

Freedom of Information (Amendment) (Scotland) Bill – Consultation Response



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I welcome this opportunity to submit my views to the Scottish Ministers on the proposals for a Freedom of Information (Amendment) (Scotland) Bill.

The Scottish Information Commissioner has a statutory duty to enforce and promote the Freedom of Information (Scotland) Act 2002 (FOISA). The proposed Bill contains amendments which will impact on that role, enhancing Scotland's FOI regime and the public right to information in a number of areas - reducing the lifespan of certain exemptions and enhancing the ability to take forward prosecutions under section 65 of FOISA.

I welcome the majority of the proposed amendments contained in the draft Bill. However, I hold significant concerns in relation to the proposal to introduce an absolute exemption for aspects of section 41(a) (Communications with Her Majesty, etc). Absolute exemptions are not regarded as good practice and I consider this measure to be unnecessary. It would also create a fresh discontinuity in the way requests for related information would be dealt with under FOISA and the Environmental Information (Scotland) Regulations 2004 (the EIRs).

I set out my reasoning in my response to the consultation questions below. In addition, I also propose an alternative approach to the proposed section 65 amendment, which would serve to ensure that a prosecution could be taken forward in as wide a range of relevant circumstances as possible.

I would be happy to provide further information or respond to any questions arising from this submission, if required.

Response to consultation questions

Do you agree with the proposed amendment allowing greater flexibility to consider the lifespan of exemptions? Please give reasons for your response.

I agree with the proposed amendment allowing greater flexibility in terms of the lifespan of exemptions. I also recognise and support the assertion in the consultation paper that FOISA has contributed to a shift in both public authority culture and public expectations, towards greater openness and accountability, and that this has led to the long lifespan for exemptions being increasingly out of step.

In my response to the Scottish Government's "Improving Openness" consultation in 2009¹ I supported the proposals, put forward at that time, to reduce the lifespan of all eight exemptions contained in section 58(1) from 30 years to 15 years. It is clear, however, that concerns around the current "all or nothing" approach to the definition of a historical record (which means that currently any changes to this definition must apply

¹ www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=5319&SID=377



equally to each exemption listed in section 58, with no room for flexibility) has frustrated the laying of an order under section 59(1).

While I supported the earlier proposal to reduce the lifespan of all exemptions contained in section 58(1) to 15 years, I acknowledge that the proposed amendment will serve to remove the barriers which may have prevented Ministers from laying an order under section 59(1) of FOISA.

It is important to remember, of course, that most of the exemptions in question are subject to the public interest test, and that there will clearly be cases where it is appropriate for information falling within the scope of the exemptions to be released earlier, where the public interest in withholding the information is outweighed by that in release. These circumstances, will of course, continue to be addressed, both in public authorities' handling of the FOI requests they receive, and in the Commissioner's decisions on appeals.

The consultation paper does not make clear whether the reduction of the lifespan of exemptions would be fully retrospective, or whether it would only apply to records created after the Amendment Bill is introduced. In the interest of ensuring that the subsequent administration of FOI requests is as straightforward as possible, I would recommend that the amendment be made fully retrospective, so that it applies to all records held by authorities, regardless of their creation date. Such an approach would also be consistent with that taken following the Ministers' 2009 decision to make the bulk of the historic information held by the National Archives of Scotland available after 15 years.

I would encourage Ministers to also consider making similar amendments to the Environmental Information (Scotland) Regulations 2004 (the EIRs) in order to introduce a lifespan for equivalent exceptions contained in the EIRs. As noted in my earlier response the "historical records" provisions in FOISA is not reflected in the EIRs. This means that exceptions can be cited in relation to information regardless of its age under the EIRs, while the equivalent exemptions in FOISA will fall away in relation to non-environmental information. I would recommend addressing this anomaly by amending the EIRs, in order to ensure consistent rights of access to the information covered by these two interrelated regimes.

With a view to the intended section 59(1) Order and the Scottish Government's preliminary views, please provide any comment you may have regarding specific exemptions, for example Section 33(1), Section 36 or Section 41(a).

Specific comment is provided in relation to sections 33(1), 36 and 41(a) below.

Section 33(1) – commercial interests

With regard to the exemptions contained under section 33(1), I would support the reduction of the lifespan to 15 years for both section 33(1)(a) and 33(1)(b).

