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SPICe Briefing
Freedom of Information (Amendment) (Scotland) Bill

30 August 2012

12/54

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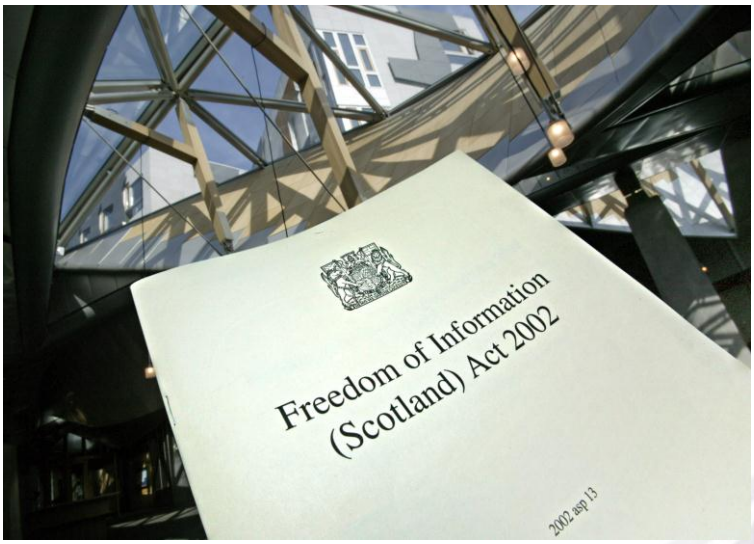
The Scottish Government introduced the Freedom of Information (Amendment) (Scotland) Bill on 30 May 2012. It is a technical Bill which sets out, in the Government's words, to remedy weaknesses which it has identified in the Freedom of Information (Scotland) Act 2002.



The Scottish Parliament
Pàrlamaid na h-Alba

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EXECUTIVE SUMMARY

The Scottish Government introduced the Freedom of Information (Amendment) (Scotland) Bill on 30 May 2012. The Bill is seen as the Government's response to a number of weaknesses in the present freedom of information legislation, the Freedom of Information (Scotland) Act 2002.

The Bill includes provisions to:

- give Scottish Ministers enhanced powers to reduce the lifespan of historical records, so there could be varying lengths of time for different public bodies or for different kinds of records

- clarify that information which is provided in a body's publication scheme does not also have to be provided in response to an FOI request

- allow authorities to issue, in reply to a request for information concerning personal information, a 'neither confirm nor deny' response

- allow prosecution for offences, under Section 65 of FOI(S)A, to be made up to six months after sufficient evidence has been amassed, rather than six months after commission of the offence

- create an absolute exemption for communications with Her Majesty, the heir and the second in line to the throne.

This final proposed amendment, which aims to bring Scottish legislation into line with amendments made to the UK Freedom of Information Act 2000 by the UK Government, has been the most disputed.

The Bill does not include any proposed additions to the list of bodies covered by the 2002 Act although Scottish Governments, in previous sessions of the Scottish Parliament, had consulted on possible additions. This omission from the amendments contained in the Bill has been the change most sought after by many of the respondents to the Scottish Government's consultation and the Scottish Parliament's Finance Committee's call for evidence.

FREEDOM OF INFORMATION RIGHTS

Article 19 of the Universal Declaration of Human Rights states that

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Included in this right is the right of access to information which is seen as an important tool in order to empower people. Freedom of information laws, which permit access to public information are seen as essential to ensure these rights. Equally important are the means by which information is made available, be it through information technology or the simple sharing of documents.

Similar rights are expressed in Article 10 of the European Convention on Human Rights

> Freedom of expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Freedom of information (FOI) legislation has been in existence since the eighteenth century (in Sweden) but it was not until the twenty first century that the United Kingdom passed its first FOI Bill.

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

Following a lengthy consultation period (1999-2001) the Freedom of Information (Scotland) Act (FOI(S)A) 2002 put on a statutory footing the right of access to information held by a range of public authorities in Scotland. The Act followed on from the UK Freedom of Information Act which had received Royal Assent in 2000.

The principle underlying the operation of the Scottish and UK freedom of information regimes is that any public authority, to which freedom of information legislation applied, should be subject to only one regime. Information held by Scottish public authorities, irrespective of whether that information relates to reserved or devolved matters, is subject to the Scottish freedom of information regime. Information held by UK public authorities operating in Scotland (e.g. the Ministry of Defence and the Department of Social Security) as well as cross-border authorities (e.g. the Forestry Commission) are subject to the UK freedom of information regime.

Thus the UK Freedom of Information Act, which received Royal Assent on 30 November 2000, also had some application in respect of Scotland.

The Scottish Act, which had received Royal Assent on 28 May 2002 and came into force on 1 January 2005, established an independent Scottish Information Commissioner to protect and enforce the new FOI regime.

The Act delineates exemptions to access, so information may be withheld because it is covered by a content exemption; a class exemption; or an absolute exemption. Absolute exemptions of themselves provide a basis for a Scottish public authority to refuse to release the information. However, in most cases, of content or class exemptions, a Scottish public authority has to satisfy itself that the public interest in disclosing the information is outweighed by the need to maintain the exemption.

The Scottish Information Commission (2006) has produced guidance on the public interest test:

- The test requires authorities to undertake a balancing exercise to consider the public interest in disclosing information and the public interest in maintaining the exemption.

- Where the public interest in maintaining the exemption outweighs the public interest in the disclosure of the information, then the information can be withheld. If the public interest in disclosing the information is equal to or greater than the public interest in maintaining the exemption, then the information must be disclosed.

The list of Scottish public authorities covered by the legislation was set out in Schedule 1 of FOI(S)A. The Act also provided Scottish Ministers with the power to add bodies to this list, but only if they were bodies within the devolved competencies of the Scottish Parliament.

The bodies covered by the Act include:

- Scottish Ministers

- Scottish Parliament and the Scottish Parliamentary Corporate Body (SPCB)

- National Health Service bodies

- local authorities

- police bodies

- cultural bodies including the Boards of the national collections and Creative Scotland

- various Non-Departmental Public Bodies and Executive Agencies, including Scottish Environmental Protection Agency and the Scottish Further and Higher Education Funding Council.

In October 2007 the new Scottish Government outlined its six principles on FOI:

CONSTITUTIONAL REFORM AND GOVERNANCE ACT 2010

At a UK level the Constitutional Reform and Governance Bill (CRAG Bill) was one of the last bills to receive Royal Assent prior to the General Election of May 2010. It had been introduced by the Government on 20 July 2009 but it was not until its report stage in the House of Commons, on 2 March 2010, that the Secretary of State for Justice, Jack Straw, introduced a clause which would amend the Public Records Act 1958 and the Freedom of Information Act 2000.

When the amended Bill was introduced in the House of Lords on 3 March 2010 it contained a new part which redefined historical records, reducing the time period for them from 30 to 20 years, and changed the exemption in the Freedom of Information Act 2000 for information relating to communications with the Royal Family and Royal Household.

