



Freedom of Information (Amendment) (Scotland) Act 2013 Briefing Note

4 April 2013
(updated 11 December 2013)

Introduction

1. This briefing note explains the implications of the Freedom of Information (Amendment) (Scotland) Act 2013 (the Amendment Act) which received Royal Assent on 19 February 2013. It will come into force on 31 May 2013.
2. The Amendment Bill was introduced with the intention of addressing perceived weaknesses in two key areas of the Freedom of Information (Scotland) Act 2002 (FOISA). These were:
 - (i) The inability of Ministers to reduce the lifespan of some of exemptions, while retaining the lifespan of others.
 - (ii) The inability to successfully pursue prosecutions under section 65 of FOISA (the offence of concealing or destroying information to prevent disclosure), due to the small “window” within which a prosecution could be brought.
3. The Bill’s progression through Parliament, and evidence from a number of stakeholders, led to a number of further proposals being adopted.
4. The final Amendment Act makes the following key amendments to FOISA:
 - (i) The path is cleared for the lifespan of certain exemptions to be shortened (section 59)
 - (ii) The window for section 65 prosecutions is extended
 - (iii) Authorities will be able to “neither confirm nor deny” whether they hold personal data (section 18)
 - (iv) Section 25(3) is amended to clarify that information available under an authority’s publication scheme is exempt
 - (v) There is a new requirement for Ministers to report to Parliament on their use, or otherwise, of the power to designate additional bodies (section 7A)
 - (vi) There is a new requirement for Ministers to consult more widely in relation to designation orders (section 5(5))

- Each of these amendments is considered in more detail below, accompanied by details of the specific text amendment to FOISA. The order in which the amendments are presented follows the order in which they appear in FOISA.

Amendment to Section 5(5)

Ministers are required to consult more widely in relation to designation orders

Background

- Section 5 of FOISA already gives Ministers the power to designate bodies that provide public functions or services as a “public authority” for the purposes of FOISA. A body designated in this way would be required to fulfil the obligations of FOISA – i.e. to adopt and maintain a publication scheme, and respond to written requests for information in accordance with FOISA.
- Section 5(5) requires Ministers to consult with bodies likely to be affected by a designation order (or their representatives) before laying an order. During the passage of the Amendment Bill, concerns were raised that the existing consultation requirement was too restrictive, focussing only on the bodies which will be affected, rather than considering the views of other interested parties, e.g., service users.

The amendment

- The Amendment Act amends section 5(5) of FOISA, extending the list of people to be consulted. The new provision requires that, in addition to the bodies considered for designation, Ministers must also consult “such other persons as they consider appropriate”.
- The Deputy First Minister made clear, during the Stage 3 debate on the Bill¹, that the new provision is intended to ensure that service-users and members of the public would be included in any future consultation, along with any other parties considered appropriate by Ministers.

Revisions to FOISA

- The Amendment Act revises section 5 of FOISA in the following way. New additions are highlighted in bold red text, while deletions are highlighted in underlined bold blue text in the table below.

5	Further power to designate Scottish public authorities
(1)	The Scottish Ministers may by order designate as a Scottish public authority for the purposes of this Act any person mentioned in subsection (2) who-
(a)	is neither for the time being listed in schedule 1 nor capable of being added to that schedule by order under section 4(1); and
(b)	is neither a public body nor the holder of any public office.
(2)	The persons are those who either-
(a)	appear to the Scottish Ministers to exercise functions of a public nature; or
(b)	are providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority.
(3)	An order under subsection (1) may designate a specified person or persons falling within a specified description.

¹ Scottish Parliament Official Report, 16 January 2013, Col. 15538-15539

- (4) An order under subsection (1) made by virtue of-
- (a) subsection (2)(a) must specify the functions of a public nature which appear to be exercised;
 - (b) subsection (2)(b) must specify the service being provided.
- (5) Before making an order under subsection (1), the Scottish Ministers must -**
- (a) consult –**
 - (i) every person to whom the order relates; or**
 - (ii) persons appearing to them to represent such persons.**
- (5) Before making an order under subsection (1), the Scottish Ministers must -**
- (a) consult –**
 - (i) every person to whom the order relates; or**
 - (ii) persons appearing to them to represent such persons, and**
 - (b) also consult such other persons as they consider appropriate.**

Addition of section 7A

A new requirement for Ministers to report to Parliament on their use of the power to designate bodies

