

FREEDOM OF INFORMATION (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Freedom of Information (Scotland) Bill introduced in the Scottish Parliament on 27 September 2001:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on Legislative Competence; and
- the Presiding Officer's Statement on Legislative Competence.

A Policy Memorandum, also prepared by the Scottish Executive, is printed separately as SP Bill 36-PM.

EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. 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.

BACKGROUND

4. The Bill creates a right of access to information held by Scottish public authorities.

5. The Code of Practice on Access to Scottish Executive Information is a non-statutory scheme which requires the Scottish Executive and its associated agencies to make certain information available to the public and to release information in response to specific requests. The Bill creates a statutory right of access and provides for a more extensive scheme for making information publicly available, covering a much wider range of public authorities, including: the Scottish Executive; the Scottish Parliament; local government; National Health Service in Scotland (NHSiS) bodies; educational institutions; the police; and a number of other Scottish public authorities and offices.

6. The Bill sets out a number of exemptions from the duty to disclose information. It provides a right of access to information, while protecting information which should properly remain confidential. The Bill permits people to apply for access to documents, or copies of documents, as well as to the information itself.

7. The provisions in the Bill will be regulated by an independent Scottish Information Commissioner, to be appointed by The Queen on the nomination of the Scottish Parliament. The public will have direct access to the Commissioner, rather than only through the intervention of their MSP (as is the case with access to the Scottish Parliamentary Commissioner for Administration, who deals with complaints under the present Code of Practice on Access to Scottish Executive Information).

8. The statutory rights under the Bill and the Information Commissioner's regulatory powers extend to information contained in historical public records, such as those held by the National Archives of Scotland.

THE BILL – AN OVERVIEW

9. The Bill:

- 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.

10. The Bill is in seven Parts.

Part 1 – Access to information held by Scottish public authorities

11. 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 section 1;
- describes the application of the public interest test (section 2);
- provides for the Bill to cover the authorities, persons or office-holders specified in schedule 1 and publicly-owned companies and includes a power to specify further persons as public authorities for the purpose of the Bill;
- 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 public authorities to adopt and maintain a publication scheme and to publish information in accordance with it.

Part 2 – Exempt information

12. This Part sets out the circumstances in which information is “exempt information” for the purposes of the Bill. 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

13. This Part creates the office of “Scottish Information Commissioner”. It places a duty on the Commissioner to promote good practice and Scottish public authorities’ compliance with the Bill, 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

14. 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 Bill. Subject to certain conditions, for example the exhaustion of other means of complaint, the Commissioner is under a duty to reach a decision. The Commissioner is also given powers to mediate between parties to an appeal.

15. 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 Bill does not give rise to any right of action against a Scottish public authority for breach of statutory duty and 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

16. 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

17. 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 Bill, 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

18. This Part:

- provides a power to make regulations relating to environmental information;
- 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; and
- details procedures for the giving of notices under this Bill.

19. Part 7 also sets out the commencement provisions for the Bill. The provisions in this Bill will come into effect at the end of a period of five years from the date of Royal Assent, unless brought into effect earlier by order of the Scottish Ministers. During the period between Royal Assent and the date all the provisions have come into effect, the Scottish Ministers must make annual reports to Parliament on progress towards full commencement.

THE BILL – SECTION BY SECTION

Part 1 – Access to information held by Scottish public authorities

Section 1 – General entitlement

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

21. A person making a request for information from 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 subsection 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 Part 2 relate to the nature of the information requested.

22. Subsection (3) enables the authority to request any further information necessary in order to identify and locate the information. Section 8 of the Bill requires that an applicant describe the information requested, and, although the Bill 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 Bill in submitting a request for information.

23. The information communicated to an applicant is to be the information held by an authority at the time the request is received. However, subsection (4) allows an authority 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 help ensure that requests for information under the Bill do not interfere with the other day-to-day work of an authority and sound record management.

Section 2 – Effect of exemptions

24. This section sets out the circumstances where the general entitlement to obtain information will nevertheless 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.

25. 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.

26. 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)
- section 36(2) (information obtained from a person where its disclosure would constitute a breach of confidence actionable by that person)
- section 37 (court records etc.)
- section 38(1)(a) (personal data of which the subject is the applicant)
- section 38(1)(c) (personal census information)
- section 38(1)(d) (health records of the deceased)
- section 38(1)(b) (personal data), where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

27. These exemptions ensure that the Bill does not interfere with other statutory provisions (such as the Data Protection Act 1998) 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 Bill to apply).

Section 3 – Scottish public authorities

28. This section defines the term “Scottish public authority” and specifies that certain information is outwith the scope of the Bill.

29. “Scottish public authority” means any body (or other person or office-holder) which is listed in schedule 1, designated by order under section 5(1), or which is a publicly-owned company as defined by section 6.

30. Subsection (2) defines when, for the purposes of the Bill, 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.

31. Subsection (2)(a)(ii) specifically exempts information held in confidence, having been supplied by a Minister of the Crown or by a UK Government Department. This provision takes account of the competence conferred on the Scottish Parliament to legislate on “access to information”.

32. Unless subject to section 22 or designated as open information for the purposes of subsection (4) of section 3, information is by that subsection specifically removed from the scope

of the Bill if it has been transferred by a public authority (as defined by the UK Freedom of Information Act 2000) to the Keeper of the Records of Scotland. (The term “public authority” for the purposes of the Freedom of Information Act 2000 is defined as any body or person, or the holder of any office, which is listed in Schedule 1 to, or designated by an order under, that Act.) The effect of a public authority designating information as open information for the purposes of section 3(4) is therefore to bring that information within the scope of the Bill where this would not otherwise have been the case.

Section 4 – Amendment of schedule 1

33. This section makes provision as to future amendment of schedule 1.

34. Subsection (1) provides that the Scottish Ministers may by order amend schedule 1 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 schedule 1. Such an order would be subject to the negative resolution procedure.

35. The references to an authority with mixed functions or no reserved functions are to read in accordance with Part III of Schedule 5 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 section 88 of the Scotland Act 1998 – a cross-border public authority.)

