

# Proposals for a new Public Records (Scotland) Bill



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Submission by the Scottish Information Commissioner to the consultation paper from the Keeper of the Records of Scotland on behalf of Scottish Ministers.

## Introduction

I welcome the opportunity to submit my views to the Keeper of the Records of Scotland on his consultation paper (on behalf of Scottish Ministers) about proposed public records legislation.

By way of introduction, I am the Scottish Information Commissioner, appointed by Her Majesty The Queen on the nomination of the Scottish Parliament. I have statutory responsibility for enforcing and promoting Scotland's freedom of information (FOI) laws<sup>1</sup>. My decisions are legally enforceable and can be challenged only by appeal to the Court of Session on a point of law.

As the Keeper's consultation paper acknowledges, there is a strong relationship between record keeping and FOI law. In order to respond properly to FOI requests, authorities must manage their records so that they can establish whether requested information is held and where they hold it. If they do not hold the information requested, they must be able to prove (in the event of an appeal to me) how they know this to be the case.

In recognition of the importance of good record keeping, the Scottish Parliament built guidance on this subject into the Freedom of Information (Scotland) Act 2002 (FOISA). Section 61 of FOISA requires Scottish Ministers to issue and maintain a Code of Practice on Records Management. I rely on the Code<sup>2</sup> for my enforcement work, both when investigating applications and assessing authorities' compliance with their responsibilities under FOISA.

I welcome the proposal to introduce records legislation to strengthen further the responsibilities of public authorities. In my experience, those authorities that manage their records properly are best equipped to respond to FOI requests promptly and they are more likely to get their responses right first time. As the consultation paper also points out, there are significant benefits for every organisation in having more efficient and effective records management.

In preparing my response to this consultation, I have considered the impact of the proposed new public records legislation on my own role and function, particularly in relation to the

<sup>1</sup> Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004

<sup>2</sup> Freedom of Information (Scotland) Act 2002, Code of Practice on Records Management, November 2003  
<http://www.scotland.gov.uk/Resource/Doc/1066/0003775.pdf>



Code. I have a further, particular interest in this consultation paper which has arisen as a direct consequence of the recommendations of the Shaw Report<sup>3</sup>. In late 2004, Peter Peacock, the then Minister for Education and Young People, announced several measures in response to Public Petition 535. One of those measures was to ask me to verify that the Scottish Executive had done as much as it could to trace and open up records about institutional children's homes and education. My report<sup>4</sup>, published in 2005, found that the Scottish Executive had taken all reasonable steps to trace and open all historical records that it holds in relation to the institutions concerned. However, I also drew attention to the lack of structured records of individual children and the problems that it caused. I noted the problems caused by our very permissive legislation covering the management of public records. In the absence of coherent records systems, the officers were searching for "needles in haystacks". The Shaw Report picked up on those findings and explored their implications as part of the recommendations. There can be no stronger case for the importance of proper record keeping than ensuring that our most vulnerable people have access to their own history so that they can understand what has happened to them. I therefore particularly welcome the focus of the Scottish Ministers' proposals.

**Q1 Do you agree that a public record is one that is created or received by a publicly funded authority, or do you think that the 'public' status of a record is determined by the information that it contains?**

The term 'information' in FOISA is generally defined as 'information recorded in any form'. 'Record' is not defined, but is used extensively throughout the legislation, at times interchangeably with 'information'. These definitions, or rather the lack of them, were highlighted in the Court of Session's recent Opinion in *Glasgow City Council v Scottish Information Commissioner*. I agree, on the basis of that experience, that a statutory definition of "public records" should be developed to help avoid confusion in the new legislation.

I agree with the proposal to take account of international standards and that the legislation should cover all forms of records. The ISO 15489-1:2001 definition of a "record" (information created, received and maintained as evidence and information by an organisation or person, in pursuance of legal obligations or in the transaction of business) would appear to cover all forms of records, including electronic.

I agree that the "public" element of the definition of a "public record" should relate to the designation of the authority which holds the information. The status should not depend on the information the record contains.

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<sup>3</sup> An independent review of the systems in place to protect children and keep them safe in residential care between 1950-1995. November 2007 <http://www.scotland.gov.uk/Publications/2007/11/20104729/0>

<sup>4</sup> Examination of the Scottish Executive Education Department's Procedures for the Identification and Provision of Access to Records related to Children's Homes and Residential Schools  
<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=138&SID=229>



## **Q2 Do you have any comments on the inclusion of those bodies listed in Annex D?**

My preference would be for the proposed records legislation to be extended to all bodies subject to FOISA rather than the creation of a separate list. These bodies are already subject to the Code of Practice on Records Management, statutory guidance issued by the Scottish Ministers under Section 61 of FOISA (the s61 Code). The requirements of the proposed new legislation closely follow the existing guidance in the s61 Code. It would be a pragmatic step to extend a legal obligation to the authorities already subject to the Code. In her foreword, the Minister makes a compelling case for the business benefits of proper record keeping which make authorities more effective and efficient. Even small authorities need to manage their records.

