

# **FREEDOM OF INFORMATION (AMENDMENT) (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 (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 30 May 2012:

- Explanatory Notes;
- a Financial Memorandum;
- Scottish Government Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 14–PM.

## **EXPLANATORY NOTES**

### **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 seeks to make similar amendment to the 2002 Act in respect of the exemption relating to communications with Her Majesty as has been made to the equivalent section of the UK Freedom of Information Act 2000 ('the 2000 Act').

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 Parliament<sup>1</sup> submitted by the then Scottish Information Commissioner in January 2012.

### **THE BILL – SECTIONS**

#### **Section 1 – Royal exemptions**

9. Section 2 of the 2002 Act sets out those exemptions which are 'absolute'. This means there is no requirement to consider the public interest when applying the exemption.

10. The Constitutional Reform and Governance Act 2010 (CRA) introduced amendments subdividing section 37(1)(a) of the 2000 Act (the UK equivalent of section 41(a) of the 2002 Act). These amendments included making separate reference to communications with the

---

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

Sovereign; communications with the heir to, or the person who is for the time being second in line of succession to, the Throne; and communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne.

11. The Bill seeks to replicate the effect of the CRAG amendments by specifying that certain information falling within the section 41(a) exemption (as set out in new section 2(2)(f) of the 2002 Act, inserted by section 1(2)(b) of the Bill) no longer requires to be assessed in terms of the public interest. Therefore, when applying the section 41(a) exemption to information falling within new section 2(2)(f), the public interest in whether or not to release does not need to be considered.

12. The Bill further reflects the relevant CRAG amendments by clarifying (as set out in new section 2(3) of the 2002 Act, inserted by section 1(3) of the Bill) that communications made or received on behalf of a particular member of the Royal Family are regarded as being communications with that member – and therefore afforded the same level of exemption.

13. Communications made with the Royal Family and the Royal Household (other than those on behalf of Her Majesty, the heir to, or the person who is for the time being second in line of succession to, the Throne, and a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne) continue to be subject to assessment against the public interest in whether or not to release them.

## **Section 2 – Refusal notice**

14. 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.

15. 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**

16. 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.

## **Section 4 – Historical periods**

17. Section 57(1) of the 2002 Act defines the period of time after which a record becomes a ‘historical record’. 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’.

18. 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).

19. The Bill allows separate provision to be made for individual exemptions and records of certain descriptions, as specified in any order. The enhanced order-making power also applies to those exemptions coming under section 58(2) of the 2002 Act.

### **Section 5 - Time limit for proceedings**

20. 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.

21. 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.

### **Section 7 – Commencement**

22. 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 Scottish Ministers may by order determine.

---

## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

23. This document relates to the Freedom of Information (Amendment) (Scotland) Bill (‘the Bill’) introduced in the Scottish Parliament on 30 May 2012. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

24. The provisions in the Bill are of a largely technical nature.

25. The Bill is intended to modify, improve and strengthen existing measures in the Freedom of Information (Scotland) Act 2002 ('the 2002 Act').

## **COSTS ON THE SCOTTISH ADMINISTRATION**

26. The changes set out in the Bill will have no cost implications for the Scottish Administration. In respect of the amendment by section 4 of the Bill of the order-making power in section 59 of the 2002 Act concerning historical records, following enactment, an order will be brought forward formally setting out revised lifespans for certain exemptions. The order will be subject to appropriate consultation including an assessment of the resource implications of administering revised lifespans.

27. While the lifespans of certain exemptions have yet to be reduced as a matter of law, from 2009 it has been Scottish Government's policy to open historical files at 15 years (rather than at 30). This has resulted in the National Records of Scotland (NRS) making over 12,000 files publicly available earlier than would ordinarily have been the case.

28. The costs involved in organising the early release of these files, which were met from existing NRS budgets, are estimated to have been in the region of £60-65,000 over a two year period. Though as yet not quantified, it would be anticipated that the earlier release of information would over time reduce the number of requests (as more information would be publicly available).

29. Information requests are estimated to cost the Scottish Government £236<sup>2</sup> each (considerably more if the request continues to review and appeal stages). However, it is premature to identify long term savings from the Scottish Government's policy of early release of information.

30. In respect of the amendment of the time period for bringing a prosecution under section 65 of the 2002 Act, it should be noted that no prosecutions have yet been brought. In the event of a prosecution, costs would be borne by the Scottish Court Service (part of the Scottish Administration) and the relevant public authority or individual. In the event of the offence coming to light during an investigation by the Scottish Information Commissioner it could also be expected that there would be cost implications for that authority.