The "30 year rule"

Following an independent review of the 30 year rule, announced by the Prime Minister in 2007 and carried out by Paul Dacre, Professor David Cannadine and Sir Joseph Pilling, a report was published in 2009 (30 Year Rule Review). The review recommended that the 30 year rule be replaced by a 15 year rule. Instead of accepting the review's recommendation the UK Government decided to settle on a reduction to a 20 year period.

To enable this reduction one of the Government's report stage amendments to the CRAG Bill sought to amend the Public Records Act 1958. The effect of the amendment would be that any public record selected for permanent preservation and not required for an administrative purpose or other special reason must be transferred to the Public Record Office (now part of the National Archives) or other place of deposit within 20 years of its creation. This part of the Bill also created a power for the Lord Chancellor to make transitional arrangements by order for the reduction from 30 to 20 years.

On 13 July 2012, in a written statement, Lord McNally, the Minister of State for Justice, announced the transition to 20 years would start in 2013. He explained that as this was a major change it needed to be

> "introduced in a manageable and affordable way. A phased approach will be adopted. The point at which records are transferred to the National Archives (largely central government records) will be reduced from 2013 over a 10-year transitional period, with two years' worth of records being transferred to the National Archives every year until transition is complete. From 2023, when this transition is complete, we will transfer the single year's worth of records which are caught by the "20-year rule" each year. This first stage of the change will affect an estimated 3.3 million records and cost an estimated £34.7 million to £38.5 million over 10 years.
>
> We then intend to begin from 2015 a similar 10-year transitional period for records transferred to 116 local authority places of deposit, subject to the outcome of further detailed work on costs and the impact to the local authority archive sector. Current estimates of the cost of the second phase are £5.6 million to £15 million over 10 years. This will ensure that the "20-year rule" is implemented in an affordable way that achieves the greatest level of transparency."
>
> (House of Lords Hansard 13 July 2012 13 July 2012 col WS152-153)

Royal exemption

The Government's report stage amendments to the Bill also proposed changing the exemption in the Freedom of Information Act 2000 for information relating to communications with the Royal Family and Royal Household. The change would increase the protection for such information by making the exemption absolute so far as it relates to communications with the Sovereign, the heir to the Throne and the second in line to the Throne or those acting on their behalf.

For information relating to these communications this lifespan would be a period of 20 years from the creation of the record in which the information is contained or a period of 5 years from the date of the death of the relevant member of the Royal Family, whichever is longer.

Scrutiny of the Bill

The Bill had its second reading in the House of Lords on 24 March when Lords complained that they were not been given enough time to consider the amended Bill, especially the very recent changes made to it by the Government sponsored amendments.

For example Lord Pannick, a Crossbench peer, said

> "One could give many examples in the Bill of provisions that look attractive but need detailed consideration. For example, Part 12, on public records, is relatively uncontroversial, but one sees in Clause 86 that it is linked to Schedule 15, which would amend the Freedom of Information Act to create an exemption for communications by public bodies with the heir to the throne. This raises difficult and important issues. Is it really appropriate that the heir to the throne should be able to write to public bodies, with the purpose and the effect of influencing their decisions, and have such correspondence concealed from the public? If such an exemption is appropriate, it needs to be carefully considered and confined."
>
> (House of Lords Hansard 24 March 2010 col 995)

The Labour peer Lord Berkeley raised a similar issue:

> "My main concern about this section of the Bill is that the Duchy of Cornwall is a business, as we all know. It should be considered a public sector business and therefore be subject to the Freedom of Information provision, because it has nothing at all to do with the constitution. Schedule 15 could prevent the release of information on all those issues and many more; so rather than having less transparency – I am afraid that the travel report produces less than it used to – there should be more."
>
> (House of Lords Hansard 24 March 2010 col 1017)

For his fellow Labour peer, Lord Bach the concern was why it was necessary to replace existing conventions

> "Just as it is a sovereign's right and duty to counsel, encourage and warn her Government, it is also the right and duty of the heir to the throne to be instructed in the business of government to prepare him for the time when he will be king. Both these sets of rights and duties rely on well established conventions of confidentiality that were never meant to be superseded by the Freedom of Information Act."

House of Lords Hansard 24 March 2010 col 1053

The Bill passed through its stages in the House of Lords within 3 days, a timescale which some observers criticised as not providing enough time for proper scrutiny of the Bill. For example, in the Evidence to the House of Commons Justice Committee's inquiry 'Post-legislative scrutiny of the Freedom of Information Act 2000', the Campaign for Freedom of Information regretted the Royal exemption, as they thought it was an amendment which had received:

> "minimal Parliamentary scrutiny in the "wind-up" period prior to the dissolution of Parliament before 2010 general election."
>
> (House of Commons Justice Committee 2012a vol 2 ev.159)

The Bill received Royal Assent on 8 April 2012 but the Sections amending the FOI Act have only been brought into force partially. The Royal exemption came into force on 19 January 2011. And, as stated previously, the UK Government's intention is to start phasing in the reduction to the "30 year rule" in 2013.

CONSULTATIONS ON AMENDMENTS TO THE SCOTTISH LEGISLATION

Extending the bodies covered by FOI(S)A

FOI(S)A came into force on 1 January 2005 and in October 2005 the Scottish Executive announced a limited review of the operation of the Act after its first year in force. The review included a public consultation (Scottish Executive 2005). From the start of the review Ministers stated they did not intend amending the primary legislation.

Section 5(1) of FOI(S)A gives Scottish Ministers the power to add to the bodies covered by the Act. These bodies could include ones which were neither a public body nor the holder of a public office but who either:

- appear to Scottish Ministers to exercise functions of a public nature

or

- provide under a contract made with a Scottish public authority any service which is a function of the authority.

It was the stated intention of the Scottish Executive Ministers to use the provisions in Section 5 to bring within the scope of FOI:

> "private companies involved in significant work of a public nature, for example private companies involved in major PFI contracts"
>
> Scottish Executive 2005 p. 11

The consultation paper included, in Annex A, questions on the "Development of gateway criteria to inform use of Section 5 of FOI(S)A". The idea was to identify the criteria which would be used to identify bodies which should be added to Schedule 1.

In November 2007 the Executive published the summary report of the 128 consultation responses it received. The Executive found no clear consensus on the criteria, although "many of the respondees who commented on the issue found them to be a useful approach". The summary report did not indicate how the Executive would respond to the consultation responses

and it had made no such announcement on how it planned to develop FOI(S)A prior to the General Election in 2007.

In November 2008 the new Scottish Government issued a discussion paper which sought the views, “of key stakeholders and interested parties” (Scottish Government 2008 p. 4) on the possibility of making Section 5 orders to include:

- contractors who provide services which are a function of a public authority
- registered social landlords
- local authority trusts or bodies set up by local authorities.

The Scottish Government Ministers were interested in these specific groups because of concerns raised, particularly by the Scottish Information Commissioner, regarding the accessibility of information they hold. The Ministers hoped that the responses would help them to decide whether it was necessary to hold a formal consultation on possible extension of coverage.