Background

11. Several calls were made for additional bodies to be covered by FOISA during the passage of the Bill, pointing out that the power to designate bodies under section 5 had not been used in the 10 years since FOISA was passed.
12. Designation of bodies through the Amendment Act was ruled out. Ministers stated that they believed the current designation powers under section 5, while underused, are adequate.
13. The Deputy First Minister informed Parliament that she intended to move quickly on designation, laying a section 5 order “as soon as is practicably possible.” The initial order would extend coverage to bodies set up by local authorities to deliver cultural or leisure services². Designation of other local authority trusts and public sector contractors would be further considered.
14. Ministers have since written to local authorities to inform them of the planned designation of these “arms-length” bodies.
15. Responding to concerns about the lack of progress on designation, Ministers introduced a new section, section 7A, to FOISA.

The amendment

16. Section 7A creates a new requirement on Ministers to report regularly to Parliament on their use of the designation power under section 5.
17. The new obligation requires Ministers to lay a report before Parliament every two years, with the first report to be laid on or before 31 October 2015.
18. Each report must set out how the section 5 power has been used by Ministers. If the power hasn’t been used, Ministers must explain the reasons for this to Parliament.

² Scottish Parliament Official Report, 16 January 2013, Col. 15544

Revisions to FOISA

19. The Amendment Act inserts the following text after section 7 of FOISA. New text is highlighted in **bold red** text in the table below.

<p>7A Reports on section 5 power</p> <p>(1) In accordance with this section, the Scottish Ministers must lay before the Parliament reports about the exercise of the section 5 power.</p> <p>(2) The first report is to be laid on or before 31 October 2015.</p> <p>(3) Each subsequent report is to be laid no later than 2 years after the date on which the previous report is laid.</p> <p>(4) A report must –</p> <ul style="list-style-type: none">(a) state whether the section 5 power has been exercised during the reporting period, and(b) as the case may be –<ul style="list-style-type: none">(i) explain how the power has been exercised during the reporting period (and why), or(ii) give the reason for leaving the power unexercised during the reporting period. <p>(5) A report may –</p> <ul style="list-style-type: none">(a) summarise any response to a consultation carried out during the reporting period as regards the exercise of the section 5 power,(b) indicate any intention to exercise the power in the future,(c) include such additional information as the Scottish Ministers consider appropriate. <p>(6) In this section –</p> <p>“reporting period” means –</p> <ul style="list-style-type: none">(a) in the case of the first report, period of time from the date on which section 1 of the Freedom of Information (Amendment) (Scotland) Act 2013 comes into force until the date on which the first report is laid,(b) in the case of a subsequent report, period of time from the date on which the previous report is laid until the date on which the subsequent report is laid, <p>“section 5 power” means order-making power conferred by section 5(1).</p>
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Amendment to section 18

Authorities can “neither confirm nor deny” whether they hold personal data

Background

20. Section 18 of FOISA allows an authority to refuse to reveal whether it holds information in specific circumstances. Section 18 is not often used, but it can be appropriate where, for example, the act of confirming whether information was held would reveal whether a criminal investigation was underway.
21. Section 18 cannot be applied to all exemptions, only to 10 of the 17 exemption categories in FOISA. The list did not previously include the “personal information” exemption under section 38 of FOISA.

22. This omission meant that there could be cases where an authority is compelled to confirm whether personal information is held and, in doing so, reveal whether or not an individual was, for example, under surveillance. In this example, the surveillance might be compromised, or personal data about the person under surveillance might be inappropriately released into the public domain, leading to the authority breaching the Data Protection Act 1998.

The amendment

23. The Amendment Act adds section 38 to the list of exemptions where the section 18 “neither confirm nor deny” provision can be used. This means that authorities can refuse to reveal whether personal data exists or is held, where the authority considers it would be contrary to the public interest to do so.
24. As with all other relevant provisions, the application of section 18 in relation to personal information can be appealed to the Commissioner if a requester feels it has been applied inappropriately.

Revisions to FOISA

25. The Amendment Act revises section 18 of FOISA in the following way. Amendments are highlighted in **bold red** text in the table below.

<p>18 Further provision as respects responses to request</p> <p>(1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 38, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.</p> <p>(2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given by virtue of this section.</p>
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Amendment to section 25(3)

Clarifying that information available under an authority’s publication scheme is exempt

Background

26. The purpose of section 25(3) of FOISA is to ensure that information which is accessible under an authority’s publication scheme is exempt from release in response to FOI requests. It reflects the emphasis in FOISA on proactive disclosure by authorities and supports them to encourage requesters to access the information for themselves through the publication scheme.

