

**FREEDOM OF INFORMATION (SCOTLAND) ACT 2002:
PROPOSALS FOR AN ORDER REVISING THE LIFESPANS OF
CERTAIN EXEMPTIONS**



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Scottish Information Commissioner

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Agnew

Forename

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2. Postal Address

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3. Permissions - I am responding as...

Individual / **Group/Organisation**
Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No

CONSULTATION QUESTIONS

1) Do you agree with the proposal that the exemptions at sections 28, 29, 30, 33(1), 37 and 40 of the Act should only apply to information which is up to 15 years old?

Response to Question 1:

Yes, I agree with this proposal. The reduction of the lifespan of these exemptions to 15 years supports the wider shift towards a culture of greater openness that has occurred in Scotland since the implementation of the Freedom of Information (Scotland) Act in 2005, and is consistent with the reduction by Ministers of the period after which preserved files can be opened.

During previous consultations on related issues there have been some concerns raised about the reduction of the lifespan of section 33(1) to 15 years. In relation to these concerns, I would reiterate the views expressed by this office in response to earlier consultations. In February 2012 my predecessor reported that we had been presented with no evidence to suggest that information constituting a trade secret was held by Scottish public authorities. This remains the case in June 2013.

In relation to section 33(1)(b), it is also our experience that relevant information loses its sensitivity relatively quickly, and as such we hold no concerns around the proposals to reduce the lifespan to 15 years.

As set out in my written evidence to the Finance Committee during the passage of the Freedom of Information (Amendment) (Scotland) Act, it is also my view that the reduction of the timescale may also reduce the administrative impact of FOI for authorities in some circumstances, as the relevant exemptions will no longer be applicable and therefore do not need to be considered.

2) Do you agree with the proposals that:

a) the section 36 exemption (relating to legal advice and information provided in confidence) should continue to apply for 30 years?

b) the section 41(a) exemption (communications with Her Majesty, the Royal Family and the Royal Household) should apply for the later of either 20 years after the information was created or 5 years after the death of the monarch or the relevant member of the Royal Family?

Response to Question 2(a):

I support the retention of the section 36 exemption at 30 years. During the consultation exercise a number of respondents raised concerns about the reduction in the lifespan of this exemption. I think it appropriate to give regard to concerns including, for example, that a reduction may have a detrimental impact on the donation of records to archives – e.g. where a period of confidentiality may be a pre-condition of donation.

It is also important to note that retaining the time period at 30 years for this exemption will not necessarily mean that all relevant information will remain exempt for that time. There will be circumstances where information is disclosed sooner. This will include, for example, where a breach of confidence is no longer actionable or, in relation to section 36(1), where the balance of the public interest favours disclosure.

Response to Question 2(b):

I have no significant concerns around the proposed amendment to the lifespan of section 41(a). While there will be circumstances where the amendment will extend the lifespan of the exemption beyond the current 30 years, there will also be circumstances where this lifespan is reduced.

An important development in the passage of the Freedom of Information (Amendment) (Scotland) Act was the decision by Ministers to retain a public interest test in relation to section 41(a). The retention of this critical safeguard ensures that, while the lifespan of the exemption may extend beyond 30 years in some circumstances, there remains the possibility of the appropriate release of information before that time in the public interest.

In this context, I support the proposal.

3) Do you have any other comments on the draft order provided at Annex A?

I have no additional comment on the draft order.

4) Do you have any comments on the draft partial BRIA provided at Annex B?

During the earlier consultation process, a small number of responses were received which suggested that reductions in lifespan may lead to additional burden, complexity or administrative concerns for authorities. These concerns are referenced in the draft partial BRIA at Annex B.

Having considered these concerns, I am not wholly persuaded by the arguments at this stage. It may be that the additional information gathered during this consultation process allows more informed conclusions to be drawn.

When considering the issue of “burden”, we should be careful not to

assume that information which has been subject to an exemption in the past can, under current provisions, remain undisclosed until the expiry of the lifespan of that exemption.

A fundamental principle of FOI is that each request must be considered on its own merits. While an exemption may apply to information at a particular time (e.g. because it is commercially sensitive), that exemption may fall away over time, with information becoming less sensitive as time passes, or as public interest arguments change. In this way, information may become appropriate for release long before a record becomes “historical” for the purposes of section 57(1).

Information must therefore be considered on a case-by-case basis whenever a request is received. This duty exists currently, and I am not convinced that the proposed reduction in timescales would add any significant additional burden.

When dealing with requests, public authority staff are commonly required to consider information that has been requested against a range of potential exemptions that may apply. While it has been suggested that reducing the lifespan of some exemptions brings an additional layer of complexity to this process, I would be minded to take the view that any additional complexity that might arise in these circumstances is minimal, with the assessment being principally one of considering the age of the information against whether the exemption would still apply. When compared with an assessment of whether a live exemption can be applied to specific information, such considerations will be relatively straightforward. It may be, therefore, that a reduction in the lifespan of exemptions reduces, rather than increases, the burden for authorities when considering requests for older information.

I would also note that it is my experience that the focus of information requests is commonly on information from the current or recent past, with the overwhelming majority of our appeals relating to information of this type. It may therefore be the case that, for most authorities, requests for information aged 15 years or more will be relatively rare. I would also anticipate that the volume of information held from a particular date will reduce significantly over time, in line with effective records management, so that, for most authorities, the amount of information which is aged 15 years or more will be relatively small.

The outcome of this consultation will, I am sure, shed more light on these issues, and I look forward to reading the Ministers’ conclusions in due course.