In December 2009, following this initial ‘discussion’ with stakeholders, the Scottish Government published its summary report and conclusions (Scottish Government 2009c) and announced it would consider extending the coverage of FOI(S)A. Speaking at the 2009 Holyrood Freedom of Information Conference in Edinburgh (Scottish Government 2009d), Bruce Crawford, the Minister for Parliamentary Business, said:

> "Responses to a discussion paper which looked at the options for extending coverage of the FOI Act beyond the public sector supported the principle of greater openness. I now intend to formally consult with a range of organisations about whether it is appropriate for them to be covered by FOI.
>
> It is important that organisations who deliver key public services for the people of Scotland operate transparently so the public can be reassured we are getting high quality services and value for money. I am also sympathetic to the view that people should be able to 'follow' the expenditure of public money through their access to information, in particular in relation to PFI/PPP contracts which tend to be high value and long term”.
>
> (Scottish Government 2009d)

This latter consideration would later be echoed by Audit Scotland’s 2011 report, for the Accounts Commission, which considered how councils are utilising arm’s-length external organisations. In that report Audit Scotland identified 130 major arm’s length external organisations (ALEOs), which it defined as

> “companies, trusts and other bodies that are separate from the local authority but are subject to local authority control or influence. Control or influence can be through the council having representation on the board of the organisation, and/or through the council being a main funder or shareholder of the organisation.”
>
> (Audit Scotland 2011 p. 6)

Audit Scotland were concerned that

> “The fact that an ALEO may be a separate organisation from the council is unlikely to be at the forefront of service users’ and taxpayers’ minds. One consequence of using more complex delivery structures involving ALEOs is that the public may be less clear about who is responsible for services and, for example, who they should complain to if they are

> unhappy with the services they receive. Maintaining transparency is a key objective in good governance."
>
> (Audit Scotland 2011 p.12)

In his announcement on the consultation, in 2009, Mr Crawford went on to say that

> "Given the global economic downturn, some sectors of the economy are under particular strain and recent events are having a wide-ranging impact on both private and public sector bodies. A key part of the consultation will be our examination of the costs and burdens associated with any extension of coverage and any risks to business efficiency and competitiveness that flow from that. The Government is committed to increasing sustainable economic growth and will only introduce legislation that is measured and proportionate".
>
> (Scottish Government 2009d)

The Minister promised that the Government would listen to organisations which raised concerns about being able to meet the requirements of FOI. Mr Crawford also announced the publication of a revised Code of Practice providing guidance to public authorities in meeting their duties under Freedom of Information (Scottish Government 2009e).

In July 2010 the Scottish Government launched the formal consultation (Scottish Government 2010a) on the possibility of extending the coverage of FOI(S)A to include:

- contractors who run privately managed prisons and provide prisoner escort services
- leisure, sport and cultural trusts and bodies used by local authorities
- the Glasgow Housing Association
- the Association of Chief Police Officers in Scotland
- contractors who build and maintain schools
- contractors who build and maintain hospitals
- contractors who build, manage and maintain trunk roads under private finance contracts.

The consultation (open from 28 July – 2 November 2010) put the case for extending the legislation to cover each of the groups and addressed specific questions to each of the groups being considered for inclusion in the Act. The consultation sought the views of not only those bodies which were being considered for inclusion but any interested parties.

The consultation received 72 responses which the Government analysed in its response paper (Scottish Government 2011a). The responses were found to be universally supportive of the principles of openness, transparency and accountability but not in favour of a formal extension of the Act, with no clear consensus on how best to achieve the FOI principles.

In a news release, published at the same time as the response paper, the Minister for Parliamentary Business, Bruce Crawford, announced the Government's intention to bring forward a Bill clarifying and strengthening the Freedom of Information (Scotland) Act. However the Government decided that it would be premature to extend coverage to a greater range of bodies delivering public services. Mr Crawford stated:

"It was also apparent from the replies to the consultation that many of these organisations are already acting within the spirit of the act by making relevant information available, through both voluntary and statutory means. Ministers believe it would be premature to extend coverage before the deficiencies in the Act can be put right and the opportunity is taken to strengthen and update the current legislation.

In the meantime, alternative methods with the same aim, including revision to the FOISA Code of Practice, assessment of the impact of the proposed Scottish Housing Charter and the further development of the transparency agenda, will continue to be explored."

(Scottish Government 2011b)

Lifespan of certain exemptions

Part 5 of FOI(S)A 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. 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.

In addition to the consultation on extending the bodies covered by FOI(S)A the Government had already consulted on reducing the lifespan of historical records (Scottish Government 2009a) from 30 years to 15 years for all of the Scottish public sector. The Government proposed introducing the reduction via an amending order made under Section 59 of FOI(S)A, enabling them to change the definition of an 'historical record'. The consultation asked if the consultees agreed with the proposed reduction or preferred a reduction to 20 years instead.

The closure of that consultation, in September 2009, coincided with the Government instructing the National Archives of Scotland (now the National Records of Scotland) to make publicly available the bulk of the historic Scottish Government files it holds once the information was 15 years old (Scottish Government 2009b).

CONSULTATION ON A SCOTTISH DRAFT BILL

The Scottish Government published its *Consultation on proposals for a Freedom of Information (Amendment) (Scotland) Bill* in December 2011. The consultation ran from 16 December 2011 to 8 March 2012.

The draft bill was seen by the Government as a means of remedying weaknesses which had been identified in FOI(S)A during its previous consultations.

Lifespan of certain exemptions

The draft bill paper included the Government's response to the results of its 2009 consultation on 'improving openness' by reducing the lifespan of certain exemptions, i.e. 'historical records' (Scottish Government 2009a). The proposals in the draft bill were based on the responses to that earlier paper, which the Government said strongly supported

"amending the definition of 'historical record' and thereby reducing the period of time particular exemptions could be applied"

(Scottish Government 2011c p. 6)

The majority of respondents supported the proposed reduction to 15 years, although some raised issues regarding the particular exemptions, namely Section 33(1): trade secrets or commercial interests of any person and Section 36: confidential communications.

The Government recognised that a blanket reduction to 15 years would not be appropriate for all organisations so the proposed amendment to Section 59 of FOI(S)A would give Scottish Ministers the powers to make differing changes to the lifespan of exemptions. The Government's intention was to use the new powers to reduce the period of 'historical records' to 15 years, except for confidential communications, as defined in Section 36, and communication with Her Majesty and other members of the Royal Family and of the Royal Household, as defined in Section 41(a) of FOI(S)A.

Royal exemption

The draft bill also included the Scottish Government's response to the changes to the UK FOI Act, included in the Constitutional Reform and Governance Act 2010 (CRAG Act), with regard to communications with Her Majesty, the heir and the second in line to the throne and other members of the Royal Household. The Scottish Government considered it was appropriate to have a common approach throughout the UK to the treatment relating to Her Majesty.

Prior to the passing of FOI(S)A access to information held by Scottish Executive departments and a range of other Scottish public authorities was governed by the *Code of Practice on Access to Scottish Executive Information* (Scottish Executive 1999). The code included a list of exemptions. Those exemptions included:

> "Communications with the Royal Household
>
> Information relating to confidential communications between Ministers and Her Majesty the Queen or other Members of the Royal Household, or relating to confidential proceedings of the Privy Council."
>
> (Scottish Executive 1999 Part II para 3)

These exemptions were then replaced by section 41 of FOI(S)A:

> "Information is exempt information if it relates to—
>
> (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household; or
>
> (b) the exercise by Her Majesty of Her prerogative of honour."