27. However, the wording of section 25(3) was challenging. Lord Reed commented that section 25(3) “does not readily yield its meaning...”³ He proposed wording which would explain the exemption more clearly.

The amendment

28. The Amendment Act replaces section 25(3) with Lord Reed’s concise rewording, clearly setting out that information which is accessible through an authority’s publication scheme is exempt from disclosure.

Revisions to FOISA

29. The Amendment Act revises section 25 of FOISA in the following way. New additions are highlighted in **bold red** text, while deletions are highlighted in underlined bold blue text in the table below.

<p>25 Information otherwise accessible</p> <p>(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.</p> <p>(2) For the purposes of subsection (1), information-</p> <p>(a) may be reasonably obtainable even if payment is required for access to it;</p> <p>(b) is to be taken to be reasonably obtainable if-</p> <p>(i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or</p> <p>(ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by,</p> <p>members of the public on request, whether free of charge or on payment.</p> <p><u>(3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority’s publication scheme and any payment required is specified in, or determined in accordance with, the scheme.</u></p> <p>(3) For the purposes of subsection (1), information is to be taken to be reasonably obtainable if –</p> <p>(a) it is available –</p> <p>(i) on request from the Scottish public authority which holds it, and</p> <p>(ii) in accordance with the authority’s publication scheme, and</p> <p>(b) any associated payment required by the authority is specified in or determined under the scheme.</p>

Amendment to section 59

Clearing the path for the lifespan of certain exemptions to be shortened

Background

³ See: <http://www.scotcourts.gov.uk/opinions/2009csih73.html>

30. Sections 57 and 58 of FOISA state that specified exemptions can no longer be applied when the information reaches a certain age, and becomes a “historical record”. For some exemptions this period is set at 30 years (e.g. those relating to UK relations, the formulation of Scottish Administration policy or confidentiality). For others (e.g. those relating to personal data, honours or law enforcement) this period is longer.
31. Ministers had previously looked at reducing this time period for some exemptions, so that information could be disclosed sooner. However, FOISA provides an “all or nothing” approach to the reduction of time periods for exemptions. Ministers cannot currently reduce the lifespan of some of the 30 year exemptions listed in section 58(1), while leaving others at 30 years.
32. Few concerns have been raised about reducing the lifespan of the exemptions that relate to, for example, court records, audit functions or relations with the UK. However, there have been concerns about reducing the lifespan of some exemptions, in particular, the section 36 confidentiality exemption. Respondents to the Scottish Government’s consultation⁴ said that the exemption had previously been used in relation to intelligence information, and that a reduction in the time period might inhibit donations to archives.

The amendment

33. The Amendment Act amends section 59 of FOISA, allowing Ministers to modify the rules by which a record becomes “historical”. The section 59 amendment allows Ministers to introduce different periods for different exemptions, or even for different types of records.
34. It is important to note that the Amendment Act doesn’t reduce the lifespan of any exemptions. What it does do is pave the way for Ministers to make an order to do so. Ministers have previously expressed a desire to reduce the time period for most (but not all) of the exemptions listed under section 58(1) of FOISA to 15 years. Any order would be subject to consultation.
35. Just because an exemption has a lifespan of 15 years, 30 years or longer, does not, of course, mean that any information which has fallen within the scope of the exemption should be withheld for that period. The case for the application of particular exemptions will often diminish over time and authorities, should, continue to consider each request for information within the current context, releasing information into the public domain where it is appropriate to do so.

Revisions to FOISA

36. The Amendment Act revises section 59 of FOISA in the following way. Sections 58 and 59 have also been reprinted below so that the section 59 amendments can be read in context. New additions are highlighted in **bold red** text, while deletions are highlighted in underlined bold blue text in the table below.

<p>57</p> <p>(1)</p>	<p>The expression “historical record”</p> <p>For the purposes of this Part, a record becomes a “historical record” at the end of that period of thirty years which commences at the beginning of the calendar year following that in which the record was created.</p>
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⁴ See: Freedom of Information (Amendment) (Scotland) Bill: Consultation Report: www.scotland.gov.uk/Resource/0039/00394208.pdf

- (2) Where records created at different dates are for administrative purposes kept together in one file or other assemblage, all the records in that file or assemblage are to be treated for the purposes of this Part as created when the latest of those records is created.

58 Falling away of exemptions with time

- (1) Information contained in a historical record cannot be exempt information by virtue of any of sections 28 to 30, 33(1), 36, 37, 40 and 41(a).