Section 5 – Further power to designate Scottish public authorities

36. This section provides that the Scottish Ministers may by order designate as a Scottish public authority for the purposes of the Bill any person who is neither listed in schedule 1 (nor capable of being added to that schedule under section 4(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. Subsection (4) requires that an order made under subsection (1) by virtue of subsection (2)(a) must specify the functions of a public nature being exercised, and, by virtue of subsection (2)(b), the service being provided.

37. Before making an order under this section, the Scottish Ministers must consult every person to whom the order relates or, where appropriate, persons appearing to them to represent such persons. Such an order would be subject to the affirmative resolution procedure.

Section 6 – Publicly-owned companies

38. This section provides that, for the purposes of section 3(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 schedule 1 (except where the schedule 1 entry regarding the authority is limited to certain information).

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

40. Publicly-owned companies are, under the terms of section 3(1)(b), subject to the Bill's provisions.

Section 7 – Public authorities to which Act has limited application

41. Under this section, the Scottish Ministers will be able to provide that any authority brought within the scope of the Bill under section 4 would only be subject to the Bill's provisions in relation to certain specified information. The authority's obligations under this Bill would not extend to any other information which that authority held.

42. Under subsection (2), where an authority is already listed in schedule 1, the Scottish Ministers may make an order limiting the public authority's obligations under the Bill 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 schedule 1. Such an order would be subject to the affirmative resolution procedure.

43. Subsection (3) provides Ministers with similar powers in respect of an organisation designated as a "Scottish public authority" under section 5. Subsection (4) provides that an order can be made in respect of a publicly-owned company under section 6. Such an order would also be subject to the affirmative resolution procedure.

Section 8 – Requesting information

44. 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 Bill.

45. The first condition is that the applicant has to submit their request in writing. 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.

46. A request must also state the name and address of 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.

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

Section 9 – Fees

48. 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 Bill. Such regulations will be subject to the negative resolution procedure. 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.

49. Under subsection (6), 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

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

51. An authority must respond promptly to a request for information meeting the criteria under the Bill. 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.

52. 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.

53. 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).

54. The definition of a “working day” is contained in section 70 of the Bill.

55. 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 the affirmative resolution procedure.

Section 11 – Means of providing information

56. 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 subsection (2), that authority must supply it in the format 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 but may, for example, inspect and take a copy. It will ultimately be for the Scottish Information Commissioner to determine what is reasonably practicable in the circumstances.

Section 12 – Excessive cost of compliance

57. 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 the negative resolution procedure.

58. Subsection (2) allows the regulations to provide that an authority may aggregate the costs of requests for information where one person makes two or more requests or where it appears to the authority that two or more people are acting in concert or in pursuance of a campaign. 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.

59. 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.

Section 13 – Fees for disclosure in certain circumstances

60. This section provides that a Scottish public authority may charge a fee, determined in accordance with regulations made under subsection (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 the negative resolution procedure. Subsection (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.

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

Section 14 – Vexatious or repeated requests

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

63. Subsection (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

64. Subsection (1) places a “duty to assist” on a Scottish public authority, by requiring the authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. This provision

applies, therefore, to applicants enquiring in advance of submitting an application and once an application has been made.

65. In relation to the provision of advice or assistance in any case, an authority is deemed to have complied with the duty imposed by subsection (1), as respects that case, if it has conformed with the code of practice issued under section 60.

Section 16 – Refusal of request

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

67. 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 ‘refusal notice’. A refusal notice must specify the four matters listed at subsection (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. Consideration of disclosure, the public interest test, the search, retrieval and copying etc. of the requested information must all be done within this 20-day timescale. The refusal notice does not require to disclose information which itself would be exempt.

68. 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, within the 20-day timescale (or any other timescale subsequently set by Scottish Ministers or the Commissioner under section 10), provide the applicant with a refusal notice as above.

69. 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.

70. 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 section 20(1)), and of the right of appeal to the Scottish Information Commissioner (conferred by section 47(1)).

Section 17 – Notice that information is not held

71. 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 section 10. Special rules apply where information is not held and a refusal notice is given under section 18 (see below).

Section 18 – Further provision as respects responses to request

72. This section allows an authority to give a refusal notice as described in section 16 (within the same timescale as set down in section 10) which states that the authority does not wish to reveal whether or not the information is in fact held by them (irrespective of its existence or

otherwise and irrespective of whether the information is held by it or otherwise), though only in those circumstances where, should the information exist and be held by the authority, it would be exempt by virtue of certain exemptions in Part 2. There may well be perfectly valid reasons why the disclosure of the existence (or otherwise) or the holding (or otherwise) of sensitive information could cause harm. It will be for the Scottish Information Commissioner ultimately to determine whether or not the information should be disclosed. Section 16(1)(a) and (2) do not apply to a refusal notice issued under this section.

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

- section 28 (relations within the United Kingdom)
- section 29 (formulation of Scottish Administration policy etc.)
- section 31 (national security and defence)
- section 32 (international relations)
- section 34 (investigations by Scottish public authorities and proceedings arising out of such investigations)
- section 35 (law enforcement)
- section 39(1) (health and safety)
- section 41 (communications with Her Majesty, etc. and honours)

Section 19 – Content of certain notices

74. This section requires that a fees notice issued under section 9(1), or a refusal notice issued under section 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or under section 18(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.

Section 20 – Requirement for review of refusal etc.

75. This section details the process by which an applicant can require a Scottish public authority to review a refusal decision.

76. 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 subsection (3), the applicant's requirement for review must be in writing or e-mail; contain the name and address of the applicant; contain details of the initial request; and indicate why a review is being requested.

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

Section 21 – Review by Scottish public authority

78. This section sets out the procedures to be followed by a Scottish public authority in dealing with an applicant's requirement for review under section 20. An authority must respond to a requirement for review within 20 working 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 30 working days where the case is one covered by section 22(4), that is where another authority besides the Keeper has a role to play in carrying out the necessary review.

79. In responding to the applicant, the authority is required by subsection (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 further appeal to the Scottish Information Commissioner (subsection (10)).

80. Under subsection (8) an authority is not required to carry out a review where it believes the request to be "vexatious" or "repeated" in terms of section 14 (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 20-day period (30-day period for the Keeper) indicating that it considers the requirement for review to be vexatious or repeated and setting out the details of the applicant's right of appeal to the Scottish Information Commissioner.