These exemptions had mirrored the exemptions in the UK FOI Act 2000, which had been subject to a public interest test.

> "It is a fundamental constitutional principle that communications between the Queen and her Ministers and other public bodies are essentially confidential in nature and there is therefore a fundamental public interest in withholding information relating to such communications. That is so because the Sovereign has the right and the duty to counsel, encourage and warn her government. She is thus entitled to have opinions on government policy and to express them to her ministers. She is, however, constitutionally bound to accept and act on the advice of her ministers. Any communications which have preceded the giving of that advice remain confidential, because of the need to maintain the political neutrality of the Queen in public affairs (its reality and appearance); this itself is fundamental to the UK system of constitutional monarchy"

(Ministry of Justice guidance 2011)

Time limit for proceedings

In addition the draft bill included provisions which would amend the time period, in Section 65 of FOI(S)A, within which the Scottish Information Commissioner (SIC) may seek prosecution of anyone found to have altered, defaced, erased, destroyed or concealed records. At present Section 65 requires that any person suspected of such an offence must be prosecuted within six months of the commission of the offence using the summary procedure. This procedure is set out in Section 136(1) of the Criminal Procedure (Scotland) Act 1995. It is mainly used for less serious cases where a sheriff hears a case without a jury.

In practice the SIC had found that six months is too short a time period as it is potentially ten months from the commission of such offences before it might be discovered by the Commissioner. As a result the Government's proposal was to extend the time period to 12 months.

CONSULTATION RESPONSES

The Scottish Government published its consultation report on the draft bill (Scottish Government 2012) in May 2012. The Government received 51 responses, which are available on their website, plus a late response from the Campaign for Freedom of Information in Scotland, which is available on the Campaign's website.

Lifespan of certain exemptions

While the Government claimed near universal support for the changes to the definition of historical records its report did highlight the concerns raised by the Commission for Ethical Standards in Public Life in Scotland

> "We are concerned that the level of flexibility proposed will lead to a more complex and less accessible Freedom of Information system.
>
> We consider a set historical record period to be much preferable to the flexible approach outlined in the draft amendment. A set time period provides for clarity and consistency
>
> […] Increasing the variety of historical record periods would result in Freedom of Information and records management systems of unnecessary complexity".

NHS Greater Glasgow and Clyde was also concerned about the possible complexities which these changes could add to the FOI regime.

The response by the Scottish Council on Archives raised concerns about the impact of reductions on the deposit in public archives of private papers as:

> "Private archives gifted to a public archives by a private owner fall within the scope of the 2002 Act. The application of an access period as short as 15 years could present particular problems. Most importantly, it has the potential to dissuade private owners from gifting their archives to public institutions since they would be denied any negotiating rights as to what might be regarded as an appropriate closure period for all or some of an archive."

A similar concern was raised by Universities Scotland.

Other responses which raised concerns about the exemptions included the one from the Archives and Records Association which pointed out concerns with the issue of duration of confidentiality:

> "Under common law, confidentiality does not have a fixed duration. Although the sensitivity of information often declines over time, in some cases the nature of the information or relationship is such that the confidentiality endures for many years.
>
> Examples of records where it would be inappropriate to reduce the duration of the confidentiality exemption include social work, children's homes and adoption records. These records may hold information comparable to that in medical records. Although there is some overlap with other exemptions, notably those set out in s 38, no other exemptions afford complete protection to this sort of information."

In their responses, Glasgow Caledonian University, Glasgow City Council, Heriot Watt University, Highlands and Islands Enterprise (HIE), North Lanarkshire Council, Northern Constabulary, Queen Margaret University, Scottish Social Services Council, Stirling Council, NHS Ayrshire and Arran, and the University of West of Scotland, all also raised concerns about releasing confidential information after only 15 years.

For example, HIE was concerned about the impact the proposed changes would have on the third party commercial information which it holds on the businesses it helps to fund:

> "While it is accepted that 15 years is an adequate length of time for most business cycles, it is conceivable that information held by HIE about a third party business could continue to provide that business with a significant competitive advantage after that time. In those cases, disclosure of information supplied to HIE could continue to prejudice substantially the commercial interests of those who have accessed services provided by HIE."
>
> (Highlands and Island Enterprise 2012 para 9)

While Glasgow City Council pointed out that:

> "some information may remain sensitive after a long time has passed. While this is unusual, we still feel the option to rely on the exemption should remain. If information has lost its sensitivity this can be dealt with through applying the test of substantial prejudice in the normal way."
>
> (Glasgow City Council 2012)

Heriot Watt University's concerns were also about the reduction in time in relation to commercial interests in particular its production of multiple choice examination questions. They described the creation of multiple choice questions as a "sort of trade secret" which are expensive to produce and have a shelf life of more than 15 years.

The University of the West of Scotland, in its support of a longer timescale in FOI(S)A for commercial interests, quoted a UK patent having a 20 years statutory protection period. While the University of Dundee pointed out that the research outputs from the higher education sector are predicated on innovation, and that it is impossible to predict when protection under a trade secret banner might be required to save the intellectual property of institutions.

In its submission Universities Scotland echoed some of the concerns raised by specific universities and provided the further example of longitudinal research which can require that data sets are provided and held in confidence.

> "Notwithstanding the exemption for on-going research (S.27(2)), any limit on a University's ability to accept information in confidence for an extended period may prejudice its ability to secure access to such data and therefore its ability to conduct the highest quality research."

In contrast other respondents believed it was possible for access to confidential information in their area of work to be reduced to 15 years, for example, the Scottish Independent Advocacy Alliance believed this would be possible because:

> "section 38 on personal information, section 27(2) on research information and the Data Protection Act 1998 will provide the protection needed for any cases where it is not in the public interest, or an individual's interest, for information to be released."

In his response the Scottish Information Commissioner (2012) reminded the Government that most of the exemptions are subject to the public interest test and that:

> "there will clearly be cases where it is appropriate for information falling within the scope of the exemptions to be released earlier, where the public interest in withholding the information is outweighed by that in release. These circumstances, will of course, continue to be addressed, both in public authorities' handling of the FOI requests they receive, and in the Commissioner's decisions on appeals."

With regard to confidentiality the Commissioner was willing to concede that the

> "length of time for which the information should remain confidential will often depend on the specific nature of the information, and the circumstances of the case. While I am not fully convinced of the necessity to retain the lifespan of the section 36 exemptions at 30 years, I accept that there may conceivably be cases where it will be appropriate to retain the exemption beyond 15 years."

Some of the respondents, including the SIC and UNISON Scotland called for the amendment to be made fully retrospective, meaning that it should apply to all records held by bodies, including records created before the proposed amendment bill is passed and comes into force.

Royal exemption

With regard to the proposed changes to bring FOI(S)A into line with the CRAG Act the Scottish Information Commissioner was not convinced that the changes to the royal exemptions were necessary, especially since Scottish Ministers had not set out their own rationale for the changes, and:

> "Protections also exist in terms of the absolute exemptions relating to personal data (section 38(1)(b) of FOISA) and confidentiality (section 36(2)), both of which may often be applicable to information likely to fall within the scope of the section 41(a) exemption."