Section 33(1)(a) exempts information where it constitutes a "trade secret". I note that the consultation paper suggests that no examples of "trade secrets" held by Scottish public authorities were provided in response to the 2009 consultation. This is consistent with my own experience where there have been very few cases where exemption under section 33(1)(a) has been argued by authorities in refusing information. Indeed, only six of the 1,340 decisions published on my website reference this exemption, of which the majority (five decisions) relate to tendering information. In each of these six cases I was not persuaded that the information in question constituted a trade secret. I have, to date, been presented with no evidence to suggest that such



information is held by Scottish public authorities, and support the Ministers' conclusion that the lifespan of this exemption should be reduced.

In relation to section 33(1)(b), and in common with the view set out in the consultation document, it has been my experience that information falling within the scope of section 33(1)(b) will generally lose its sensitivity over a relatively short period of time, and I would agree with the Ministers' conclusion that a reduction of the lifespan of the exemption to 15 years is appropriate in relation to this exemption. Commercial information can and will, of course, continue to be disclosed before that time, where the exemption has been found not to apply, or where it does apply, but release is nevertheless in the public interest.

Section 36 – confidentiality

The consultation document sets out, in relation to section 36, that Ministers are minded to maintain the exemption at 30 years, although it is noted that separate treatments may be considered for the two constituent parts of the section. It is certainly my experience that there are significant differences to be addressed in the consideration of the passage of time in relation to each of the two exemptions contained under section 36.

Section 36(1) protects information where a claim to confidentiality of communications could be maintained in legal proceedings. This will include, for example, information which attracts legal professional privilege, such as communications between a client and their legal advisor. Under section 36(1), information which is found to fall within the scope of the exemption will normally retain that status while it remains undisclosed. Loss of that privilege over time will generally only occur as a consequence of the information no longer being confidential (e.g. through the disclosure of its content). The passage of time will therefore commonly have a lesser effect than in relation to the exemption under section 36(2) – indeed, I am not aware of any examples of cases that I have considered where the passage of time was central to the non-applicability of the section 36(1) exemption.

Section 36(1) is, however, also subject to the FOISA public interest test, and it is in relation to this test that the passage of time may be most significant. As time passes, the public interest arguments in maintaining the section 36(1) exemption may diminish, as we move further from the issue which, e.g., may have prompted legal advice to be sought in the first instance.

The passage of time will play a larger role in the applicability of the section 36(2) exemption, which exempts information absolutely where it has been obtained from another person and its disclosure would result in an actionable breach of confidence. In determining whether an actionable breach of confidence would occur, authorities are required to consider a number of factors, including whether the information has the “necessary quality of confidence” for the exemption to apply, and whether disclosure would be to the detriment of the person who communicated the information.

As time passes, the possibility that information has the necessary quality for the exemption to apply will often diminish, as may the chance of disclosure causing detriment. This will often be the case, for example, in relation to tendering or contractual information which has been supplied in confidence. Once a contract has been awarded, or once a service has been established, the likelihood of the release of information relating to that service or contract resulting in an actionable breach of confidence may rapidly diminish. This may be the case, for example, in relation to the description of a proposed solution, which may be confidential during the tendering process, but may subsequently become common knowledge once a contract is awarded and the solution implemented.



While tendering and contractual cases are the focus of a large number of the section 36(2) cases I have considered, these are clearly not the only circumstances where the section 36(2) exemption might apply. I acknowledge that other types of obligations of confidence raise different issues, and the passage of time may have less effect in relation to these. These might include, for example, information which concerns employee grievance issues, information relating to the records of a deceased person or, indeed, information contained in communications with the Royal Family. In many cases, of course, other exemptions may also apply to this information.

I accept, therefore, that while the passage of time will cause the exemptions available under section 36 to fall away rapidly in some cases, there will be other circumstances where this is less likely to be the case. The length of time for which the information should remain confidential will often depend on the specific nature of the information, and the circumstances of the case. While I am not fully convinced of the necessity to retain the lifespan of the section 36 exemptions at 30 years, I accept that there may conceivably be cases where it will be appropriate to retain the exemption beyond 15 years.

With this in mind, I would support the Ministers' decision to retain the section 36 lifespan at 30 years, bearing in mind that, nevertheless, there may well be circumstances where it is appropriate to release information before that time – e.g. where confidentiality is lost or the public interest considerations favour release in relation to section 36(1), or where a breach of confidence is no longer actionable, in relation to section 36(2).

