers absolute exemption, the public interest in disclosure need not be considered. The provisions in Part 2 conferring absolute exemption are:

- section 25 (information otherwise accessible)
- section 26 (prohibitions on disclosure)

- section36(2) (information obtained from a person where its disclosure would constitute a breach of confidence actionable by that person)
- section37 (court records etc.)
- section38(1)(a)(personal data of which the subject is the applicant)
- section38(1)(c)(personal census information)
- section38(1)(d) (health records of the deceased)
- section38(1)(b)(personal data), where the first condition referred to in that paragraph is satisfied by virtue of section38(2)(a)(i) or38(2)(b).

21. This ensures that the Act does not interfere with other statutory provisions(such as the Data Protection Act1998) which allow information to be withheld; and that it does not require the disclosure of information which concerns an ongoing action in court, or of information which is otherwise accessible(and where it would be inappropriate to require the provisions of the Act to apply).

Section3 - Scottish public authorities

22. This section defines the term "Scottish public authority" and specifies that certain information is outwith the scope of the Act.

23. "Scottish public authority" means any body(or other person or office-holder) which is listed in schedule1, designated by order under section5(1), or which is a publicly-owned company as defined by section6.

24. Section3(2) defines when, for the purposes of the Act, information is considered to be "held" by an authority. This does not extend to information held on behalf of another person, but does extend to information held by a person other than the authority on behalf of the authority.

25. Section3(2)(a)(ii) provides that information is not caught by the Act if the authority is holding it in confidence, having received it from a UK Government Department. This mirrors the Scotland Act1998 (Modifications of Schedules4 and 5) Order1999. In terms of the 1998 Act, such information does not come under the devolved competence.

26. Unless subject to section22, or designated as open information for the purposes of section3(4), information is not regarded as held by the Keeper of the Records of Scotland if it has been transferred by a public authoritywithin the meaning of the Freedom of Information Act 2000. The effect of designating information as open information for the purposes of section3(4) is to bring that information within the scope of the Act where this would not otherwise have been the case.

Section4 - Amendment of schedule1

27. This section makes provision as to future amendment of schedule1.

28. Section 4(1) provides that the Scottish Ministers may by order amend schedule1 by adding a body or the holder of any office which is either a part of the Scottish Administration or is a Scottish public authority with mixed functions or no reserved functions. An order may also remove an authority from schedule1. Such an order will be subject to negative resolution,

unless it adds an authority but limits the extent of the information available in the way mentioned in section7(1), in which case it will be subject to affirmative resolution.

29. The references to an authority with mixed functions or no reserved functions are to be read in accordance with Part III of Schedule5 to the Scotland Act 1998. (A Scottish public authority with mixed functions is an authority whose functions relate to reserved and devolved matters, unless the authority is designated - by order under section88 of the Scotland Act 1998 - a cross-border public authority.)

Section5 - Further power to designate Scottish public authorities

30. This section provides that the Scottish Ministers may by order designate as a Scottish public authority for the purposes of the Act any person who is neither listed in schedule1 (nor capable of being added to that schedule under section4(1)), is neither a public body nor the holder of a public office, and who appears to the Scottish Ministers to exercise functions of a public nature or is providing, under contract to a Scottish public authority, any service whose provision is a function of that authority.

31. An order under this section would be subject to affirmative resolution.

Section6 - Publicly-owned companies

32. This section provides that, for the purposes of section3(1)(b), a company is a "publicly-owned company" if it is wholly owned by the Scottish Ministers or by any other Scottish public authority or authorities listed in schedule1 (except where the schedule1 entry regarding the authority is limited to certain information).

33. Section3(2) sets out the circumstances where, for the purposes of section3(1), a company will be considered wholly owned by the Scottish Ministers or by any other Scottish public authority or authorities.

34. Publicly-owned companies are, under the terms of section3(1)(b), subject to the Act's provisions.

Section7 - Public authorities to which Act has limited application

35. Under this section, the Scottish Ministers will be able to provide that any authority brought within the scope of the Act under section4 would only be subject to the Act's provisions in relation to certain specified information. The authority's obligations under this Act would not extend to any other information which that authority held.

36. Under section 7(2), where an authority is already listed in schedule1, the Scottish Ministers may make an order limiting the public authority's obligations under the Act to information relating to a specific function or activities. The Scottish Ministers may also make an order removing or amending any such limitation listed in schedule1. Such an order would be subject to affirmative resolution.