He pointed out that the Commonwealth principles and guidelines on the right to know state that:

> "the right of access may be subject to only such [absolute] exemptions, which are narrowly drawn, permitting government to withhold information only when disclosure would harm essential interests [...] providing that withholding the information is not against the public interest."

The Commissioner was also concerned that the proposals would mean that not only the communications themselves but also any information held by Scottish public authorities relating to the communications would be subject to the absolute exemptions. The SIC pointed out that such relevant information could include

> "information relating to the number of times such communications have taken place, details of the departments or individuals within a public authority who have been involved in communications, or details of the cost to the authority of communications."

UNISON Scotland, the Commission for Ethical Standards in Public Life in Scotland and the Campaign for Freedom of Information in Scotland also questioned the reason for changing the exemption relating to Her Majesty, the heir and second in line to the throne to an absolute one. The Commission stated:

> "there does not appear to be a compelling business case and such a case has not been made in respect of other proposed amendments. The proposed change also appears to be contrary to the general direction of Freedom of Information access that is cited as underpinning the other proposals in the consultation document."

The Commissioner and UNISON Scotland favoured amending the proposal to from an absolute to a qualified exemption with the lifespan set to 5 years after the relevant death (that being of Her Majesty, the heir, the second in line or the relevant member of the Royal Family), or 20 years after the information has been created – whichever occurs latest. This was the amendment made to the UK FOI Act by the CRAG Act.

In addition the Royal Town Planning Institute Scotland was not convinced that case had been made to extend the exemption beyond 15 years, explaining that:

> "Crown exemption has generally been removed from Scottish Planning and Building Control legislation over the last decade or so and there appears to be no convincing case made for an exemption beyond 15 years of information relating to communications with Her Majesty, other members of the Royal Family, or the Royal Household; nor for that relating to the exercise of the honours prerogative."
>
> (Royal Town Planning Institute Scotland 2012)

Time limit for proceedings

The few respondents who did not agree to the extension from 10 to 12 months were Glasgow Housing Association, UNSION Scotland, the Campaign for Freedom of Information in Scotland and the SIC. Their alternative amendment was 6 months from the date when the commission of the offence came to light.

> "This alternative would capture a situation where records were destroyed years in advance of a request being received by a public body seeking to circumvent FOI requests. […] This alternative would capture unscrupulous records management practices/procedures and call the controlling will of the relevant public body to account."
>
> (Glasgow Housing Association 2012)

The SIC was concerned because FOI(S)A timescales

> "provide that it can take up to ten months from the commission of an offence before **an appeal is made** to the Commissioner (taking into account the timescales within which an

> authority must comply with a request (section 10) for the applicant to require a review of refusal (section 20) and the authority to comply with the requirement for review (section 21) and then for the applicant to make an application to the Commissioner (section 47)).”
>
> (Scottish Information Commissioner 2012a)

He asked that

> “summary proceedings for an offence under section 65 should be commenced at any time within the period of six months from the date on which evidence, sufficient in the opinion of the prosecutor to justify proceedings, comes to his/her knowledge, with no proceedings being commenced more than 18 months after the commission of the offence.”
>
> (Scottish Information Commissioner 2012a)

The Commissioner pointed out that this is in line with the approach taken in other legislation including Section 34 of the Health and Safety and Work etc Act 1974 and Section 6 of the Road Traffic Offenders Act 1988.

Designation of additional public bodies in Schedule 1

Although it had not been one of the specific questions asked by the Government in its consultation, in their submissions Consumer Focus, Glasgow City Council, UNISON Scotland, the Scottish Library and Information Council (SLIC) and the Chartered Institute of Library and Information Professionals in Scotland (CILIPS) and the Campaign for Freedom of Information in Scotland all called for the designation of additional public bodies covered by FOI(S)A.

Their responses all highlighted the changes in the provision of public services with the growth in the number of arm’s-length bodies being used by local authorities and the public being presently unable to ‘follow the money’ with the regard to the provision of public services.

SCOTTISH INFORMATION COMMISSIONER’S REVIEW OF FOI(S)A

Prior to his departure from office in 2012 Kevin Dunion, the first Scottish Information Commissioner, laid before the Scottish Parliament a special report (Dunion 2012) . The purpose of the report was to give an opinion on the current state of FOI in Scotland, to draw attention to related matters which Parliament may wish to take into account and to make recommendations.

As well as the issues he had raised in his consultation responses Mr Dunion also commented on:

- authorities failing to recognise that the information requested is environmental and must be dealt with under the Environmental Information (Scotland) Regulations 2004
- poor records management and the fact that not all the bodies covered by FOI(S)A are subject to the provisions of the Public Records (Scotland) Act 2011
- scope for charges for information acting as a barrier to access
- empowering the SIC to take evidence under oath
- permitting the SIC discretion over late submissions on exemptions

- permitting email addresses as correspondence addresses and allowing information to be made available electronically
- stopping the clock when clarification is being sought
- permitting authorities to neither confirm nor deny that they hold personal data
- clarifying publication scheme charges
- clarifying what happens when authorities do not publish information that they stated was intended to be published within 12 weeks of a request.

In discussing the Scottish Government's decision not to add to the public bodies in Schedule 1 Mr Dunion raised concerns that

> "[…] Scotland's FOI regime is at risk of slipping behind other legislatures. The UK Government, for example, is actively considering the FOI designation of further bodies, including housing associations, and has just recently made its first designation order to extend FOIA to cover the Universities and Colleges Admissions Service (UCAS), the Association of Chief Police Officers (ACPO) and the Financial Ombudsman Service Ltd."
>
> (Dunion 2012 p. 19)

The Scottish Parliament Justice Committee held an oral evidence session with Mr Dunion on 10 January 2012. Mr Dunion again mentioned his concerns about the Scottish Ministers' decision, in January 2011, not to designate further bodies:

> "At the time, they said that they thought that it would be premature to designate before some of the deficiencies in the legislation had been remedied. We now know that the amendment bill that ministers propose is largely technical and does not really address any deficiencies that affect designation."
>
> (Justice Committee Official Report 10 January 2012 col 813)

In response to questions on time limit for proceedings Mr Dunion told the Committee that he was

> "perfectly comfortable with the idea that if the prosecution has to be brought within 12 months of the offence, it will capture those about whom we are concerned.
>
> The other mechanism would be to use the existing powers of the commissioner. If it appears that the offence took place outside the period, perhaps more naming and shaming might be required, and we could highlight where we think unjustifiable obstruction had taken place, even if it were outwith the period in which a prosecution could be brought."
>
> (Justice Committee Official Report 10 January 2012 col 817)

Mr Dunion concluded by providing the Committee with international examples of the powers of information commissioners in other jurisdictions increasing. For example a recent Brazilian Act:

> "encompasses companies that have entered into contracts with public bodies to carry out what we regard as public functions. […] The Brazilians have written it into their legislation that, if such companies fail to respond to FOI requests, three sanctions are available: the first is to issue them with a warning; the second is to issue them with a fine; and the third

is to suspend them from tendering for future public contracts until they have remedied their practice. That is an interesting way of going about it."