Section 41(a) – Communications with Her Majesty etc.

The consultation document proposes two amendments which will affect the exemption under section 41(1). It is my view that these amendments combined will have the effect of significantly altering the scope and nature of the section 41(1) exemption.

Firstly, it is proposed that, subject to the revised Order-making powers set out in the draft Bill, the lifespan of the section 41(a) exemption will be amended to a “period of until 5 years after the “relevant death” (that being of Her Majesty, the heir, the second in line, or the relevant member of the Royal Family) or 20 years after the information has been created – whichever occurs latest”.

Secondly, it is also proposed that communications with Her Majesty, the heir or the second in line of succession will be subject to an absolute exemption.

The consultation document does not set out the Ministers' rationale for these amendments, other than noting that “it is appropriate to broadly mirror amendments made to the Freedom of Information Act 2000 (FOIA), in the interests of a common approach throughout the UK to the treatment of information relating to Her Majesty”. Beyond this, however, the basis for the amendment to the lifespan of section 41(a) is not set out, nor is the rationale for the creation of an absolute exemption in relation to section 41(a) made clear.

The Westminster Government's rationale for the introduction of an equivalent amendment to FOIA, however, is set out in the Ministry of Justice's Response to the 30-Year Rule Review², which stated, at paragraph 50-51, that:

² www.official-documents.gov.uk/document/cm78/7822/7822.pdf.



“The Government believes it is important to protect the constitutional conventions surrounding the Monarchy and its records. Of particular importance are the political impartiality of the Monarchy, the Sovereign’s right and duty to counsel, to encourage and warn her Government, as well as the right of the Heir to the Throne to be instructed in the business of Government in preparation for the time when he will be King. These rely on well-established conventions of confidentiality.

“In order to ensure that the constitutional position of the Monarchy is not undermined, information relating to communications with the Sovereign, the Heir to the Throne and the second in line to the throne, and those acting on their behalf, will be covered by an absolute exemption for a period of 20 years. If the Member of the Royal Family to whom the information relates is not deceased after the end of this 20-year period the absolute exemption will continue to apply until five years after their death.”

The constitutional conventions set out by the Ministry are, to my mind, adequately and appropriately protected by the current scope of the section 41(a) qualified exemption which is fully “fit for purpose” in this regard. Protections also exist in terms of the absolute exemptions relating to personal data (section 38(1)(b) of FOISA) and confidentiality (section 36(2)), both of which may often be applicable to information likely to fall within the scope of the section 41(a) exemption. Other FOISA exemptions may also apply, depending on the nature and content of the relevant communications.

In general, absolute exemptions should be rare in freedom of information laws. The Commonwealth Principles and Guidelines on the Right to Know agreed as far back as 1999 that “the right of access may be subject to only such exemptions, which are narrowly drawn, permitting government to withhold information only when disclosure would harm essential interests ...providing that withholding the information is not against the public interest.”³ The Scottish Government’s consultation does not explain why it is necessary to move away from this good practice of having at least the public interest test, or why the creation of an absolute exemption in relation to section 41(a) is necessary. Indeed, I consider that, if enacted, the amendments in relation to section 41(a) will be somewhat regressive, creating a wide-ranging absolute exemption, which will, in certain circumstances, only be set aside after a period longer than the exemption’s current 30-year lifespan, regardless of either the nature of the information, or the strength of the public interest arguments in favour of its release.

Paragraph 25 of the Scottish Government’s consultation sets out that “the Bill proposes to make communications with Her Majesty, the heir or the second in line of succession subject to “absolute” exemption”. In my view, the scope of the proposed exemption, if enacted, will be far more wide-ranging than suggested by paragraph 25. The consultation document refers to the fact that such “communications” will be made absolutely exempt. However, the wording of section 41(a) ensures that it will not just be the communications themselves which will be subject to an absolute exemption, but also any information held by Scottish public authorities which **relates** to those communications. This may therefore include all information which can be construed as relating to such communications, regardless of the nature of that information, or of where the public interest lies in relation to its release. Relevant information that could fall within the scope of the absolute exemption would, for example, include information relating to the number of times such communications have taken place, details of the departments or individuals within a public authority who have been involved in communications, or details of the cost to the authority of communications.