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

Section 22 – Special provisions relating to records transferred to the Keeper

82. 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.

83. 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 days from receipt of the request for information.

84. 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 day period. The Keeper will include information and any statement provided by the remitting authority in his notice to the applicant.

85. 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

86. 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.

87. Subsection (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.

88. Subsection (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.

89. Subsection (4) requires an authority to publish its publication scheme but allows it to do so in whatever way it thinks appropriate.

90. Subsections (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.

91. 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 Bill, but instead under the conditions governing the disclosure of information under the publication scheme.

Section 24 – Model publication schemes

92. This section provides for the adoption of model publication schemes by Scottish public authorities falling within particular classes or categories of authorities. Subsections (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. For example, a scheme could be prepared by COSLA for local authorities; or for all schools or all universities, which each individual school or university could then adopt. 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.

93. Subsections (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.

Part 2 – Exempt information

94. Part 2 of the Bill sets out the categories of information which are exempt from the general entitlement to information held by Scottish public authorities. Other than for those exemptions which are defined in section 2 as being absolute exemptions, the public interest test in that section must be considered. Part 5 of the Bill sets out the periods after which information ceases to be exempt; those exemptions not provided for in that Part must always be considered.

Section 25 – Information otherwise accessible

95. This section provides an absolute exemption for information which is otherwise accessible to the applicant. The exemption covers information which is available on the payment of a fee or charge, and information available by virtue of other legislation. An example would be birth, death or marriage certificates available under other legislation. The exemption also sets out that information (other than information which the authority is statutorily obliged to make available, or information held by the Keeper of the Records) cannot be exempt on the basis that it is reasonably obtainable merely because it is available from the authority which holds it – unless it is made available in accordance with that authority's publication scheme and any payment required is specified in or determined in accordance with, the scheme.

96. Section 25(2)(b)(ii) serves to exempt information held by the Keeper of the Records of Scotland so long as the Keeper makes the information available for inspection and, where reasonable, copying.

97. Essentially, the exemption provides that the full provisions of the Bill need not apply to information which is otherwise accessible to the applicant.

Section 26 – Prohibitions on disclosure

98. This section provides an absolute exemption for information if its disclosure by a Scottish public authority is prohibited by statute; is incompatible with any Community (European Union) obligation; or would constitute, or be punishable as, a contempt of court. An authority withholding information from disclosure under the terms of this exemption would be expected to state what enactment or Community obligation etc. prevented its disclosure.

Section 27 – Information intended for future publication

99. This section exempts information if it is held with the intention that it be published by a public authority or any other person at a date within 12 weeks from the receipt of the request and where it is reasonable in all the circumstances that the information should not be disclosed until the planned publication date. This is an absolute exemption.

100. The public interest test in section 2 applies.

Section 28 – Relations within the United Kingdom

101. This section exempts information if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.

102. The public interest test in section 2 applies.

Section 29 – Formulation of Scottish Administration policy etc.

103. This section exempts as a class information held by the Scottish Administration if it relates to: the formulation or development of government policy; Ministerial communications; the provision of, or any request for the provision of, advice by any of the Law Officers; or the operation of any Ministerial private office.

104. Subsection (2) provides that once a policy decision has been taken, any statistical information used to provide an informed background to that decision is not to be regarded as relating to the formulation or development of the policy in question or to Ministerial communications (and will thus not be exempt under section 29(1)(a) or (b)). Subsection (3) requires the Scottish Administration to have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.

105. The public interest test in section 2 applies.

Section 30 – Prejudice to effective conduct of public affairs

106. This section exempts information if its disclosure would prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers, or the effective conduct of public affairs. Information is also exempted where its disclosure would inhibit substantially the free and frank provision of advice or exchange of views.

107. The public interest test in section 2 applies.

Section 31 – National security and defence

108. Subsection (1) exempts information if exemption is required for the purpose of safeguarding national security. Subsection (2) provides that the Scottish Ministers can certify conclusively that exemption is required for such purpose.

109. Subsection (4) exempts information the disclosure of which would, or would be likely to, prejudice substantially the defence of the British Islands or of any colony; or the capability, effectiveness or security of any relevant forces.

110. The public interest test in section 2 applies.

Section 32 – International relations

111. This exemption protects information whose disclosure would substantially prejudice the effectiveness of the conduct of international relations, by, for instance, impairing the confidentiality or candour of communications between the United Kingdom and other States or international bodies.

112. The public interest test in section 2 applies.

Section 33 – Commercial interests and the economy

113. This section protects against the disclosure of commercially sensitive information, including trade secrets. It also protects against the disclosure of information which could be damaging to the economic interests of the United Kingdom.

114. The public interest test in section 2 applies.

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

115. This section covers a range of information associated with investigations carried out by Scottish public authorities.

116. The public interest test in section 2 applies.

Section 35 – Law enforcement

117. This exemption covers a range of information relating to law enforcement. It also applies to information relating to relevant civil proceedings brought by or on behalf of Scottish public authorities.

118. The public interest test in section 2 applies.

Section 36 – Confidentiality

119. Subsection (1) exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Essentially this provides an equivalent in Scotland for information for which “legal professional privilege” may be claimed in England.

120. Subsection (2) exempts absolutely information obtained from another person if its disclosure would constitute a breach of confidence actionable by that person or any other person.

Section 37 – Court records, etc.

121. This section exempts information contained in court records or other relevant legal documents, where that information is held by a Scottish public authority solely because it is contained in such a document.

122. In addition, subsection (3) disappplies this exemption to information held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (because of the existence of the more specific exemption in this regard at section 34(2)(a)).

123. Courts and tribunals are not listed in schedule 1 and are not therefore “Scottish public authorities” for the purposes of the Bill.

Section 38 – Personal information

124. This section deals with personal information, the majority of which may be available under the Data Protection Act 1998.

125. Subsection (1) exempts absolutely personal data, of which the applicant is the subject of that data, personal census information and the health records of a deceased person.

126. Subsection (1)(b) exempts personal data relating to a third party (i.e. not the applicant), but only if it meets either of the conditions mentioned in subsection (2) and (3). Subsection (1)(b) is an absolute exemption in circumstances where the conditions in subsection (2) and (3) are met. Where these conditions are not met the public interest test at section 2 applies.