37. Section7(3) restricts the application of the Act in respect of an organisation designated as a "Scottish public authority" under section5. Section7(4) provides that an order can be made

restricting the application of the Act in respect of a publicly-owned company (within the meaning of section 6). Such an order would also be subject to affirmative resolution.

Section 8 - Requesting information

38. This section details the three conditions that must be fulfilled in order that a request for information is handled in accordance with the provisions of the Act.

39. The first condition is that the applicant has to submit their request in writing or in another form with some permanency capable of being used for subsequent reference. In this context, "in writing" covers a request transmitted by electronic means (for example by e-mail), provided that it is legible to the receiving authority and capable of being used for subsequent reference. "Writing" is defined in Schedule 2 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (No.1379).

40. A request must also state the name and a correspondence address for the applicant, but the identity of the applicant is otherwise unlikely to be of concern to the authority except in the case of vexatious or repeated requests (section 14) or determining whether or not the request is for personal information (section 38). The supplying of the name and address of the applicant provides a contact point for the authority should it require additional information from the applicant to assist it in identifying and locating the information requested. It also gives an address to which the authority can send the requested information.

41. The final requirement is that the applicant describes the information requested.

Section 9 - Fees

42. This section provides the Scottish Ministers with powers to make regulations setting out the fee structure in accordance with which charges may be made for the provision of information under this Act. Such regulations will be subject to affirmative resolution. An authority will request payment for the provision of information by way of a "fees notice" and is not obliged to provide the information until payment is received. Payment must be received within 3 months of the issuing of the fees notice if the request is to be further actioned.

43. Under section 9(7), the charging structure set out in regulations under this section would not apply where the information was being disclosed by or under another enactment with its own charging scheme - in this situation, the existing scheme would continue to apply.

Section 10 - Time for compliance

44. This section sets out the timescales within which an authority must comply with a request for information under the Act.

45. An authority must respond promptly to a request for information meeting the criteria under the Act. In any event, it must respond no later than the twentieth working day from the date of receipt of the original request, or from the date of receipt of any additional information requested by the authority.

46. Where the Keeper of the Records of Scotland receives a request for information which falls to be considered under section 22, the Keeper must respond no later than the thirtieth working day from the date of receipt of the original request, or from the date of receipt of any additional information requested by the Keeper. On receipt of a request for information which the transferring authority has not indicated is open, the Keeper will forward a copy of the request to the originating public authority. It is for that authority to decide whether an exemption in Part 2 applies and, where section 2 applies, whether there is an overriding public interest in disclosure, and to advise the Keeper accordingly.

47. In instances when the authority requests a fee from an applicant, the period from the date of issue of the fee request to the date the fee is received is disregarded from the 20 working day timescale (or as the case may be 30 working days).

48. The definition of a "working day" is contained in section 73 of the Act.

49. The Scottish Ministers may make regulations to vary the period (up to a maximum of 60 working days) within which an authority must comply with a request. Those regulations could provide different periods in different cases or give discretion to the Scottish Information Commissioner. Such regulations would be subject to affirmative resolution.

Section 11 - Means of providing information

50. This section provides that, where an applicant expresses a preference for the information held by an authority to be supplied in any of the means specified in section 11(2), that authority must supply it by the means requested, provided it is "reasonably practicable" so to do, giving reasons if it does not. In determining what is reasonably practicable, an authority may have regard to all the circumstances, including costs. The applicant is not limited to one option. It will ultimately be for the Scottish Information Commissioner to determine what is reasonably practicable in the circumstances.

51. Section 11(5) provides that this section does not in any way detract from an authority's obligations under the Disability Discrimination Act 1995 with respect to those applicants with a disability.

Section 12 - Excessive cost of compliance

52. This section provides that a Scottish public authority need not comply with a request for information if the authority estimates that the cost of complying would exceed an amount set out in regulations made under this section. Such regulations will be subject to affirmative resolution. Section 12(2) allows the regulations to provide that an authority may aggregate the costs of requests for information in specified circumstances where two or more requests are made to the authority by one person or by different persons in certain circumstances.

53. * 53. If the authority estimates that the total cost of dealing with such requests would exceed the upper cost threshold set in the regulations, then the authority is not required to comply with either or any of the requests.

54. The regulations may make provision as to the costs to be estimated and the manner in which those costs are to be estimated. For example, the regulations could specify a maximum

rate for photocopying costs. The regulations may also make provision as to the manner in which and the time within which information is to be made available publicly under section 12(2)(c).