- (2) Information cannot be exempt information by virtue of—

- (a) section 41(b) after the end of that period of sixty years; or
- (b) section 34(2)(b), 35 or 38(1)(c) or (d) after the end of that period of one hundred years,

which commences at the beginning of the calendar year following that in which the record containing the information is created.

59 Power to vary periods mentioned in sections 57 and 58

- (1) The Scottish Ministers may by order amend [subsection \(1\) of section 57 or](#) paragraph (a) or (b) of subsection (2) of section 58 so as to substitute for the number of years for the time being mentioned in the provision in question such other number of years (not being a number which exceeds that mentioned in the provision as originally enacted) as may be specified in the order.

(1A) The Scottish Ministers may by order –

- (a) make provision modifying any enactment in accordance with which a record becomes a “historical record” for the purposes of this Part, and**
- (b) do so by amending this Part or otherwise.**

(1B) Provision by virtue of subsection (1A) may (in particular) state that a record becomes such a “historical record” –

- (a) in relation to the exemption under section 41(a), at the end of –**
 - (i) a specified period (not exceeding 30 years) beginning with the date on which the record is created or a particular date in the calendar year following that date, or**
 - (ii) a specified period (not exceeding 30 years) beginning with the occurrence of an event apart from the creation of the record,**
- (b) in relation to any other exemption under Part 2, at the end of a specified**

period (not exceeding 30 years) beginning with the date on which the record is created or a particular date in the calendar year following that date.

(1C) An order under subsection (1) or (1A) may make different provision for –

- (a) records of different descriptions,**
- (b) exemptions of different kinds,**
- (c) different purposes in other respects.**

- (2) An order under subsection (1) **or (1A)** may contain such [transitional provisions and savings](#) supplemental, incidental, consequential, transitional, transitory or saving provision as the Scottish Ministers think fit.

37. The Amendment Act also makes a small additional amendment to section 72 to FOISA, adding section 59(1A) orders to the list of orders which must be laid before and approved by the Scottish Parliament. This amendment has not been reprinted in full here. It requires the addition of the text “or (1A)” after the text “59(1)” in section 72(2)(b) of FOISA.

Update, December 2013

38. Following the enactment of the Amendment Act, Ministers brought forward an order under section 59(1) of FOISA. The order, the Freedom of Information (Scotland) Act 2002 (Historical Periods) Order 2013 (the Order), is due to come into effect on 1 April 2014.
39. The effect of the Order will be to reduce the lifespan of all of the exemptions which currently last for 30 years to 15 years with the exception of section 36 (confidentiality), and section 41(a) (communications with Her Majesty, etc.). The exemption in section 36 will continue to last for 30 years. The revised section 57(1C) sets out how long the exemption in section 41(a) will last for, but is now tied in to the date of death of members of the Royal Family.
40. The exemptions which will now only last for 15 years are those in:
- (i) section 28 (relations within the United Kingdom);
 - (ii) section 29 (formulation of Scottish Administration policy etc.);
 - (iii) section 30 (prejudice to effective conduct of public affairs);
 - (iv) section 33(1) (commercial interests and the economy);
 - (v) section 37 (court records, etc.) and
 - (vi) section 40 (audit functions),
41. The Order amends section 57(1) of FOISA by replacing the existing section 57(1) with the following:

57	The expression “historical record”(1) For the purposes of this Part, a record becomes a “historical record” in accordance with subsections (1A) to (1C).
(1A)	A record becomes one at the end of the period of 15 years beginning with 1st January in the calendar year following the date on which the record is created.
(1B)	A record containing information which would be exempt by virtue of section 36 becomes one at the end of the period of 30 years beginning with 1st January in the calendar year following the date on which the record is created.
(1C)	A record containing information which would be exempt by virtue of section 41(a) becomes one at the end of the later-ending of—
(a)	the period of 20 years beginning with the date on which the record is created;
(b)	the period of 5 years beginning with—
(i)	in relation to communications with Her Majesty, the date of the death of Her Majest
(ii)	in relation to communications with another member of the Royal Family, the date of the death of that member,
(iii)	in relation to communications with the Royal Household, the date of the death of the Sovereign reigning when the record is created.
(1D)	In the application of subsections (1A) to (1C)—
(a)	the general rule in subsection (1A) is subject to the operation of subsections (1B) and (1C) so far as relevant;

(b) (b) a record to which both subsections (1B) and (1C) relate becomes a historical record at the end of the later-ending of—

(i) the period provided for in subsection (1B),

(ii) (ii) the period provided for in subsection (1C)(b).

