

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Freedom of Information (Amendment) (Scotland) Bill (introduced in the Scottish Parliament on 30 May 2012) as amended at Stage 2. Text has been added as necessary to reflect amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government 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 amends the Freedom of Information (Scotland) Act 2002 ('the 2002 Act').

5. The 2002 Act has been in force since 1 January 2005. Two areas of the 2002 Act have been identified as requiring amendment which can only be achieved through primary legislation.

6. The two areas concern:

- the order-making power relating to the definition of what constitutes a 'historical record' and the lifespans of certain exemptions, and
- the ability to prosecute in the event of information not being disclosed due to, for example, alteration, destruction or concealment.

7. The Bill also expands the provisions at section 5 of the 2002 Act relating to the use of the power to extend coverage by widening the scope of consultation and introducing the requirement for Scottish Ministers to report periodically on the use (or otherwise) of the order-making power.

8. In addition, the Bill proposes two minor amendments intended to add clarity and strength to the 2002 Act. Both these amendments arise from the Special Report to the Scottish Parliament¹ submitted by the then Scottish Information Commissioner in January 2012.

THE BILL – SECTIONS

Section 1A – Designation of authorities

9. Section 5 of the 2002 Act provides that the Scottish Ministers may by order designate as a Scottish public authority for the purposes of the Act any person who is neither listed in 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 who is providing, under contract to a Scottish public authority, any service whose provision is a function of that authority.

10. The Bill expands on section 5 in two respects. Firstly, it broadens the required scope of consultation on an order made under section 5(5) to include “other persons as Ministers consider appropriate”, for example, those likely to use the services of a body proposed for coverage. The Bill also introduces a requirement for the Scottish Ministers to report periodically to the Parliament on the use, or otherwise, of the power to extend coverage under section 5. The reporting period is set at three years - though this in no way precludes the use of the power at any other time during this period.

Section 2 – Refusal notice

11. Section 18 of the 2002 Act sets out that a Scottish public authority can issue a refusal notice in responding to a request for information, if to reveal whether the information existed or was held would be contrary to the public interest. Such a response, usually referred to as ‘neither confirm nor deny’ can only be issued in relation to certain exemptions which would apply to the information, if held.

12. The Bill adds section 38 (which provides exemption for personal information) to those exemptions listed at section 18 of the 2002 Act, enabling a ‘neither confirm nor deny’ response to be issued where a request concerns personal information. The amendment also brings the Bill into line with the Environmental Information (Scotland) Regulations 2004 which already provide for a ‘neither confirm nor deny’ response to be issued in respect of personal information.

Section 3 – Accessible information

13. Section 25 of the 2002 Act concerns information which is otherwise accessible. All public authorities subject to the 2002 Act are required to satisfy the requirement to adopt a publication scheme. The Bill clarifies that any information made available under an approved publication scheme is exempt and does not need to be provided to the applicant.

¹ <http://www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReport2012.asp>

Section 4 – Historical periods

14. Section 57(1) of the 2002 Act defines the period of time after which a record becomes a “historical record”, which is currently thirty years. Section 58 of the 2002 Act identifies those exemptions which are time limited, including, at section 58(1), those exemptions which cannot be applied to information contained in a ‘historical record’.

15. Section 59 of the 2002 Act contains order-making powers to reduce the period of time after which a record becomes ‘historical’ (thereby reducing the period of time those exemptions mentioned at section 58(1) can be applied) and also the lifespans of those exemptions mentioned at section 58(2). At present, an order amending the specified time period at section 57(1) would affect all those exemptions mentioned at section 58(1) – it is not possible to reduce the lifespan of just some of the exemptions mentioned at section 58(1).

16. The Bill replaces the existing power to modify section 57(1) with a new power to modify the rules around the meaning of “historical record”. In particular, it provides that in modifying the definition of “historical record” an order may set specific time periods (though not exceeding thirty years) beginning with the date on which the record is created, or a particular date in the calendar year following that date, in line with the power in section 59(1). Specifically in respect of the exemption in section 41(a) (Communications with Her Majesty etc.) the specified time period can begin with the occurrence of an event other than the creation of the record, for example, the death of the relevant member of the Royal Family.

17. The Bill also amends section 59 to allow for an order in relation to either the meaning of “historical record” or section 58 to make different provision for individual exemptions and records of certain descriptions, or for different time periods for particular records.

18. The Bill further allows such an order to make such ancillary provision (for example, consequential, supplementary, incidental, transitional, transitory or saving provisions) as the Scottish Ministers think fit.

Section 5 - Time limit for proceedings

19. Section 65 of the 2002 Act sets out that a person who, with the intention of preventing disclosure of information subject to a request, alters, defaces, blocks, erases, destroys or conceals the information is guilty of an offence. An offence under section 65 is a summary only offence with a fine not exceeding, at current levels, £5,000. As a summary only offence, any prosecution must be brought within six months of the commission of the offence, in accordance with section 136 of the Criminal Procedure (Scotland) Act 1995.

20. The Bill amends the 2002 Act by specifying that the time period within which a prosecution must be brought is six months from the date on which evidence, sufficient in the opinion of the prosecutor to justify proceedings, comes to his or her knowledge. No proceedings can be commenced more than three years after the commission of the offence.

This document relates to the Freedom of Information (Amendment) (Scotland) Bill as amended at Stage 2 (SP Bill 14A)

Section 7 – Commencement

21. This section brings into force sections 6 to 8 on the day after Royal Assent. Other sections come into force on such a day as the Scottish Ministers may by order determine.

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