Section 13 - Fees for disclosure in certain circumstances

55. This section provides that a Scottish public authority may charge a fee, determined in accordance with regulations made under section 13(1), for the communication of information which, by virtue of section 12(1) or (2), it is not obliged to communicate and which it is not otherwise required by law to communicate. Such regulations will be subject to negative resolution. Section 13(2) sets out that the regulations may provide that a fee is not to exceed a particular amount and is to be calculated in a manner specified in the regulations.

56. This section does not affect any existing statutory provisions regarding charges for the disclosure of information.

Section 14 - Vexatious or repeated requests

57. This section provides that section 1(1) does not oblige an authority to comply with vexatious requests.

58. Section 14(2) provides that an authority does not have to comply with repeated or substantially similar requests from the same person other than at reasonable intervals.

Section 15 - Duty to provide advice and assistance

59. Section 15(1) places a "duty to assist" on a Scottish public authority. This provision applies both to applicants enquiring in advance of submitting an application and once an application has been made.

Section 16 - Refusal of request

60. This section details the manner in which an authority is required to provide a refusal of a request for information.

61. If an authority considers it is not required to disclose the information requested because of any exemption in Part 2, it must, within the period set under section 10, provide the applicant with a notice in writing. A refusal notice must specify the four matters listed at section 16(1)(a) to (d). Such a notice must also state the public interest reasons for withholding the information in the case of those exemptions which also require the public interest test to be considered. The refusal notice does not require the disclosure of information which itself would be exempt.

62. If an authority considers it is not required to disclose the information because it estimates that to do so would incur excessive cost under section 12, then it must also provide the applicant with a refusal notice as above.

63. An authority must also issue a refusal notice if it considers a request for information is vexatious or a repeated request under section 14. However, an authority is not obliged to do this

if it has already done so in response to an identical or substantially similar request and to do so would clearly be unreasonable.

64. A refusal notice for non-disclosure of information which is exempt, or where disclosure would incur excessive cost, or where the request is considered vexatious or a repeated request, must also specify the details of complaints procedure operated by that authority, of the right of internal review(conferred by section20(1)), and of the right of appeal to the Scottish Information Commissioner(conferred by section47(1)).

Section17 - Notice that information is not held

65. If an authority receives a request for information it does not hold, it is still required to provide notice in writing to that effect, within the period set under section10. Special rules apply where information is not held and a refusal notice is given under section18(see below).

Section18 - Further provision as respects responses to request

66. An authority may, under certain circumstances, give a refusal notice under this section where the authority considers that to reveal whether the information exists or is held would be contrary to the public interest.

67. This provision applies in respect of the following exemptions:

- section28(relations within the United Kingdom)
- section29(formulation of Scottish Administration policy etc.)
- section30(prejudice to effective conduct of public affairs)
- section31(national security and defence)
- section32(international relations)
- section33(commercial interests and the economy)
- section34(investigations by Scottish public authorities and proceedings arising out of such investigations)
- section35(law enforcement)
- section39(1)(health and safety)
- section41(communications with Her Majesty, etc. and honours)

Section19 - Content of certain notices

68. This section requires that a fees notice issued under section9(1), or a refusal notice issued under sections16(1),(4) or(5)(including a refusal notice given by virtue of section18(1)) or under section17(1) must contain particulars of the procedure provided by the authority for dealing with complaints and of the right to request a review and to appeal to the Commissioner.

Section20 - Requirement for review of refusal etc.

69. This section details the process by which a dissatisfied applicant can require a Scottish public authority to review the way it has dealt with a request.

70. Any applicant dissatisfied with the handling of their request for information can require an authority to review its conduct in relation to any aspect of the request. Under section20(3), the

applicant's requirement for review must be in writing or in another form capable of being used for subsequent reference; contain the name and a correspondence address for the applicant; contain details of the initial request; and indicate why a review is being requested.

71. Under section20(5), an applicant would need to submit the requirement for review either(a) within 40working days of the expiry of the 20working day (or in the case of the Keeper, 30working day) period set for responding to the original request, or(b) within 40working days of the authority's response to the original request outwith that 20working day (or in the case of the Keeper, 30working day) period. However, under section20(6) public authorities have the discretion to accept a requirement for review received after expiry of these time limits.

72. Section20(7) allows the Scottish Ministers to make regulations to vary this timescale.

Section21 - Review by Scottish public authority

73. This section sets out the procedures to be followed by a Scottish public authority in dealing with an applicant's requirement for review under section20. An authority must respond to a requirement for review within 20working days of receiving it, and can confirm the initial decision, arrive at a different decision or simply arrive at a decision(where the complaint is that none was reached in the first instance). The Keeper of the Records of Scotland is allowed 30working days where the case is one covered by section22(4), that is where another authority besides the Keeper has a role to play in carrying out the necessary review.

