

# **Freedom of Information (Scotland) Act 2002**

## Overview

This ‘Overview’ provides a general introduction to the Freedom of Information (Scotland) Act 2002 and aims to outline the broad principles of this legislation. This document should not be viewed as definitive practical guidance but rather as an informative guide to aid basic understanding of the Act. The Overview will be supplemented in due course with two codes of practice and other associated guidance.

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## In summary

1. The Freedom of Information (Scotland) Act 2002 was passed by the Scottish Parliament on 24 April and received Royal Assent on 28 May 2002. It will introduce a general statutory right of access to all types of 'recorded' information of any age held by Scottish public authorities. Subject to certain conditions and exemptions, any person who makes a request to a public authority for information will be entitled to receive it.
2. The Act will be promoted and enforced by a fully independent Scottish Information Commissioner. Kevin Dunion has been appointed to this post by Her Majesty, on the nomination of the Scottish Parliament.
3. Two Codes of Practice to be issued under the Act will provide guidance to public authorities:
  - on responding to requests for information and associated matters (Section 60 Code of Practice); and,
  - on records management (Section 61 Code of Practice).
4. Each Scottish public authority will be required to adopt and maintain a 'publication scheme' setting out how it intends to publish the different classes of information it holds, and whether there is to be a charge for the information.
5. The Act is not yet in force. The Executive has agreed an implementation timetable with the Scottish Information Commissioner which will fully commence the Act on 1 January 2005. The Scottish Freedom of Information Implementation Group, with representation from across the Scottish public sector, was established in 2001 to prepare and oversee a strategy to successfully implement this legislation. The Group has twice published an Annual Report and these can be viewed alongside the Group meeting papers and minutes on the Executive's website (<http://www.scotland.gov.uk/government/foi/>).

## Who is covered by the Act?

6. The Act applies to Scottish public authorities. A detailed list is contained in Schedule 1 of the Act. This includes:
  - the Scottish Executive and its agencies;
  - Local Authorities;
  - NHS Scotland (NHS Boards, Trusts and other Health related organisations);
  - Schools, Colleges and Universities;
  - the Police; and,
  - the Scottish Parliament.
7. Schedule 1 also contains a list of other public bodies covered by the Act, ranging from various official advisory and expert committees to regulators and organisations such as the Parole Board for Scotland, the Scottish Environmental Protection Agency, the Scottish Qualifications Authority and the Mental Welfare Commission for Scotland.
8. The Act provides for other authorities to be added later, and for organisations to be designated as public authorities if they exercise functions of a public nature or provide a

service under a contract which is a function of a public authority. This provision would enable private companies to be brought within the scope of the Act should they be involved in significant work of a public nature, for example major PFI /PPP contracts. In such cases, only the company's involvement in work of a public nature would be affected by FOI and not other areas of its business.

9. As part of the devolution settlement, UK Government departments operating in Scotland and cross-border public authorities (e.g. the MoD and the Forestry Commission) are not be covered by Scottish FOI legislation, but instead by the UK Freedom of Information Act 2002.

## **The right to information**

### *New rights*

10. The Freedom of Information (Scotland) Act 2002 entitles a person who requests information held by a Scottish public authority, subject to certain conditions and exemptions, to receive the information. The applicant may express a preference for receiving the information in a particular format, in summary, or by asking to inspect a record.

11. As soon as the Act is in force, applicants will be able to exercise this statutory right of access to information. Requests may then be made for information recorded both before and after the Act was passed. The Act is fully retrospective and will apply to information of any age.

12. Public authorities will also need to be aware that there is a right of access to certain information under Environmental Information Regulations (see [paragraphs 50 & 51](#)) and other existing legislation (see [paragraph 56](#)).

### *Making a request*

13. Under the Act, there will be no restrictions on who may apply to a Scottish public authority for information, although the request must be in writing or in another form with some permanency capable of being used for subsequent reference (such as a recording made on audio or video tape). All recorded communications to a public authority seeking information must be considered as FOI requests, although the applicant does not have to quote the Act or give reasons for requesting the information.

## **New responsibilities for public authorities**

### *Publication schemes*

14. The Act places a duty on each Scottish public authority to adopt and maintain a 'publication scheme', which must be approved by the Scottish Information Commissioner. Such schemes must set out:

- the classes of information the authority publishes;
- the manner in which the information is published; and,
- details of any charges.

15. In considering the content of its publication scheme, the Act requires a public authority to have regard to the public interest in allowing access to the information it holds about:

- the provision, cost and standard of its service provision;
- factual information or analysis informing decision making; and,
- the reasons for decisions made by it.