(Justice Committee Official Report 10 January 2012 col 827)

OTHER RELEVANT SCOTTISH LEGISLATION AND GUIDANCE

As mentioned previously there are other pieces of legislation which overlap with some aspects of access to information.

Environmental Information (Scotland) Regulations 2004

The Environmental Information (Scotland) Regulations 2004 (EIRs) were implemented to meet Scotland's obligations under the Aarhas Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters). Under the regulations, it is possible to require a Scottish public authority to provide environmental information.

Under paragraph 2 of the regulations, environmental information includes information about:

- the elements of the environment, such as air and atmosphere
- factors, such as emissions, which may affect those elements
- measures, such as policies and plans, likely to affect those elements and factors.

Importantly, the regulations contain a much wider definition of a Scottish public authority than the one given in FOI(S)A. Under paragraph 2, as well as the bodies listed in Schedule 1 of FOI(S)A, the definition of a Scottish public authority includes any other public body exercising "mixed or no reserved functions" under the Scotland Act 1998, and any person or body, under the control of a Scottish public authority, which does one of the following:

- has public responsibilities relating to the environment
- exercises functions of a public nature relating to the environment
- provides public services relating to the environment.

Any body that is covered by the regulations has a duty to make environmental information available on request (paragraph 5) – within 20 or 40 days, depending on the nature of the request. The body may make a reasonable charge for supplying the information.

The body can refuse to make information available on the basis of a number of exceptions listed in paragraph 10. These are similar to, but not the same as, the exemptions under FOI(S)A. In all cases, the body should consider whether the interest in maintaining the exemption is outweighed by the public interest in releasing the information.

There are exemptions in relation to general confidentiality and commercial confidentiality – although these do not apply to requests for environmental information in relation to emissions. There is also an exemption where the request involves making available internal communications.

In 2007 the Scottish Information Commissioner issued a decision dealing with what constitutes an internal communication (Scottish Information Commissioner 2007). It is a wide exclusion and

can cover emails and documents sent between individuals in the same organisation. It can also cover draft letters and file notes for internal purposes. It may also, in certain circumstances, include documents sent between different bodies designated as Scottish public authorities.

As with requests under the Freedom of Information (Scotland) Act 2002, the Scottish Information Commissioner can be asked to review whether a Scottish public authority has complied with the law in the way it has dealt with a request for information. A decision of the Scottish Information Commissioner can be appealed to the Court of Session on a point of law.

In their responses to the Scottish Government's 2011 *Consultation on proposals for a Freedom of Information (Amendment) (Scotland) Bill* the Scottish Information Commissioner and UNISON Scotland called for the EIRs to be amended to ensure that the prosecution powers in the regulations are similar to those proposed for FOI(S)A.

In the Environmental Information Briefing on *The EIRs and FOISA,* produced by the Office of the Scottish Information in 2004, a table was produced which sets out the key differences between EIRs and FOI(S)A (see Table 1 below).

Table 1 EIRs v. FOISA – The Key Differences

	EIRs	FOISA
Format of request	There is no requirement under the EIRs that requests should be made in a format capable of having some permanency. Verbal requests are valid requests for environmental information, although Scottish public authorities are encouraged to record any verbal requests for reference.	FOISA requires requests to be in writing or any other format capable of having some permanency (section 8(1)(a)).
Copies of documents	The duty on public authorities to make environmental information available includes the duty to provide copies of documentation.	FOISA provides a right of access to information, not to documentation.
The definition of a Scottish public authority	The definition of a Scottish public authority is wider under the EIRs than FOISA.	Only those bodies listed in schedule 1 of FOISA, designated by order under section 5 of FOISA, or publicly-owned companies as defined by section 6 of FOISA (section 3).
Charging	Scottish public authorities may charge only for producing the information requested (regulation 8(3)), but may not charge for inspecting information (regulation 8(2)). Charges may be made only in accordance with a published schedule of charges (regulation 8(8), but which may be at variance with the FOISA fees regulations.	Scottish public authorities may charge for locating, retrieving and providing the information only in terms allowed by the Fees Regulations [SSI 2004/376 and SSI 2004/467]
Cost limit	The EIRs do not have an upper or lower cost limit, effectively meaning that a request cannot be refused on cost grounds.(However excessive cost may mean	Section 12(1) of FOISA provides that a Scottish public authority is not obliged to respond to a request if it estimates that

	that the request is manifestly unreasonable (regulation 10(4)(b)). With no lower cost threshold, a Scottish public authority may make a charge for the provision of any information under the EIRs.	the cost of complying with the request would exceed a prescribed amount (currently £600). A Scottish public authority may make a charge for information between specified limits (Fees regulations made under section 9(4)) but cannot charge for the first £100 of costs.
What information is **'held'**	Environmental information is held by an authority if it is in its possession and it has been produced or received by that authority (regulation 2(2)(a)). Unlike FOISA the EIRs do not specifically exclude information held on behalf of another person.	Under FOISA, information is not held if it is held on behalf of another person (section 3(2)(a)(i)).
Transfer of request	Unlike FOISA, the EIRs make provision for the transfer of a request from one body to another (regulation 14) (but only if the body does not hold the information or makes use of the services of another body to hold this information on its behalf (regulation 2(2))).	FOISA does not allow for the transfer of requests between Scottish public authorities. A refusal notice must be served. The applicant should be advised of which body does hold the information if it is reasonable to expect an authority to do so (section 15(1)).
Extension of 20 working day period	A Scottish public authority may extend the 20 working day period for making the information available by up to a further 20 working days, but only if the volume and complexity of the information requested makes it impractical for the authority to comply with the request or to make a decision to refuse to do so (regulation 7(1)).	There is no extension to the 20 working day period in which a Scottish public authority must respond to a request under FOISA.
Active dissemination	A Scottish public authority must organise and keep up to date environmental	There is no direct equivalent under FOISA, although Scottish public

	information with a view to active and systematic dissemination of that information (regulation 4(1)).	authorities are required to adopt and maintain a publication scheme (section 23(1)).
Prohibitions on disclosure	The EIRs specifically provide that any enactment or rule of law which would prevent the making available of information in accordance with the EIRs shall not apply (regulation 5(3)).	FOISA specifically provides that information is exempt information if its disclosure is prohibited by or under an enactment (section 26(a)).
Emissions	Special status is given to information relating to emissions (regulation 10(6)). Essentially there will be very limited situations in which information relating to emissions can be withheld by a Scottish public authority.	There is no equivalent under FOISA of special status for emissions information.
Discretion to accept representations/requests for review	There is no discretion afforded to Scottish public authorities under the EIRs to accept representations for review where they fall outwith the timescales set out in the EIRs.	A Scottish public authority may comply with a requirement for review made after the expiry of the time allowed if it considers it appropriate to do so (section 20(6)). Unlike the EIRs, any subsequent application to the Commissioner will be valid where this provision is invoked.
Public interest and restrictive interpretation	All of the EIRs exceptions are subject to the public interest test (regulation 10(1)(b)); should be read in a restrictive way (regulation 10(2)(a)) and a presumption in favour of disclosure should be applied (regulation 10(2)(b)). (Regulation 11, which deals with personal data, is a quasi-exception to which the public interest test applies only in parts.)	The public interest test only applies to certain exemptions under FOISA, as set out in section 2.