³ www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/commonwealth_expert_grp_on_the_rti_99-03-00.pdf



The exemption that would be created by the proposed amendment would, for this reason, be extremely far reaching, arguably more so than any other of the limited number of FOISA exemptions which are absolute. For these, the exemptions largely apply either to information which is contained within a specific type of document (e.g. a court record (section 37)), or where release would result in the breach of an existing law (e.g. section 26, section 36(2), section 38(1)(b)).

It is my view that it will only be appropriate to create a new absolute exemption for information in circumstances where there will never be public interest arguments which will favour the release of the information when weighed against those in non-disclosure. While I consider that the public interest in the maintenance of the constitutional convention underpinning section 41(a) is certainly very strong (and note that this has been demonstrated in a number of recent rulings of my counterpart the Information Commissioner in relation to the exemption under section 37(a) of FOIA), I cannot agree that there will never be circumstances where such information should be released in the public interest. Examples of where a disclosure may conceivably be appropriate, for example, may include:

- communications where the information in question is so far removed from the actual content or nature of any communications with the Royal Family that there is little or no evident public interest against disclosure (e.g. as in my Decision 105/2007);
- circumstances where there is significant public interest in release, and release would not undermine the privacy nor the constitutional position of members of the Royal Family (such as in the (UK) Information Commissioner's decision FS50154684 concerning information relating to the public cost of the Royal Family (albeit in that case relating to communications with the Royal Household)); or
- hypothetically, circumstances where a member of the Royal Family or staff on their behalf acts significantly outside their constitutional role in such communications, to the clear detriment of the public interest.

I note the Ministers' view that the amendment is proposed in the interests of a common approach throughout the UK. However, there are many examples where the Scottish law does not share a common approach with FOIA, which are often held to indicate that FOISA promotes greater transparency.

Furthermore, while the proposed amendment would indeed introduce a common approach on this matter with the Westminster FOI regime, it would simultaneously create a fresh discontinuity in relation to how such requests are dealt with in Scotland under FOISA and the EIRs.

Under the EIRs, there is no equivalent exception to the section 41(a) exemption. Therefore, requests for information relating to communications with the Royal Family which contain environmental information are not subject to a bespoke exception in the same way as under FOISA. Such requests, therefore, must be considered in terms of the exceptions available under the EIRs, with the exceptions contained under regulation 10(5)(d) (which relates to confidentiality), regulation 10(5)(f) (which relates to the interests of the person providing the information) and regulation 11 (which concerns to personal data), perhaps being those exceptions that authorities may be most likely to consider in relation to such information.

Each of the EIR exceptions (apart from certain parts of regulation 11 (personal data)), will continue to be subject to the public interest test, so an assessment of where the public interest lies in relation to the information will be retained in relation to any royal communications that contain environmental information. While the proposed amendment will make such information absolutely exempt from release under FOISA, where the information is environmental it may still be subject to a disclosure in the public interest. This will, in my view, create a clear anomaly in the way such information is considered.



In relation to the proposed draft Order which will alter the lifespan of section 41(a), I note that this will have the effect, in some circumstances, of reducing the lifespan of the exemption below the current 30 year threshold, with this lifespan being reduced to 20 years where a “relevant death” (of Her Majesty, the heir, the second in line, or the relevant member of the Royal Family) occurs within 15 years of the creation of the information. I also note, however, that there will be circumstances where this amendment will extend the lifespan of the exemption beyond the current 30 year threshold. Where, for example, information is 26 or more years old, and the member of the Royal Family to whom the communications relate is still alive, the lifespan of the exemption will continue until 5 years after the relevant death i.e. beyond 30 years.

It is difficult to comment on this particular amendment independently from the proposed amendment to introduce an absolute exemption for aspects of section 41(a) as, together, these two amendments serve to significantly restrict the right of access to information falling within the scope of the exemption. The effect of the two provisions would result in an absolute exemption for information relating to communications, which would in some cases last for more than the current 30 years. There would be no prospect of a release before that time on public interest grounds, regardless of either the distance of the information from the actual content of communications, the nature and content of the information, or the weight of public interest which may exist in relation to its disclosure.

Should Ministers be minded to retain section 41(a) as a qualified exemption, therefore, I would support the proposal to amend the lifespan of section 41(a) as set out in paragraph 24 of the consultation document.