16. Publication schemes may either be designed for particular bodies or may be generic. The Commissioner may approve model schemes for a group of similar bodies, such as schools.

17. Information is exempt from the Act if the applicant can reasonably obtain it by other means. Where information is already accessible because it is covered by the authority's publication scheme, the authority will not then be required to provide the information in response to an FOI request. In other words, 'published' material is not generally covered by the Act.

### *Responding to requests*

18. A request will have to satisfy certain conditions before an authority is obliged to respond to it. For example, it must be in a form capable of being used for subsequent reference and must include sufficient information to enable the authority to identify the information requested. Authorities will not have to comply with vexatious or repeated requests if the authority has recently responded to an identical or substantially similar request from the same person. However, public authorities will be under a duty to provide advice and assistance to anyone making a request. Further guidance on this duty will be set out in the Section 60 Code of Practice (see [paragraphs 32 & 33](#)).

19. Scottish public authorities will be required to respond to requests within 20 working days. In certain circumstances, the Keeper of the Records of Scotland (listed in Schedule 1) will have 30 working days to respond to requests. Where possible, information must be provided to the applicant in the manner requested, if it is reasonably practical to do so. It should be noted that this does not detract from any duty the authority is placed under by the Disability Discrimination Act 1995. Guidance will be developed explaining how public authorities should administer the FOI regime in accordance with this legislation.

20. As mentioned in paragraph 17, a public authority will not have to respond to an FOI request for information that is included in a publication scheme as the material is otherwise accessible. In contrast, an authority will be required to respond to requests for material which is 'unpublished' on a case-by-case basis, taking into account the right of access and any exemption that may apply (exemptions are described in [paragraphs 26 – 31](#)). It should be noted, however, that there is an exemption which covers material that is due to be published within twelve weeks.

21. Where an authority decides not to release the information requested, because it considers an exemption applies, it must give reasons for its decision. This is known as a 'decision notice' which must inform the applicant of his/her right of appeal firstly, to the authority (to review its decision) and, if still dissatisfied, to the Scottish Information Commissioner. However, in most cases where an exemption applies, an authority may still be required to release the information if it is in the public interest to do so (see [paragraphs 24 – 31](#)).

## Fees

22. Public authorities may charge for the disclosure of information. An authority's publication scheme will be required to set out any charges for the provision of information under the scheme. Statutory charging regimes for the provision of information (for instance, for extracts of birth or marriage certificates) are unaffected by the Act.

23. Information that is not covered by an authority's publication scheme or is not subject to a statutory charging regime will be considered under FOI fee regulations. These will be developed following public consultation. During the Parliamentary passage of the Freedom of Information (Scotland) Bill 2002, the Executive proposed the following:

- any request costing under £100 to fulfil will be free of charge to the applicant;
- for requests costing between £100 and an upper cost threshold (likely to be set between £500 and £600) the applicant will be charged 10% of prescribed costs; and,
- authorities will not be required to respond to requests costing in excess of the upper cost threshold (although they may do so if they wish).

## The public interest

24. In the majority of cases where an exemption applies, the authority will also have to consider whether to release the information in the public interest. This public interest test involves considering the circumstances of each particular case and the exemption that covers the information. The balance will always lie in favour of disclosure: information should only be withheld if the public interest in withholding it is *greater* than the public interest in releasing it.

25. Those exemptions to which the public interest test does not apply are known as 'absolute' exemptions. Such categories include:

- information otherwise accessible;
- statutory prohibitions on disclosure;
- breaches of confidence;
- court records; and,
- information for which other access rights are provided – such as personal information covered by the Data Protection Act 1998.

## Exemptions

26. Certain types of information held by a public authority may be regarded as exempt information i.e. it would not have to be provided in response to an individual request. The Act sets out a number of such categories, relating to matters such as national security and defence, police investigations, and the formulation or development of government policy.

27. Before an exemption is cited to withhold information, a public authority will usually be obliged to consider two further points. Firstly, some of the exemptions can only be cited if the release of the information would *prejudice substantially* the purpose to which the exemption relates. For instance, information held in connection with law enforcement can only be withheld if its release would, for example, prejudice substantially the prevention or the

detection of a crime. The form “substantial prejudice” is known as a “harm test” and it is intended to make clear that information should be disclosed unless the prejudice caused would be real, actual and of significant substance.

28. Secondly, some exemptions require the public authority to apply the "public interest" test before making a final decision as to whether or not to release the information (see [paragraphs 24 & 25](#)). Most of the exemptions will require a public authority to apply both the harm test and the public interest test.