Historical records	The exceptions in the EIRs do not fall away after a set period.	Certain exemptions cannot be applied to a 'historical record' as defined by section 57 of FOISA.

(Scottish Information Commissioner 2004)

Public Records (Scotland) Act 2011

The Public Records (Scotland) Act 2011 (the Act) will be fully implemented on 1 January 2013. Under the provisions of the Act named Scottish public authorities are required to manage their corporate records efficiently. Each of these authorities must submit a formal records management plan (RMP) to the Keeper of the Records of Scotland (the Keeper) for his agreement. The Keeper has published a 'model plan' that explains the various elements he would expect to see in a public authority RMP. The named Scottish public authorities appear in Schedule 1 of the Act and include local authorities, Health Boards and Joint police boards. Section 2 of the Act gives Scottish Ministers the power to add to the named authorities, so for example publicly owned companies could be included. The Act defines a "publicly owned company" as one which is either wholly owned by Scottish Ministers, or another authority.

It is hoped that establishing effective records management arrangements will deliver significant benefits for authorities – for example it will help to:

- increase efficiency and effectiveness, delivering savings in administration costs
- improve and develop service delivery
- achieve business objectives and targets
- ensure compliance with the Public Records (Scotland) Act 2011 and other legislative requirements (including those in FOI(S)A and the EIRs), standards and codes of conduct
- support transparency and open government.

Statutory guidance

Under Section 60 of the Freedom of Information (Scotland) Act 2002 Scottish Ministers were to issue, and from time to time revise,

> "a code of practice providing guidance to Scottish public authorities as to the practice which it would, in the opinion of the Ministers, be desirable for the authorities to follow in connection with the discharge of the authorities' functions under this Act".

The latest revised version of the *Scottish Ministers' code of practice on the discharge of functions by Scottish public authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004* was published in December 2010 (Scottish Government 2010b).

In addition, under Section 61 of the FOI(S)A 2002, Scottish Ministers were to issue, and from time to time revise,

> "a code of practice providing guidance to Scottish public authorities as to the practice which it would, in the opinion of the Ministers, be desirable for the authorities to follow in connection with the keeping, management and destruction of the authorities' records".

The first guidance, prepared in consultation with the Scottish Information Commissioner and the Keeper of the Records of Scotland, were published by the Scottish Executive in November 2003. Revised guidance was published in December 2011 (Scottish Government 2011d).

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

The Scottish Government introduced the Freedom of Information (Amendment) (Scotland) Bill on 30 May 2012.

Historical periods

As stated above, in 2009, the Scottish Government reduced exemption time for the historical Scottish Government papers held by the National Records of Scotland from 30 years to 15 years. The third and final tranche of files to be released under this initiative, containing government papers from the years 1989 to 1994, was made available in the National Archives of Scotland in May 2010 (National Archives of Scotland 2010). The latest annual release, made in January 2012, contained 300 Scottish Government files which mostly dated from 1996 (National Archives of Scotland 2012).

With the provisions in section 4 of the Amendment Bill Scottish Government Ministers will be given powers, via secondary legislation, to have a more flexible approach to definitions of 'historical records' and the lifespans of certain exemptions for different bodies.

In the Policy Memorandum accompanying the Bill the Government promise that any order arising from these provisions would be subject to consultation. The Government hopes that this consultation on any draft order would allay any fears regarding undue complexity being introduced with the use of these ministerial powers. However the Policy Memorandum does not state if the changes to the definition of historical records will be made retrospective.

Royal exemption

The provisions in section 1 of the Bill are intended to bring FOI(S)A into line with the changes to the UK FOI Act, brought in by the Constitutional Reform and Governance Act 2010, they would remove the need to use the public interest test for this category of communication, thus creating an absolute exemption for communications with certain members of the Royal family.

Provision of information in a publication scheme

Section 3 of the Bill (Accessible information) clarifies that information which is provided in a body's publication scheme does not have to be provided, in response to an FOI request. This was one of the issues which the previous SIC raised in his final report (Dunion 2012 p.24)

Time limit for proceedings

Section 5 of the Bill will allow for prosecution for offences under Section 65 of FOI(S)A up to six months after sufficient evidence has been amassed. The provisions reflect the changes requested by respondents to the Government's consultations.

Neither confirm nor deny personal data is held

The provisions in Section 2 of the Bill (Refusal notice) will, in line with the provisions already in paragraph 11 of the Environmental Information (Scotland) Regulations 2004, allow authorities to issue in reply to a request for information concerning personal information a 'neither confirm nor deny' response. This was again one of the issues which the previous SIC raised in his final report (Dunion 2012 p.24)

CALL FOR EVIDENCE

The Scottish Parliament Finance Committee was designated as the lead Committee in June 2012 and proceeded to put out a call for evidence on the Bill.

The Committee received 37 responses which are available on its web pages. The responses were generally in favour of the principles behind the Bill although some respondents thought it could have gone further (Campaign for Freedom of Information in Scotland 2012b)

Historical periods

The issue of earlier access to confidential papers was again raised with the same arguments as had been previously presented to the Government's consultation by the Archives and Records Association and the Scottish Council on Archives.

In their submission the Chief Fire Officers Association (Scotland) asked for clarification on whether it was the Government's intention to make the changes retrospective.

The Archives and Records Association (2012b para 5) raised concerns about the resource implications of the changes "if the historical "closure period" of a large number of records were reduced at the same time."

The Commission for Ethical Standards in Public Life in Scotland was still concerned that the changes will lead to a more complex system

> "with different historical record periods for each exemption, for each sub-section of an exemption, for each record format (paper, audio, electronic, etc) and for other purposes not yet identified. "
>
> (Commission for Ethical Standards in Public Life in Scotland 2012b p.3)

Similar concerns were raised by Consumer Focus Scotland:

> "if the flexibility allowed by the proposed amendments enables different approaches to be taken by different types of organisations, then this may result in a lack of clarity for consumer. We believe that the consumer interest is best served by applying lifespan reductions consistently across the listed exemptions, along with clear justifications for any variations."
>
> (Consumer Focus Scotland 2012 para 11)

A contrary view was given by SCVO who see the:

> "benefits of having earlier access to records, by removing the consolidation of exemptions, outweigh the slight additional complexity brought about by the Bill."

(Scottish Council for Voluntary Organisations 2012 para 4)

NHS Lanarkshire was also happy with the flexibility which the proposals could provide since:

> "exemptions are so diverse in nature that we feel it would be difficult to find one exemption period to fit them all."
>
> (NHS Lanarkshire 2012 para 3)

UNISON agreed with the SIC's call for amendments to the EIRs in order to bring the regulations into line with FOI(S)A in its both its present, and its proposed amended, state. And SEPA considered:

> "that any such amendment to the time limit period should be applied to the EIRs to ensure consistency is maintained between the two interrelated regimes."
>
> (Scottish Environment Protection Agency 2012b para 5)

Royal exemption

In her response to the call for evidence the new SIC, Rosemary Agnew, raised concerns about the introduction of an absolute Royal exemption. She highlighted the fact that the present legislation can be used to restrict access to communications with Her Majesty, her heirs and members of the Royal Household and therefore questions why the proposed changes are necessary.