Section 65

Do you agree with the proposed amendment increasing the relevant time period to 12 months?

While I am supportive of the move to increase the relevant time period, I am not fully confident that 12 months from the date the offence is committed will be adequate to facilitate prosecution in all circumstances. I would instead propose that Ministers consider an amendment to allow for summary prosecution within a fixed period of the offence coming to light.

I would recommend that summary proceedings for an offence under Section 65 should be commenced at any time within the period of 6 months from the date on which evidence, sufficient in the opinion of the prosecutor to justify proceedings, comes to his/her knowledge, with no proceedings being commenced more than 18 months after the commission of the offence.

Please give reasons for your response.

I am pleased to report that section 65 considerations have only been a feature in an extremely small proportion of the cases that I have considered since FOISA came into effect in 2005. For the overwhelming majority of the cases I consider, there has been neither any allegation nor any evidence of section 65 offences being committed by public authority staff. Section 65 has been a factor in only a very small number of cases, and in those cases I have so far been unable to take matters forward for prosecution. This has been as a direct result of the six month timescale for prosecution created by section 136(1) of the Criminal Procedure (Scotland) Act 1995. I therefore fully support the Ministers’ intention to amend section 65 of FOISA to increase the timescale available for the prosecution of an offence.



I am concerned, however, whether the proposed amendment to extend this timescale to 12 months will be adequate to bring forward a prosecution in all circumstances. The consultation document suggests that it may be up to ten months from the commission of an offence before that offence is **discovered** by the Commissioner. However, FOISA timescales provide that it can take up to ten months from the commission of an offence before **an appeal is made** to the Commissioner (taking into account the timescales within which an authority must comply with a request (section 10) for the applicant to require a review of refusal (section 20) and the authority to comply with the requirement for review (section 21) and then for the applicant to make an application to the Commissioner (section 47)).

Once an appeal is made, further time is required for both the validation of that application, and the investigation of the case, including, where relevant, the identification and investigation of alleged section 65 offences.

Given that an offence under section 65 will often, by its nature, be an offence of intentional concealment or destruction, suspected offences may only come fully to light following detailed investigation of the circumstances by the Commissioner's staff. In such cases, where a section 65 offence is suspected, the Commissioner's staff will need to gather evidence relating to the alleged offence before it can be determined whether the evidence is sufficient for a referral for prosecution to be made. Where an authority is reluctant to cooperate fully with an investigation, it may be necessary to issue an Information Notice to secure information, which can result in a further 42 days elapsing before information is provided. It may also be necessary to use the provisions of Schedule 3 introduced by section 54 to seek a warrant to enter and search premises, which require notice to be given to the occupier of the premises demanding access and, if this is refused, to be given notice of an application to a sheriff for a warrant.

While the extension of the timescale to 12 months would have the effect of substantially reducing the proportion of cases where a prosecution cannot be brought due to the expiry of the timescale, for the reasons set out above, it may often be the case that the capacity to prosecute may be frustrated.

Therefore, with the above factors in mind, I would recommend that summary proceedings for an offence under section 65 should be commenced at any time within the period of six months from the date on which evidence, sufficient in the opinion of the prosecutor to justify proceedings, comes to his/her knowledge, with no proceedings being commenced more than 18 months after the commission of the offence.

Such an amendment would be consistent with the approach taken to increase the time limit for the commencement of summary proceedings beyond the six month time limit in a range of other legislation. This includes, for example:

- Section 6 of the Road Traffic Offenders Act 1988
- Section 20 of the Wildlife and Countryside Act 1991
- Section 116 of the Social Security Administration Act 1992
- Section 34 of the Health and Safety and Work etc Act 1974
- Section 11 of the Computer Misuse Act 1990
- Section 107 of the Friendly Societies Act 1992

It is important to also note that any amendment to section 65 to extend the timescale for the prosecution of an offence will only affect offences committed in relation to requests made under section 1 of the Freedom of Information (Scotland) Act 2002. I would therefore also urge Ministers to introduce an equivalent amendment to regulation 19 of the Environmental Information (Scotland) Regulations 2004, in order to



ensure that alleged offences in relation to requests made under regulation 5 of the EIRs can be fully and appropriately investigated and prosecuted.

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