127. The first condition (detailed in subsection (2)(a)) is where disclosure of the information would breach the Data Protection Act by contravening the “data protection principles” (listed at Schedule 1 to that Act) or if its disclosure would be likely to cause damage or distress (Section 10 of that Act); and, in any other case, disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data) were disregarded.

128. The second condition (subsection (3)) is where that data relates to someone who would not have a right to know about it or a have a right to access to it under the Data Protection Act (due to the exemptions in Part IV of that Act).

129. Subsection (1)(d) exempts “a health record” (as defined in section 1(1) of the Access to Health Records Act 1990) of a deceased person. Access rights to health records are available under the Data Protection Act 1998 (which provides for access by an individual to their own health records) and the Access to Health Records Act 1990 (which, in specified circumstances, provides access to the health records of deceased persons). This is an absolute exemption, which ceases to apply 100 years after the creation of the records.

130. Subsection (4) provides that in relation to requests for information made under the Bill, various transitional exemptions relating to manually held personal information, as contained in Part III of Schedule 8 to the Data Protection Act 1998 (and which will apply until 23 October 2007), are to be disregarded.

131. Definitions of the various phrases used in this section are provided at subsection (5).

132. Subsection (6) amends section 8(7) of the Census Act 1920 so that disclosures of personal census information after 100 years will not be a criminal offence under that Act. At present all census records in Scotland held by General Register Office for Scotland are to some extent “protected” under the terms of section 8(2) to (7) of the 1920 Act (as amended by section 1 of the Census (Confidentiality) Act 1991). As the Bill provides a general right of access to all information held by Scottish public authorities, including census records held by the Registrar General for Scotland, it is necessary to exempt personal census information from that access right in order to underwrite the assurances of confidentiality that were given to those completing census returns. The exemption for personal census information is an absolute exemption, which ceases to apply after 100 years.

Section 39 – Health, safety and the environment

133. Subsection (1) exempts information, the disclosure of which would, or would be likely to, endanger the physical or mental health or safety of an individual.

134. Subsection (2) exempts information if that information is required to be made available by virtue of environmental information regulations (EIRs) made under section 62. Environmental information is exempt if an authority is obliged to release the information requested in accordance with those regulations or would be so obliged but for an exemption under those regulations. Access to environmental information held by a Scottish public authority will be available first under those regulations, rather than under the Bill. However, the Bill would still continue to have some significance as regards environmental information, since it places a duty on public authorities to consider the release of that information which is exempt under the EIRs, where it is in the public interest so to do.

135. Subsection (3) makes clear that the exemption for information available under the regulations does not limit the operation of the exemption in section 25 (“information otherwise accessible”).

136. The public interest test in section 2 applies.

Section 40 – Audit functions

137. This section exempts information, the disclosure of which would, or would be likely to, prejudice substantially the exercise of a Scottish public authority’s auditing functions. The section relates to the audit of the accounts of other public authorities, or examinations into the economy, efficiency and effectiveness with which they use their resources in the discharge of their public functions. The section would not extend to the internal auditing functions of authorities.

138. The public interest test in section 2 applies.

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

139. This section exempts as a class information relating to communications with Her Majesty, the Royal Family or the Royal Household; or relates to the award of any honour or dignity by Her Majesty.

140. The public interest test in section 2 applies.

Part 3 – The Scottish Information Commissioner

Section 42 – The Scottish Information Commissioner

141. This section provides as to the appointment of the Scottish Information Commissioner and the basis on which that office is held.

142. Under subsection (1) the Commissioner will be appointed by Her Majesty on the nomination of the Parliament. The Parliamentary corporation will determine the Commissioner's salary, allowances and other terms and conditions. The Commissioner will hold office for a term not exceeding 5 years, and for no longer than 2 terms unless re-appointment for a third is desirable in the public interest. The Commissioner retires at the end of the calendar year in which the age of 65 is reached, and can be removed from office by Her Majesty following a resolution of the Parliament passed by a majority of no less than two thirds of the total number of members of the Parliament.

143. Under subsection (7) the Commissioner is not subject to the direction or control of the Parliament, the Parliamentary corporation or any member of the Scottish Executive, except in relation to the preparation of accounts (which, under paragraph 4(1) of schedule 2, must be in accordance with any directions provided by the Scottish Ministers) and the appointment of staff (which, under paragraph 3(4) of schedule 2, requires the approval of the Parliamentary corporation).

Section 43 – General functions of Commissioner

144. This section places a duty on the Commissioner to promote good practice and enforce Scottish public authorities' compliance with the Bill, 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 Bill. The Commissioner is permitted to charge fees for such services. This section also places a duty on the Commissioner from time to time to consult with the Keeper of the Records of Scotland about the promotion of observance by authorities of the code of practice as to the keeping, management and destruction of records (issued by the Scottish Ministers under section 61).

Section 44 – Recommendations as to good practice

145. This section enables the Commissioner to take action where he or she considers that the practices of a Scottish public authority in relation to its functions under the Act do not conform with a code of practice issued under section 60 or 61. The Commissioner may issue a "practice recommendation", specifying the provisions with which the Commissioner considers the authority's practice does not conform and the steps the authority should take to so conform. The Commissioner is required to consult with the Keeper of the Records of Scotland before issuing a practice recommendation which relates to a failure to conform with the code of practice (issued under section 61) as to the keeping, management and destruction of records.

Section 45 – Confidentiality of information obtained by or furnished to Commissioner

146. This section sets out the conditions governing the disclosure of information held by the Commissioner. The Commissioner, or a member of his or her staff, will not be able to disclose information furnished to the Commissioner under this Bill and which is not available in the public domain, unless that disclosure is made with lawful authority.

147. The Commissioner will be considered to have lawful authority where the circumstances set out at subsection (2) are present, including where disclosure is required under this Bill (as a consequence of an FOI request made to the Commissioner).

Section 46 – Laying of reports

148. This section requires the Commissioner to lay annual reports before the Scottish Parliament and enables him or her to lay such other reports as he or she thinks appropriate.