Addition of section 65A

Extending the window for section 65 prosecutions

Background

42. Section 65 of FOISA makes it an offence to deliberately alter, conceal or destroy any information that has been requested under FOI. Anyone found guilty of this offence faces a substantial fine – up to £5,000.
43. It is reassuring to note that allegations of offences under section 65 have been rare so far in Scotland. However, in a number of cases where allegations have been made, the Commissioner has been unable to take the case forward for prosecution, largely because prosecution must be brought within six months of the commission of the offence. FOISA request, review and appeal timescales mean that it might take up to ten months from the commission of an offence before an appeal is even made to the Commissioner. The window for prosecutions is extremely small, and may be passed before the Commissioner is informed.

The Amendment

44. The Amendment Act addresses this problem through the addition of section 65A to FOISA. Section 65A provides that any prosecution must be brought within six months of the discovery of the offence, rather than six months from commission. In doing so, it removes a key barrier to section 65 offences being prosecuted effectively.
45. To provide balance to the new provision, the amendment also introduces a new limitation in 65A(2) restricting proceedings to offences which occurred in the last three years. The Scottish Ministers have also announced plans to introduce a similar amendment to the Environmental Information (Scotland) Regulations 2004.

Revisions to FOISA

46. The Amendment Act adds section 65A after section 65 of FOISA. Amendments are highlighted in **bold red** text in the table below.

65 Offence of altering etc. records with intent to prevent disclosure.

(1) Where—

(a) a request for information is made to a Scottish public authority; and

(b) the applicant is, under section 1, entitled to be given the information or any part of it,

a person to whom this subsection applies who, with the intention of preventing the disclosure by the authority of the information, or part, to which the entitlement relates, alters, defaces, blocks, erases, destroys or conceals a record held by the authority, is guilty

of an offence.

- (2) Subsection (1) applies to the authority and to any person who is employed by, is an officer of, or is subject to the direction of, the authority.
- (3) A person guilty of an offence under subsection (1) is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.

65A Time limit for proceedings

- (1) **Proceedings for an offence under section 65(1) may be commenced within the period of 6 months beginning with the date on which evidence that the prosecutor believes is sufficient to justify the proceedings came to the prosecutor's knowledge.**
- (2) **No such proceedings may be commenced more than 3 years—**
 - (a) **after the commission of the offence, or**
 - (b) **in the case of a continuous contravention, after the last date on which the offence was committed.**
- (3) **In the case of a continuous contravention, the complaint may specify the entire period during which the offence was committed.**
- (4) **A certificate signed by or on behalf of the prosecutor stating the date on which the evidence referred to in subsection (1) came to the prosecutor's knowledge is conclusive as to that fact (and such a certificate purporting to be so signed is to be regarded as being so signed unless the contrary is proved).**
- (5) **Section 136(3) of Criminal Procedure (Scotland) Act 1995 applies for the purposes of this section as it does for those of that section.**

Update, December 2013

47. The Environmental Information (Scotland) Amendment Regulations 2013 (the Amendment Regulations) amend the Environmental Information (Scotland) Regulations 2004 (the EIRs), to extend the window for equivalent prosecutions in relation to requests for environmental information. The Amendment Regulations came into force on 31 May 2013, The Amendment Regulations insert an additional provision, regulation 19A, after regulation 19 (offences) of the EIRs. Regulation 19A of the EIRs uses similar wording to Section 65A of FOISA, bringing the two provisions in line with one another. The new EIR provision is highlighted in **bold red** text in the table below.

19A Time limit for proceedings

- (1) Proceedings for an offence under regulation 19(1) committed on or after 31st May 2013 may be commenced within the period of 6 months beginning with the date on which evidence that the prosecutor believes is sufficient to justify the proceedings came to the prosecutor's knowledge.
- (2) No proceedings for an offence referred to in paragraph (1) may be commenced more than 3 years—
 - (a) after the commission of the offence; or
 - (b) in the case of a continuous contravention, after the last date on which the offence was committed.
- (3) In the case of a continuous contravention, the complaint may specify the entire period

during which the offence was committed.

- (4) A certificate signed by or on behalf of the prosecutor stating the date on which the evidence referred to in paragraph (1) came to the prosecutor's knowledge is conclusive as to that fact (and such a certificate purporting to be so signed is to be regarded as being signed unless the contrary is proved).
- (5) Section 136(3) Criminal Procedure (Scotland) Act 1995 applies for the purposes of this regulation as it does for those of that section.

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