74. In responding to the applicant, the authority is required by section21(5) to set out what decision has been reached and the reasons for arriving at that decision. The authority must also set out for the applicant the procedures for an application to the Scottish Information Commissioner and an appeal to the Court of Session (section21(10)).

75. Regulations may be made by the Scottish Ministers under section21(6) to vary the 20 (or in the case of the Keeper when the second condition in section21(2) is met, the 30) working day timescale. Such regulations will be subject to affirmative resolution.

76. Under section21(8) an authority is not required to carry out a review where it believes the request to be "vexatious" or "repeated" in terms of section14(a request which is identical or substantially similar to a previous request by the same applicant, where no reasonable period of time has passed since the previous request). If an authority decides that it is not obliged to conduct a review, it must still respond to the applicant within the 20working day period(30working day period for the Keeper) indicating that it considers the requirement for review to be vexatious or repeated and also set out for the applicant the procedures for an application to the Scottish Information Commissioner and an appeal to the Court of Session.

77. An applicant can at any time by written notice withdraw a requirement for review.

Section22 - Special provisions relating to records transferred to the Keeper

78. This section addresses the situation where the Keeper of the Records of Scotland receives a request for information which has been transferred to him by a Scottish public authority and which has not been designated by that authority as open information for the purposes of this section, or where the Keeper receives a requirement for review that relates to a relevant

decision taken by the transferring authority. In those circumstances, the Keeper must, as soon as practicable, send a copy of the request to the transferring authority.

79. Where a request for information is involved, it is for the remitting authority to decide whether the information is exempt by virtue of any provision in Part 2 and, in cases where it is, to determine whether there is an overriding public interest in disclosure. The remitting authority must advise the Keeper of its decision in sufficient time to enable the Keeper to comply with the requirement, as set down in section 10, for the Keeper to respond within 30 working days from receipt of the request for information.

80. Where the Keeper receives a relevant requirement for review, it is for the remitting authority to review the decision it took under section 22(2) and to advise the Keeper accordingly in such time as will enable the Keeper to give notice in writing to the applicant within the 30 working day period. The Keeper will include information and any statement provided by the remitting authority in his notice to the applicant.

81. Records transferred to the Keeper by the Secretary of State for Scotland before 1 July 1999 are treated as falling within the provisions of this section and the Scottish Ministers are deemed to be the remitting authority in respect of such records.

Section 23 - Publication schemes

82. This section places a duty on Scottish public authorities to adopt and maintain a scheme which relates to the publication of information by the authority, to publish information in accordance with it and to review it from time to time. Subject to the need to obtain the approval of the Commissioner, and to the requirements set out in this section, each authority is free to draw up its own scheme and so can tailor its proposals to its particular circumstances.

83. Section 23(2) requires an authority to specify the classes of information which it publishes or intends to publish, the manner of publication and whether the information is available to the public free of charge or on payment. A publication scheme is intended to be a guide to the authority's publications and the scheme can be general in nature or specific.

83. Section 23(3) requires an authority, when adopting or reviewing a scheme, to have particular regard to the public interest (a) in allowing the public to have access to information held by it and (b) in the publication of reasons for decisions made by it.

84.

85. Sections 23(5) and (6) concern the approval of publication schemes. The Commissioner may refuse to approve a scheme, approve it only for a specified period, or revoke a previous approval. The Commissioner must give a reason for refusing to approve or for revoking the approval of a scheme.

86. Material made generally available in accordance with a publication scheme would be exempt under section 25 from the right of access. As such, the Scottish public authority would not be obliged to provide information dealt with in a publication scheme under the conditions set out in Part 1 of the Act, but instead under the conditions governing the disclosure of information under the publication scheme.

Section24 - Model publication schemes

87. This section provides for the adoption of model publication schemes by certain kinds of Scottish public authority. Section24(1) and(2) give an authority the option of adopting a model publication scheme, which may have been prepared by the Commissioner, or others, rather than preparing their own. This would enable better use to be made of resources, so that the Commissioner would not have to approve a large number of draft schemes and authorities could work together in preparing model schemes. A model scheme could be adopted by an authority with or without modifications. If modifications are proposed, the further approval of the Commissioner is required in relation to those modifications.

88. Sections24(3) and(4) contain provisions for approval, refusal to approve and revocation of approval of schemes which are comparable to those for individual schemes, except that when revoking a previous approval of a model publication scheme the Commissioner must publish a notice to this effect including a statement of reasons for revocation.