29. It should be noted that only the information to which an exemption applies can be withheld. If a particular document has been requested which contains some exempt information, only those specific items of exempt information can be withheld. The remainder of the document would still have to be released.

30. The exemptions in the Act do not preclude the disclosure of information by a public authority. If information is considered to fall within an exemption and, where relevant, it is considered not to be in the public interest to disclose that information, a public authority need not disclose that information, but the Act does not *require* the authority to withhold it.

31. It is anticipated that the Scottish Information Commissioner, over time and in light of case-by-case experience, will develop detailed guidance on exemptions.

### **Section 60 Code of Practice - Functions under this Act**

32. The Act specifies that two Codes of Practice are to be issued. Section 60 provides for the Scottish Ministers, after consultation with the Scottish Information Commissioner, to issue a Code of Practice providing guidance on how public authorities should discharge their duties in complying with the Act.

33. The Section 60 Code covers the duty to provide advice and assistance to applicants, the transferring of requests from one authority to another, consultations with third parties (persons other than the applicant who may be affected by the release of information), the procedures for dealing with complaints, and the inclusion in contracts entered into by public authorities of terms relating to the disclosure of information. General guidance on the collection and recording of statistics to monitor responsibilities under the Act will be included in this Code.

### **Section 61 Code of Practice - Records Management**

34. Section 61 provides for the issue by the Scottish Ministers, after consultation with the Commissioner and the Keeper of the Records of Scotland, of a Code of Practice providing Scottish public authorities with guidance on the keeping, management and destruction of their records. This Code may also include guidance on the transfer of records to the Keeper of the Records of Scotland, on reviewing records before such a transfer and on a Scottish public authority holding records on behalf of another such authority.

## The Scottish Information Commissioner

35. The Act establishes the post of a fully independent Scottish Information Commissioner, with responsibility to promote and enforce the FOI legislation. Kevin Dunion has been appointed to this post by Her Majesty, on the nomination of the Scottish Parliament.

36. The Commissioner will be an independent public official whose duties will include:

- the promotion of good practice;
- approving and assisting in the preparation of publication schemes;
- providing information on operation of the Act; and,
- enforcing compliance with the Act.

37. The Commissioner will lay before the Parliament an annual report and other such reports as the Commissioner considers appropriate.

38. The office of the Scottish Information Commissioner is independent of the office of the (UK) Information Commissioner. The (UK) Information Commissioner is responsible for policing the (UK) Freedom of Information Act 2000, which does not apply to bodies covered by the Scottish legislation. However, unlike the Scottish Information Commissioner, the (UK) Information Commissioner has responsibility for the enforcement of the Data Protection Act 1998. The interface between FOI and data protection is covered in [paragraphs 52-55](#).

## Enforcement

39. A person who has made a request for information may apply to the Scottish Information Commissioner for a decision as to whether the public authority had dealt with the request in accordance with the Act. If the Commissioner considered that an appeal was valid, the public authority would be notified and comments invited. The Commissioner may endeavour to effect a settlement between the applicant and the authority.

40. In the absence of any settlement the Commissioner must issue a decision within four months of receipt of the appeal.

41. To assist in the consideration of an appeal, the Commissioner may serve an 'information notice' to the public authority. This power allows the Commissioner to obtain information held by an authority to support an appeal investigation.

42. If the Commissioner was satisfied that a public authority had failed to comply with a provision in the Act, an 'enforcement notice' may be served. Such a notice would advise the authority to take action to comply with the provision.

43. If the public authority failed to comply with either a decision, information or enforcement notice, the Commissioner could certify such failure to the Court of Session. The Court could inquire into the matter and, after hearing witnesses or any statement made on behalf of the public authority, deal with the authority as if it had committed contempt of court.

## Appeals

44. When serving a notice of any kind, the Commissioner must at the same time explain the appeals mechanism. The Act provides scope for appellants and public authorities to appeal, on points of law, against decisions made by the Commissioner to the Court of Session.

## Ministerial certificates

45. The Act includes provision for the Scottish Ministers to take a collective decision on the disclosure of information covered by a limited number of exemptions. The First Minister may, after consulting the other members of the Executive, issue a certificate which would override a decision or enforcement notice given to the Scottish Administration by the Commissioner. This certificate would need to be issued within 30 working days of the Commissioner giving such a notice and the First Minister would be required to lay a copy of it before the Parliament within ten days of its issue.