The Commissioner highlighted that a feature of current absolute exemptions

> "is that each clearly and narrowly defines the information which will fall within its scope. Current absolute exemptions largely apply to information contained within a specific type of document (e.g. a court record), or where release would breach an existing law (e.g. section 26, section 36(2), section 38(1)(b)). The absolute exemption created by the proposed amendment will again mark a divergence from this principle. The proposed exemption will not be restricted only to information contained in communications with senior royals, but will also absolutely exempt any information which ***relates*** to those communications in any way. This will include all information detailing e.g. the number of times communications have taken place"
>
> (Scottish Information Commissioner 2012b para 9)

The Commissioner went on to question the efficiency of aligning the Scottish legislation with the UK legislation as she believes it will open the Scottish legislation up to being even more inconsistent with the existing EIRs. She explains that:

> "At present, there are two main routes of access to (non-personal) information in Scotland. When a requester is seeking access to environmental information, the request is made under […] the EIRs, while requests for all other information are dealt with under the FOI Act. The provisions of the EIRs […] contain no specific exceptions for information relating to communications with the Royal Family, and such requests are considered in terms of the existing EIR provisions. Requests for relevant environmental information must be considered in terms of e.g. regulation 10(5)(d) (which relates to confidentiality), regulation 10(5)(f) (which relates to the interests of the person providing the information) and regulation 11 (which concerns personal data). Each of the EIRs' exceptions (apart from certain parts of regulation 11 (personal data)), will continue to be subject to the public interest test, so an assessment of where the public interest lies will be required in

> relation to any royal communications that contain environmental information. While the proposed amendment will make information that relates to communications with senior royals absolutely exempt from release under FOI, where those communications relate to the environment, the information may still be subject to disclosure in the public interest. This is inconsistent, could be confusing to both requesters and Scottish public authorities, and creates process inefficiencies at a time when funding to public authorities is being squeezed."
>
> (Scottish Information Commissioner 2012b para 10)

The Commissioner pointed out that, as shown previously in this briefing, these amendments to UK Bill did not receive a very lengthy scrutiny period in either House of the UK Parliament. The Commissioner therefore called on the Scottish Parliament to ensure proper scrutiny of the implementations of these proposed Scottish amendments takes place during the passage of this Bill.

The response from Mr Alistair Sloan also raised concerns about the wider implications of making the exemptions relate to correspondence:

> "For example, a request to the First Minister's office for information as to the number of piece of correspondence he had sent to Her Majesty would be caught by that exemption because the information *relates* to correspondence with Her Majesty. To reveal the number of pieces of correspondence a particular Minister has had with Her Majesty would do nothing to prejudice the privacy of correspondence between public authorities and Her Majesty. It would be hard to argue that the public interest in releasing such information would be outweighed by the public interest in maintaining the exemption."
>
> (Sloan 2012)

In their submissions the Campaign for Freedom of Information in Scotland and UNISON both stated that the Scottish Government should not have followed the UK changes to its FOI legislation with regard to the Royal exemption.

The Commission for Ethical Standards in Public Life in Scotland raised concerns because as the proposed changes will increase the length of the exemption this seems to be contrary to requirement in Section 59(1) of FOI(S)A, which states that Ministers should not make changes to the number of years which would be in excess of the number in the Act as it was originally enacted.

East Lothian Council, Highland Council and Alistair Sloan all think it be would be better to retain the public interest test for royal communications.

Provision of information in a publication scheme

The only submission to mention this issue was the one from the SIC who endorsed the proposed change, which had been one of the issue raised his final report by her predecessor Kevin Dunion.

Time limit for proceedings

The Commission for Ethical Standards in Public Life in Scotland believed that the concerns they raised on this provision during the Government's consultation on the draft bill have been addressed so they were happy with the Bill's provisions.

Law Society of Scotland was also glad to see that a statutory limitation period had been included in the Bill's provisions.

In his response Andrew Sloan asked for more severe penalty than the £5,000 fine which a summary conviction can attract, even if this means that the matter might need to brought before a higher court.

Neither confirm or deny personal data is held

The only submission to mention this was from the SIC and she endorsed the proposed change which echoed the request in his final report from her predecessor Kevin Dunion.

Other issues raised in the call for evidence submissions

Designation of additional public bodies was raised by the SIC, the Campaign for Freedom of Information in Scotland, UNISON and the Consumer Focus Scotland who wrote:

> "continued delay to extending FOISA places significant numbers of consumers at a disadvantage, as they are unable to access information from organisations providing public services. For example, if a landlord is a local authority, information can be requested. However, housing associations do not have to comply with FOISA."
>
> (Consumer Focus Scotland 2012 para 6)

In its submission the STUC drew attention to an FOI exercise it had carried out jointly with Close the Gap, a Scottish Government funded project to close the gender pay gap. They found that in providing FOI information local authorities were not consistent in how they define what constitutes an ALEO when it comes to their service provision:

> "One local authority submitted a response from its Corporate Procurement Unit stating that it did not contract any ALEOs to deliver services. Contrary to this, one ALEO lists on its website that local authority as a customer for which it delivers services. When this was communicated to the local authority contact, an alternative response was eventually received from the Corporate Procurement Unit confirming the contract with the ALEO. This clearly raises questions about the accuracy of the information contained within local authority responses to the FOI request, and more widely, in terms of trying to obtain a complete picture of the number ALEOs currently being contracted to deliver services on behalf of public bodies".
>
> (STUC 2012 para 10)

While agreeing that FOI(S)A should be extended to include access to information on the provision of public service from all providers the SCVO (Scottish Council for Voluntary Organisations) does not want Schedule 1 amended to include individual third sector organisations. Instead it suggests that the best way of achieving access to such information would be

> "to insert a freedom of information clause into all contractual relationships between government and public service providers which requires compliance"
>
> (SCVO 2012 para 7)

Similarly for University and College Union Scotland any extension to access to information would be better described as being extended “to cover the provision of public services rather than just public bodies”.

A number of other respondents endorsed the submission made by the Campaign for Freedom of Information in Scotland, namely: Napier Students Association, National Union of Journalists Scotland, Poverty Alliance, SCID (Scotland's Campaign against Irresponsible Drivers) and Scottish Borders Council. The Campaign’s submission also mentioned the fact that UK legislation has been recently extended to include other bodies.

In his submission Andrew Sloan called for a wider extension asking for the Law Society of Scotland, the Faculty of Advocates and COSLA be included.

In its submission the Campaign for Freedom of Information in Scotland called the Committee’s attention to the research carried out by Strathclyde University’s researchers, Will Dinan, Kate Spence and Hannah Hutchison, on the experiences and perceptions of the use of Freedom of Information in the Scottish voluntary sector. The research was carried out on behalf of the SIC and showed there was a reluctance on the part of voluntary organisations to make use of FOI to gather information from public authorities with which the voluntary organisations might have a funding or working relationship. The SCVO was also anxious to bring this research to the attention of the Finance Committee asking it to investigate this and the other areas of concern raised with the researchers by the third sector.

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