Part 4 – Enforcement

Section 47 – Application for decision by Commissioner

149. This section sets out the circumstances in which an applicant can apply to the Scottish Information Commissioner for a decision as to whether a Scottish public authority has dealt with a request for information in accordance with Part 1 of the Bill. Application to the Commissioner will be available where an applicant is dissatisfied with a notice given under section 21(5) or (9) following a review by the authority of its original decision, or where the public authority concerned failed to give such a notice. Subsection (2) sets out the form in which applications are to be made to the Commissioner, and the information which must be included in any application. Subsection (4) sets out the timescales within which any such applications must be made.

Section 48 – When application excluded

150. Under this section, an applicant will not be able to appeal to the Commissioner for a decision under section 47(1) as respects a request for review made to the Scottish Information Commissioner, a procurator fiscal, or the Lord Advocate (to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland).

151. Section 48 excludes appeal to the Commissioner for a decision under section 47(1), but the Commissioner, the Lord Advocate and procurators fiscal are subject to the other duties and obligations set out in this Bill.

Section 49 – Commissioner's decision

152. This section sets out the Commissioner's obligations in relation to an application made in accordance with section 47(1), providing this is not excluded by section 48.

Section 50 – Information notices

153. This section enables the Commissioner to obtain from a Scottish public authority information (including unrecorded information) that he or she requires to deal with an

application under section 47 or to determine on whether an authority has complied, or is complying, with the provisions of the Bill or a code of practice issued under section 60 or 61. A written notice under this section is referred to as an “information notice”, and it must specify the time within which the information is to be provided and may specify its form.

154. Subsections (2) and (3) specify the contents of an information notice, which are to include details of the right of appeal against the notice and the time within which the information is to be given.

155. Subsections (5) and (6) set out that an authority is not required to supply the Commissioner with information relating to communications between a legal adviser and client (or a person representing a client) about the client’s compliance with the Bill or about any proceedings arising from it.

156. Subsection (7) provides that the information requested by the Commissioner in an information notice cannot be withheld on the basis of any obligation to maintain secrecy, or of any other restriction on disclosure. This is subject to the limitation relating to the professional legal adviser and client relationship set out at subsection (5).

157. Subsection (8) allows the Commissioner to cancel an information notice.

Section 51 – Enforcement notices

158. This section enables the Commissioner to issue an “enforcement notice” to a Scottish public authority which the Commissioner is satisfied has failed to comply with a provision of Part 1 of the Bill. The notice specifies the steps the authority is to take in order to comply. An enforcement notice requires to set out the time by which these steps must be taken and details of the authority’s right of appeal.

159. The time limit specified in the notice must not expire before the time for an authority to appeal under section 56 expires. Should an authority decide to exercise the right of appeal under that section, then the notice need not be complied with before that appeal is concluded.

160. The Commissioner can also cancel an enforcement notice.

Section 52 – Exception from duty to comply with certain notices

161. This section sets out the conditions under which the First Minister can, after consulting the other Scottish Ministers, issue a certificate to the Commissioner stating that the First Minister is of the opinion that there has been no failure to comply, in respect of one or more requests for information, with section 1(1).

162. Under subsection (1) such a certificate can apply only to a decision or enforcement notice given to the Scottish Administration and where the information in question is exempt by virtue of section 29, 31(1), 32(1)(b), 34, 36(1) or 41(b).

163. Subsection (3) provides that the First Minister is, as soon as practicable after issuing such a certificate, to lay a copy of it before the Parliament and, in relation to a decision notice, to inform the person to whose application the notice relates of the reasons for the First Minister's opinion. In so doing, the First Minister is not obliged to disclose information which is itself exempt.

164. The certificate must be issued within 30 days of the Commissioner's notice being given to the Scottish Administration or, where an appeal is brought on a point of law under section 56, of the day on which the cause is finally determined.

Section 53 – Failure to comply with notice

165. This section sets out the sanctions for non-compliance with a decision notice, information notice or enforcement notice issued by the Scottish Information Commissioner, providing that the Court of Session may hold a Scottish public authority in contempt of court.

166. Where an authority fails to comply with any notice issued by the Commissioner, the Commissioner will be entitled to refer the issue to the Court of Session.

167. In relation to information notices (which, under section 50, allow the Commissioner to obtain information to support consideration of cases appealed to his or her office), an authority will be deemed to have failed to comply with the notice where it knowingly or recklessly makes a false statement.

168. Where the Commissioner refers an authority to the Court of Session, the authority will be entitled to offer a statement of defence, including presenting witnesses.

Section 54 – Powers of entry and inspection

169. This section introduces schedule 3 which makes provision for the Commissioner's powers of entry and inspection.

Section 55 – No civil right of action against Scottish public authority

170. This section ensures that the legislation does not create any right to sue for damages for breach of a statutory duty. It does not affect the Commissioner's powers in section 53(1).

Section 56 – Appeal against notices under Part 4

171. This section provides that an appeal against the Commissioner's decision, on a point of law, can be made to the Court of Session in the circumstances listed.

Part 5 – Historical records

Section 57 – The expression “historical record”

172. This section defines, for the purpose of this Part of the Bill, the expression “historical record” as a record which is thirty years old, counting from the calendar year following that in

which it was created. Where records are kept in a file, the period of thirty years (and any other period defined in section 58) is reckoned from the calendar year following that in which the most recent record was created.

Section 58 – Falling away of exemptions with time

173. The effect of this section is to disapply some of the exemptions in Part 2 in the case of information contained in a historical record, thereby extending the scope of the right of access in section 1 in these cases. Information contained in a file in which the most recent record is thirty years old or more cannot be exempt under the following sections:

- section 28 (relations within the United Kingdom)
- section 29 (formulation of Scottish Administration policy etc.)
- section 30 (prejudice to the effective conduct of public affairs)
- section 33(1) (commercial interests)
- section 36 (confidentiality)
- section 37 (court records, etc.)
- section 40 (audit functions) and
- section 41(a) (communications with Her Majesty)

174. The exemption for information relating to honours (section 41(b)) is disappplied at the end of 60 years commencing at the beginning of the calendar year following that in which the record containing the information is created. The exemptions for information relating to sections 34(2)(b) (investigations into the cause of death), 35 (law enforcement) and 38(1)(c) or (d) (certain personal information) fall away after 100 years, on the same basis.

