

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Freedom of Information (Amendment) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The Bill seeks to modify, improve and strengthen existing measures in the Freedom of Information (Scotland) Act 2002 ("the 2002 Act").
3. The key provisions of the Bill:
- reflect amendments recently made to the United Kingdom Freedom of Information Act 2000 in respect of the exemption relating to communications with Her Majesty, with other members of the Royal Family or with the Royal Household, to ensure such communications remain suitably protected;
 - introduce greater flexibility in the order-making power relating to the definition of an "historical record" and the lifespans of certain exemptions, with the intention of enabling a draft order to be brought forward reducing the lifespan of certain exemptions thereby making more information publicly available earlier in the interests of enhanced public sector openness, and
 - strengthen the ability to bring a prosecution in the event of records subject to a request being altered, defaced, blocked, erased, destroyed or concealed with the intention of preventing disclosure.

Rationale for subordinate legislation

4. The Scottish Government has had regard, when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill, to:
- the fact that the Bill seeks to enhance existing subordinate legislative powers;
 - the need to maintain the flexibility to respond to changing circumstances; and

- the fact that an order under section 59(1) of the 2002 Act is subject to the affirmative procedure.

5. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of parliamentary procedure has been considered appropriate. Both delegated powers are order-making powers.

Delegated powers

Section 4 – historical periods

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

6. This power enhances the order-making power already set out at section 59(1) of the 2002 Act by enabling the Scottish Ministers to make different provision for records of different purposes, exemptions of different kinds, or different purposes in other respects. The amendment does not alter the existing procedure under the 2002 Act.

Reason for taking power

7. The Scottish Government’s Improving Openness consultation¹ in 2009 considered whether the period of 30 years at which a record is considered “historical” should be reduced. Reducing the period at which point records are considered to be “historical” impacts on the lifespan of the exemptions set out at section 58(1) of the 2002 Act. A consequence of reducing the 30-year period could therefore be to make more information publicly available earlier.

8. At the time of the Improving Openness consultation, the Scottish Government considered that the practice of making records routinely available after 15 years should be applied to all Scottish public authorities subject to the 2002 Act. However, the Scottish Government also acknowledged that those authorities subject to freedom of information legislation are wide ranging and numerous and that other authorities might have different views on the appropriate lifespan of the “30 year” exemptions, dependent on the nature of the information that they hold.

9. This was borne out in consultation responses² highlighting particular issues with certain exemptions and certain types of records, often specific to certain types of authority – for example, social work records, adoption records and information bequested for research purposes. Consequently, the Scottish Government has considered that, while the specified time period at section 57 of the 2002 Act should be reduced, separate provision should be made for particular exemptions and types of record to ensure that adequate protection for certain information remains.

¹ <http://www.scotland.gov.uk/Publications/2009/07/01094653/0>

² <http://www.scotland.gov.uk/Publications/2009/11/26114548/0>

Choice of procedure

10. An order made under this section is subject to the affirmative procedure in order that the Parliament may be given opportunity to consider any issues arising from a decision to reduce the lifespan of exemptions set out at section 58 of the 2002 Act.

Section 7 – commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
**Parliamentary procedure: Default laying requirement under section 30 of the
Interpretation and Legislative Reform (Scotland) Act 2010**

Provision

11. This provision enables the Scottish Ministers to appoint a day or days on which the provisions of the Bill come into force (other than sections 6, 7 and 8, which come into force on the day after Royal Assent). The Scottish Ministers may make such transitional, transitory or saving provision in the commencement order as might be required (section 7(3)).

Reason for taking power

12. This provision will enable the Scottish Ministers to appropriately commence the provisions of the Bill. It is desirable for the Scottish Ministers to be able to control commencement in case it is necessary to bring forward or delay the commencement of the Bill. It is anticipated that section 1 of the Bill will commence at such time as an order made under section 59(1) of the 2002 Act comes into force.

Choice of procedure

13. The power is subject to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10). This is typical for commencement orders.

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

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