31. Given prosecution is the role of the Scottish Court Service it is anticipated that any relevant costs would be borne as part of existing budgets and should not be seen as an additional cost on top of standard financial requirements.

32. In the absence of evidence from section 65 prosecution figures, estimating potential costs involved are taken from two reports into the costs of the Scottish Criminal Justice System. The first, published in 2008, suggests a maximum figure of about £2,200 (though the data is from

---

<sup>2</sup> <http://www.scotland.gov.uk/About/FOI/FOICostReport>

2005/06)<sup>3</sup>. This is though consistent with an Audit Scotland report published in September 2011 which suggests a figure of £2,100<sup>4</sup>.

33. The cost of court proceedings will inevitably vary depending upon the complexity of each case. Duration will also vary depending on the point at which the case is concluded. It should be noted that the 2008 report cited above shows that only 7% of cases concluded at evidence led trial (resulting in the highest level of potential cost) whereas 45% of cases were resolved at the first stage of proceedings (with costs of about £250).

34. The 2008 report also provides separate figures for criminal legal aid costs including in respect of Sheriff Court summary cases. The figures suggest an average cost, in cases where legal aid is paid, of £687.

### **COSTS ON LOCAL AUTHORITIES**

35. As with the Scottish Administration above, the technical changes to the 2002 Act will have no financial implications for local authorities. In the event of an order being brought forward under an amended section 59, the views of local authorities would be invited providing an opportunity for them to set out any anticipated costs incurred relating to revised lifespans. However, it would be anticipated that any costs incurred by local authorities would be met from existing budgets. Equally, with respect to section 65, in the event of a local authority being subject to prosecution it would be expected that relevant costs would be met from existing budgets.

### **COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

36. The technical changes in the Bill have no implications for other bodies, individuals or businesses. However, any subsequent order brought forward under amended order-making powers would potentially affect all public authorities subject to the 2002 Act – particularly those holding records of significant longevity.

37. In the event of an order being brought forward setting out revised lifespans for certain exemptions, consultation would provide other bodies etc. with an opportunity to assess anticipated costs relating to revised lifespans. It should also be noted that the Office of the Scottish Information Commissioner does not anticipate any reduction in the number of applications as the result of a subsequent order reducing the lifespan of certain exemptions.

38. It would be a matter for individual authorities to decide whether to proactively release information if exemptions no longer applied - or to await a request for the information itself. However, as noted above in respect of NRS, in the event of authorities proactively releasing information in line with revised lifespans, costs would be expected to be borne from existing budgets.

---

<sup>3</sup> <http://www.scotland.gov.uk/Resource/Doc/237550/0065253.pdf>

<sup>4</sup> [http://www.audit-scotland.gov.uk/utilities/search\\_report.php?id=1706](http://www.audit-scotland.gov.uk/utilities/search_report.php?id=1706)

39. As noted earlier, the costs of bringing a prosecution in terms of section 65 would primarily fall on the Scottish Court Service and the relevant public authority or individual. However, it could also be expected that there would be limited cost implications for the Scottish Information Commissioner in the event of the offence being discovered during an investigation by the Commissioner's office.

40. As the former Scottish Information Commissioner notes in his consultation response, section 65 has been a factor in only a very small number of cases – in none of which did time allow for prosecution to be brought. Any resources involved in pursuing potential prosecution would be an integral part of the costs of investigation – with such costs expected to be met from existing budgets.

---

## **SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE**

41. On 30 May 2012, the Cabinet Secretary for Parliamentary Business and Government Strategy (Bruce Crawford MSP) made the following statement:

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

---

## **PRESIDING OFFICER'S STATEMENT ON LEGISLATIVE COMPETENCE**

42. On 29 May 2012, the Presiding Officer (Tricia Marwick MSP) made the following statement:

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

*These documents relate to the Freedom of Information (Amendment) (Scotland) Bill (SP Bill 14)  
as introduced in the Scottish Parliament on 30 May 2012*

# **FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL**

## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2012.

Applications for reproduction should be made in writing to the Information Policy Team, Office of the Queen's Printer for Scotland, Admail ADM4058, Edinburgh, EH1 1NG, or by e-mail to: [licensing@oqps.gov.uk](mailto:licensing@oqps.gov.uk).

OQPS administers the copyright on behalf of the Scottish Parliamentary Corporate Body

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland.

ISBN 978-1-4061-9041-0