175. All other exemptions continue to apply in perpetuity.

Section 59 – Power to vary periods in sections 57 and 58

176. This section allows the Scottish Ministers to vary, by order, the period in section 57(1) after which a record becomes a historical record, or the periods in section 58(2) – but the period as varied can never exceed the period mentioned in these sections as originally enacted. An order under this section will be subject to the affirmative resolution procedure.

Part 6 – Codes of practice

Section 60 – Code of practice as to functions under this Act

177. This section requires the Scottish Ministers to issue, and from time to time revise, a code of practice setting out guidance which the Scottish Ministers consider it desirable for Scottish public authorities to follow in the discharge of their duties under this Bill.

178. Subsection (2) specifies particular matters which must be included in the code such as the advice and assistance that should be given to applicants, the transferring of requests, consultation

with third parties, contractual terms, and procedures for dealing with complaints. The code may make different provision for different Scottish public authorities.

Section 61 – Code of practice as to the keeping, management and destruction of records

179. This section requires the Scottish Ministers to issue a code of practice providing guidance to Scottish public authorities as to the keeping, management and destruction of the authorities' records. In doing so, the Scottish Ministers are to have regard to the public interest in allowing public access to information held by Scottish public authorities.

180. Subsection (2) provides that the code may include guidance as to the practice to be adopted in transferring records to the Keeper of the Records of Scotland and in reviewing records prior to being transferred.

181. Before issuing or revising the code, subsection (5) requires the Scottish Ministers to consult the Commissioner and the Keeper of the Records of Scotland, and to lay the code, and any revised code under this section, before the Scottish Parliament.

Part 7 – Miscellaneous and supplemental

Section 62 – Power to make provision relating to environmental information

182. This section provides that the Scottish Ministers may make regulations to implement the “Aarhus Convention” – a United Nations Economic Commission for Europe (UNECE) Convention, which the UK (and all other European Union Member States) signed at Aarhus in Denmark in 1998. Having signed the Convention, the United Kingdom Government wishes to ratify it as soon as possible.

183. The Convention deals with access to information, public participation in decision-making and access to justice in environmental matters. As the Convention goes further than the existing Environmental Information Regulations (EIRs) in some areas, and these are not sufficient to enable the United Kingdom to meet the requirements of the Convention, new regulations must be made. The Convention is not an EC instrument, and therefore a new power to make regulations is required (the power to make regulations under section 2(2) of the European Community Act 1972 cannot be utilised). It should be noted that these regulations will implement only those provisions of the Aarhus Convention which relate to access to environmental information.

184. This section will allow the creation of a revised free-standing access regime for environmental information, replacing the current EIRs (the Environmental Information Regulations 1992 (SI 1992/3240), as amended by the Environmental Information (Amendment) Regulations 1998 (SI 1998/1447)). The current Regulations – which will be revoked on the coming into force of the revised regime – implement Directive 90/313/EEC on the Freedom of Access to Information in the Environment.

185. The new EIRs would also provide for the Independent Supervisory Authority – a requirement of the Aarhus Convention – who would be the Scottish Information Commissioner.

186. Subsection (3) gives the Scottish Ministers power to make regulations to implement those Articles of the Aarhus Convention which relate to the provision of access to environmental information. The regulations may include provisions for the purpose of dealing with matters arising from those Articles, or amendments to them. Subsection (4) permits the regulations to include provisions enabling charges to be made in connection with the disclosure of environmental information.

187. Subsection (4) also permits certain provisions of the Bill to be applied to the regulations, with modifications. The regulations may also make provision for a code of practice to be issued by the Scottish Ministers to apply to any authority, persons or body (as defined in the Convention) subject to the regulations, and for the application of the Scottish Information Commissioner's powers under sections 43 and 44, as modified if necessary. The regulations may also apply, with modifications, Part 4 of the Bill ("Enforcement"), so that the Scottish Information Commissioner will be able to enforce the regulations. The regulations may also make provision for any transitional or consequential provisions that are appropriate.

Section 63 – Power to amend or repeal enactments prohibiting disclosure of information

188. Under this section the Scottish Ministers may, by order, repeal or amend a relevant enactment if it appears that, by virtue of section 26(a), it is capable of preventing a Scottish public authority from disclosing information and Ministers wish to remove or relax the prohibition. An order under this section may make consequential modifications and transitional provisions and make different provision for different cases. Any order made under this section must be laid before, and approved by resolution of, the Scottish Parliament.

Section 64 – Offence of altering etc. records with intent to prevent disclosure

189. This section makes it an offence to alter, deface, block, erase, destroy or conceal records held by a public authority with the intention of preventing disclosure to an applicant who has made a request for the information and is entitled to receive it. The offence applies to the public authority and anyone who is employed by, is an officer of, or is subject to the direction of, the public authority. A person found guilty of the offence is liable to a fine not exceeding level 5 on the standard scale (currently £5,000). Under section 67, the offence cannot be committed by the Scottish Parliament, Parliamentary corporation or the Scottish Administration, but can be committed by officials of those authorities.

Section 66 – Protection for actions for defamation

190. The purpose of this section is to ensure that a public authority cannot be held liable if it is required to disclose information under this Bill for which an action for defamation could be taken against it. This only applies where the information containing the defamatory matter has been supplied to that authority by a third person. It does not apply where that disclosure can be shown to have been made with malicious intent.

Section 67 – Scottish Parliament and Scottish Administration

191. This section makes provision that although the Scottish Administration, the Scottish Parliament and the Parliamentary corporation as "authorities" are exempt from prosecution under the Bill, individual members of staff acting on their behalf are not.

Section 68 – Amendment of Public Records (Scotland) Act 1937

192. This section amends the Public Records (Scotland) Act 1937. Subsection (2) amends section 7 of that Act to provide that the Scottish Records Advisory Council – an independent advisory body established under the 1937 Act – may advise the Scottish Ministers on matters relating to the application of the Bill to information contained in records held by the Keeper of the Records of Scotland. Subsection (3) adds a new duty on the Keeper to arrange that reasonable facilities are available to the public for inspecting and obtaining copies of records which he holds and which fall to be disclosed in accordance with the Bill or are exempt under section 25(2)(b)(ii). In practice, such facilities and copying services already exist at the National Archives of Scotland. However, inspection of records held by the Keeper did not feature in the 1937 Act and this amendment will now make it a requirement for such facilities to be made available.