46. This provision is designed to protect the disclosure of exceptionally sensitive information and is a standard feature of FOI regimes world-wide.

## Historical records

47. Current administrative practice in Scotland provides that some public records are closed for a certain period of time (for example 30 years) before they are then made open to the public. This practice will cease under the Freedom of Information regime. In essence, any public record will be open to the public unless a specific exemption under the terms of the Act applies to that record. The Act also sets out arrangements for certain exemptions to fall away in relation to historical records. In other words, some exemptions cease to apply when a record has reached a specified age.

48. “Historical records” are defined by the Act as records which are over 30 years old. There are several exemptions which cease to apply after 30 years, while a small number of exemptions fall away after 60 or 100 years. Examples of exemptions which fall away after 30 years include those relating to matters such as the formulation or development of government policy, relationships between government administrations within the UK, and communications with Her Majesty and other members of the Royal Family.

49. Exemptions which do not fall away with time remain always to be considered before a decision on disclosure is taken. However, this arrangement does not mean that records covered by these exemptions will necessarily remain exempt forever. Rather it is deemed appropriate for consideration always to be given to exemptions for certain matters, such as national security and defence, when deciding whether requested information should be disclosed. Consequently, a public authority receiving a request for “older” information can continue to consider exemptions which apply in perpetuity, but will also need to consider, for example, whether the public interest in disclosing the information continues to be outweighed by that in maintaining the exemption.

## **Environmental Information Regulations**

50. The Act enables the Scottish Ministers to make regulations which provide for a regime to access environmental information. These Environmental Information Regulations will implement the Aarhus Convention – the United Nations Economic Commission for Europe (UNECE) ‘Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters’. This is a measure to which the United Kingdom and all other European Union Member States are signatories. It is intended that the Scottish Information Commissioner will operate as the appellate authority under the Scottish regulations.

51. Once operational, these new regulations will be the principal means of gaining access to environmental information. Therefore, any request for environmental information will first be considered in accordance with the Environmental Information Regulations before, if necessary, taking account of the Freedom of Information (Scotland) Act 2002.

## **FOI and Data Protection**

52. Individuals already have the right to access information about them (‘personal data’) which is held on computer, and in some paper files, under the Data Protection Act 1998. This is known as a ‘subject access right’. Data protection is a reserved matter and responsibility for enforcement of the Data Protection Act 1998 lies with the (UK) Information Commissioner. To avoid any confusion, it should be noted that the Scottish Information Commissioner does not have responsibility for enforcing data protection legislation.

53. A request by an individual for information about himself/herself will be exempt under the Freedom of Information (Scotland) Act 2002 and will continue to be handled as a ‘subject access request’ under the Data Protection Act 1998. In certain circumstances such a request may involve the release of associated third party information.

54. The Freedom of Information (Scotland) Act 2002 extends access rights which already exist under the Data Protection Act 1998. Where an applicant specifically requests information about a third party, or where responding to a FOI request would involve the disclosure of personal information about a third party, the request falls within the remit of the Freedom of Information (Scotland) Act 2002. However, the authority must apply the Data Protection Principles when considering the disclosure of information relating to living individuals. An authority must not release third party information, if to do so would mean breaching one of the Principles.

## ***Data Protection Act 1998 amendments***

55. The (UK) Freedom of Information Act 2000 will make a number of amendments to the Data Protection Act 1998. One of the most significant is that the definition of ‘data’ will be extended, as far as public authorities covered by the UK FOI Act are concerned, to cover **all** personal information held. This will include ‘structured’ and ‘unstructured’ manual records. Only the right of subject access, the right to correct inaccurate data and limited compensation rights will apply to this new category of data. It is intended that this amendment will be extended to Scottish public authorities by means of an order under section 104 of the Scotland Act 1998 following full implementation of the Scottish FOI regime.

### **Relationship with other legislation**

56. The Freedom of Information (Scotland) Act 2002 does not repeal any other legislation. Any Act which contains provisions dealing with the disclosure and non-disclosure of information remains in operation and will have to be complied with. However, the Act provides that Ministers may by order repeal or amend any other enactment which, in their opinion, is capable of unnecessarily preventing disclosure of information. Any request for information held by a Scottish public authority will have to be considered under the Scottish FOI Act, when in force, as well as in relation to any other existing legislation relevant to that request.

### **Additional information**

57. Further copies of this Overview may be obtained from:

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Copies can also be made available in alternative formats and certain other languages upon request. In addition, the Scottish Executive website contains further information about FOI and can be accessed at: <http://www.scotland.gov.uk/government/foi>