Section 69 – Orders and regulations

193. A statutory instrument made under each of the following sections is subject to annulment by resolution of the Scottish Parliament (this is known as the negative resolution procedure):

- section 4(1) (orders relating to the amendment of schedule 1)
- section 9(4) (regulations relating to fees and charges)
- section 12 (regulations relating to excessive cost provisions)
- section 13(1) (regulations relating to fees for disclosure in certain circumstances)
- section 62(3) (regulations relating to access to environmental information)

194. A statutory instrument made under each of the following sections has to be debated and approved by the Scottish Parliament in draft (this is known as the affirmative resolution procedure):

- section 5(1) (orders designating further Scottish public authorities)
- section 7(2) (orders limiting, or removing any limitation to, the extent to which the Bill applies to a Scottish public authority listed in schedule 1)
- section 7(4)(b) (orders describing information held by a publicly-owned company)
- section 10(4) (regulations which vary the time in which a request must be handled)
- section 20(7) (regulations to vary the time limits within which an applicant may request a requirement for review)
- section 21(6) (regulations to vary the time in which the requirement for review must be considered)
- section 47(6) (regulations to vary the time in which the Commissioner must reach a decision on an appeal)
- section 59(1) (orders to vary the periods after which certain exemptions do not apply)
- section 63(1) (orders which amend or repeal prohibitions on disclosure)

Section 71 – Giving of notice

195. This section sets out, for the purposes of this Bill, how notices are to be given, etc., and the details as to the timings of such processes.

Section 72 – Commencement

196. Subsection (1)(a) brings into force all the provisions of the Bill five years from the date of Royal Assent (if not earlier commenced by order). Orders made under subsection (1)(b) may also contain transitional provisions, including provisions capable of having effect beyond the 5 year period described in subsection (1)(a).

197. Subsection (3) requires the Scottish Ministers to prepare and lay before the Scottish Parliament annual reports on the implementation of the Bill, starting within 12 months from the date of Royal Assent and each year thereafter until all provisions are fully commenced.

Schedules

Schedule 1 – Scottish Public Authorities

198. This schedule lists “Scottish public authorities” for the purposes of the Bill. The listing of “The Scottish Ministers” at paragraph 1 covers all Departments of the Scottish Executive, as well as the following agencies:

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

199. The Scottish Parliament, local authorities, NDPBs, NHS bodies, the Police, and Further and Higher Education institutions are all specified as Scottish public authorities. Further persons or office-holders may be designated by order under sections 4 and 5.

Schedule 2 – The Scottish Information Commissioner (introduced by section 42(12))

200. This schedule sets out various matters relating to the Scottish Information Commissioner.

201. Paragraph 1 provides that the Commissioner, and his or her staff and property, are independent of the Crown and do not have any status, immunity or privileges of the Crown.

202. Paragraph 2 provides that the Parliamentary corporation may make arrangements for the payment of pensions, allowances or gratuities to existing and former Commissioners (including compensation for loss of office).

203. Paragraph 3 provides that the Commissioner may appoint staff, on such terms and conditions as that officer may determine, and may make arrangements for the payment of pensions, allowances or gratuities to existing or former members of staff (including compensation for loss of employment). However, the Commissioner will require the approval of the Parliamentary corporation in these matters.

204. Paragraph 4 provides that the Commissioner, or a member of his or her staff, will be designated by the Parliamentary corporation as accountable officer for the office of the Commissioner. The functions of the accountable officer are to sign accounts, ensure propriety and regularity of finances, and ensure that resources are used economically, efficiently and effectively. The accountable officer is answerable to the Parliament for the exercise of the functions provided for under this paragraph.

205. Paragraph 5 provides that the Commissioner must prepare and keep accounts, in accordance with any directions Ministers may give, and send a copy of the annual accounts to the Auditor General for Scotland for auditing. The Commissioner's audited accounts must be made publicly available, subject to certain conditions. The Commissioner's financial year runs from 1st April to 31st March.

206. The Commissioner is provided with powers in *paragraph 6* to do anything which appears necessary or expedient for the purpose of, or in connection with, or which appears conducive to, the exercise of the functions of the Commissioner, and in particular may acquire or dispose of land and other property, and enter into contracts.

Schedule 3 – Powers of Entry and Inspection (introduced by section 54)

207. This schedule sets out the circumstances in which the Commissioner, where that officer suspects a contravention of the Bill, may seek a warrant enabling that officer to enter and search premises and seize material.

FINANCIAL MEMORANDUM

INTRODUCTION

208. It is estimated that the cost to public funds of implementing the proposals in the Bill might fall within the range of £2.5 million to £4.8 million per year. This figure includes the cost to public authorities of processing applicants' requests for information (including the costs to public authorities of the review and appeals process), the costs of making information available to the public under a publication scheme, the costs of any training programmes within authorities and costs borne centrally for the office of the Scottish Information Commissioner. The costs of implementing the Bill will be spread across the public sector as a whole and will be absorbed

within planned resources. It is not possible at this stage to identify separately the costs for each part of the Scottish public sector.

209. The cost of establishing and running the office of the Scottish Information Commissioner is estimated to be up to £700,000 per year. Provision for this cost has been made in this financial year and for 2002-03 and 2003-04.

COSTS ON PUBLIC AUTHORITIES

210. It is not a straightforward matter to estimate the cost to public funds of implementing the proposals in the Bill, in part because it is not possible to predict the number of requests for information under the Bill which Scottish public authorities will receive. It is also worth noting that many Scottish public authorities already handle, within existing resources, large volumes of requests for information – and make a great amount of information available to the public proactively as well as in response to requests – whether or not under a formal regime. Many public authorities will therefore have existing structures in place to support the provision of information under the Bill.

211. In *An Open Scotland*, the Executive's FOI consultation document published in November 1999, an early estimate of the cost to Scottish public authorities arising from freedom of information was given as between £9 million and £12.5 million per annum. This range was calculated as a proportion of the estimates made by the United Kingdom Government in relation to the costs to public funds of the UK freedom of information legislation. To refine the estimates, the Executive looked at the experience of other countries with statutory freedom of information regimes, in particular the Republic of Ireland (which is in the early years of rolling out its FOI legislation). However, although some useful comparisons can be drawn, each FOI regime – and the pattern of requests handled under it – is sufficiently distinctive to make it impossible to derive anything other than a general indication as to the likely costs of implementing FOI in Scotland.

212. In Ireland, for instance, the numbers of requests received during the first two years of operating its Freedom of Information Act (1999 and 2000) were 11,531 and 13,705 respectively. However, of these requests a little under half (between 43% and 46%) were for personal information – which here would fall under the Data Protection Act 1998 – and the scope of the Irish FOI Act includes a number of bodies for which the equivalents here would come under the Freedom of Information Act 2000. Nonetheless, based on the experience in Ireland, and taking into account the numbers of requests received under other FOI regimes and estimates made by the UK Government for requests it expects to handle under the UK FOI Act, we consider it not unreasonable to estimate that between 7,500 and 10,000 requests might be received annually under the Bill. If the average cost of dealing with these applications was assumed to be between £100 and £300 (which would include the cost of considering a request in addition to that of locating and supplying the information), the estimated gross cost to public funds would be in the region of £2.5 million to £4.8 million. Given that many Scottish public authorities already handle large numbers of requests for information within existing resources, the net increase in the cost to public authorities should, however, not be significant and certainly capable of being absorbed within planned resources.

213. There would, of course, be some off-setting income arising from charges made for the supply of information, but it is impossible to make a robust estimate for this element. We do not however expect this income to be significant (as locating and providing information should not prove to be a significant part of the overall cost of dealing with each request).

214. It is also worth noting that, although no decision has been taken as to the shape of the implementation programme, it is possible that (in keeping with the approach adopted elsewhere), the implementation of the Bill will be phased. The Bill provides a maximum period of 5 years for this to be completed. The cost to the public sector in preparing for and implementing the Bill could therefore, in a similar manner, be phased over a number of years.

COSTS ON THE SCOTTISH ADMINISTRATION

215. It is anticipated that implementing the Bill will require the retention of a small unit within the Executive at least for the period up to the time when all the provisions in the Bill have been brought into force (at the latest five years from Royal Assent), and it is likely that there will be a need for an ongoing central unit in the Executive to oversee the legislation. This would include the preparation of secondary legislation, as specified in the Bill, and of annual reports on the implementation of the Bill (which the Bill requires the Scottish Ministers to lay before the Parliament). A central unit would oversee the operation of the Bill by the Executive and its agencies, and provide advice where appropriate on the operation of the Bill and the codes of practice issued by the Scottish Ministers.

216. As with other Scottish public authorities covered by the Bill, the Administration will be required to comply with the obligations placed on it – by responding to requests for information, preparing a publication scheme and so on. There will be a need to make staff aware of the legislation and to train selected staff to handle requests for information. The costs of implementing the Bill will be absorbed within planned resources.

217. The Scottish Administration already operates the Code of Practice on Access to Scottish Executive Information, and is therefore well placed to comply with the requirements of the Bill.

COSTS ON LOCAL AUTHORITIES

218. Local authorities are currently subject to a number of arrangements, statutory and non-statutory, governing the provision of information to the public, such as the Local Government (Access to Information) Act 1985 and the Convention of Scottish Local Authorities (COSLA) Code of Openness in Local Government

219. Local authorities will therefore have existing structures in place able to support the provision of information under the Bill. Local authorities also publish routinely a wide range of information and, as model publication schemes – prepared by the Scottish Information Commissioner or by third parties – will be available, any additional costs which might be incurred in adopting and maintaining a publication scheme should be capable of being borne within planned resources.

COST OF ESTABLISHING AND OPERATING THE OFFICE OF THE SCOTTISH INFORMATION COMMISSIONER

220. The Bill will establish a Scottish Information Commissioner as an independent office holder to promote and enforce the Scottish freedom of information legislation. Provision has been made, at £700,000 per year, for the cost of establishing and running the office of the Commissioner.

SUPPORT FOR IMPLEMENTATION

221. To support the Scottish public sector prepare for the implementation of the Bill, the Executive has established a Freedom of Information Implementation Group. This Group, which has had its Terms of Reference agreed by, and is required to report to, the Minister for Justice, has members from Executive Departments and across the public sector (including representatives from the local authority, health and education sectors). The Group is responsible for ensuring that all necessary measures are put in place such that the Bill may be implemented smoothly and consistently across the Scottish public sector. The Group has convened two sub-groups, one to investigate the approach to training, and the second to recommend an infrastructure (within and across sectors) to assist the implementation and subsequent operation of the Bill.

222. The proposals in the Bill are not anticipated to have a significant impact on manpower levels within the public sector.

COSTS ON PRIVATE BUSINESS

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

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

COST TO INDIVIDUALS

225. There may be a charge to applicants for the provision of information under the Bill, particularly if a request is complicated and involves the search for and retrieval of a large amount of information. Fees will be calculated by the authority in accordance with regulations, which section 9 of the Bill provides that the Scottish Ministers can make.

226. The Bill also provides that existing statutory fee schemes, and any charges for information set out in an authority's publication scheme, would not be subject to the fees scheme to be set in regulations under section 9.

EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

227. On 21 September 2001, the Minister for Justice (Mr Jim Wallace) made the following statement:

“In my view, the provisions of the Freedom of Information (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

**PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE
COMPETENCE**

228. On 25 September 2001, the Presiding Officer (Sir David Steel) made the following statement:

“In my view, the provisions of the Freedom of Information (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

*These documents relate to the Freedom of Information (Scotland) Bill (SP Bill 36) as introduced
in the Scottish Parliament on 27 September 2001*

FREEDOM OF INFORMATION (SCOTLAND) BILL

EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)

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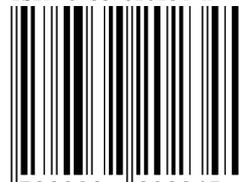
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