I consider also that there would be administrative efficiencies in the maintenance of a single schedule of public authorities. There is precedence for applying the FOISA definition of Scottish public authority to other legislation e.g., the Coroners and Justice Act 2009 and the Climate Change (Scotland) Act 2009.

If Ministers are minded to pursue the approach of a separate list, however, I think it would be beneficial to consider the addition of:

- The Crown Office and Procurator Fiscal Service
- Police services
- Community Justice Authorities
- The Mental Welfare Commission for Scotland

I would also suggest that the entry for local authorities should make clear that the legislation should apply to all statutory functions, including the licensing, valuation, fire, police and bridge boards and regional transport partnerships.

I would further suggest that the arrangement to update the separate list is sufficiently nimble so that amendments can be made quickly in the event of designation of more Scottish public authorities under section 5 of FOISA.

## **Q3 Do you believe the proposals should cover more or fewer authorities?**

As above

## **Q4 Do you have any further comments on the proposals outlined in this section?**

No

## **Q5 Do you agree that the definition of a public record should focus on the informational content rather than the physical format of the record?**

Yes. The 'public' element of the definition of a 'public record' should relate to the designation of the authority which holds the information. The information contained in the



record is relevant to the definition of 'public record'. The definition should cover records held in all formats and be future-proof.

**Q6 Are there other issues that need to be considered in relation to technology and future-proofing?**

No view

**Q7 Do you agree that when voluntary or private organisations deliver public services, using public money, records relating to carrying out that work should be considered to be public records?**

Both the Shaw Review and the Kerelaw Inquiry identified serious shortcomings in records management practices. These shortcomings were not confined to the public sector. Tom Shaw warned that the problems of the past could happen again. Scottish Executive searches of the archives in 2005 for records of former children's institutions found only scraps of evidence and large gaps in information holdings. Had proper records of care been maintained (as now required by the new Looked After Children (Scotland) Regulations 2009) and also designated as public records, they would have been managed according to a plan. Therefore I can see the potential positive benefit of the proposal in relation to these particular records.

The proposal does not include providing public access to voluntary or private sector records. Currently, if records are held by a voluntary or private sector organisation not subject to FOI legislation there is no right to request the information. Personal records are, however, accessible to the data subject under the Data Protection Act 1998. If the records maintained by voluntary or private organisations were considered public records, might they become susceptible to requests under FOI legislation when transferred for long term retention to a local authority or a public archive?

In the event that Ministers are minded to extend the new records legislation to all organisations involved in the delivery of services, I would stress the importance of a robust definition of those bodies so that is clear which bodies fall within the Keeper's jurisdiction.

**Q8 Do you have any further comments relating to records of voluntary and private organisations delivering public services?**

No

**Q9 Do you agree that the Keeper should be responsible for producing and publishing a model records management plan to guide public authorities?**

Yes. The role is appropriate to that of the Keeper who has previously published the excellent Model Action Plan under the s61 Code of Practice.



**Q10 Do you agree that public authorities should be required to produce records management plans, following the Keeper's model and with the Keeper's approval, within a certain time?**

I agree that authorities should be required to produce records management plans. The s61 Code recommends that, as part of an authority's strategy, it should have a records management policy. When approving publication schemes I require authorities to publish their records management policies – so they should all already have such a policy in place.

I am presuming that the Keeper's model will be consistent with the Model Action Plan for the s61 Code and, therefore, I agree that authorities' plans should be consistent with that.

I agree that, in principle, records management plans should have the Keeper's approval, or that he should be able to withhold his approval. There are a number of options, however, for how the Keeper might exercise this function.

**Q11 Should the proposals allow for the creation of generic records management plans by groups of public authorities rather than separate plans for each authority, where appropriate?**

Yes, generic records management plans drive consistency across a sector. There is already a code of practice on records management for the health sector.

**Q12 Do you agree that the existing duty on local authorities to make "proper arrangements" for their records would be adequately covered by the requirement to produce and implement records management plans to be approved by the Keeper under the new proposals? Please give an explanation.**

No view

**Q13 Should public authorities who fail to produce a records management plan within the specified time or to an approved standard, or who fail to provide record keeping arrangements specified in the plan, be subject to civil sanctions? If so, what sanction do you consider would be appropriate?**

I would recommend that the Keeper has powers to refer non-compliance to a court, even though these may be rarely needed in practice.

**Q14 Should the Bill allow the Keeper to issue recommendations to achieve compliance to public authorities found to be in breach of the provisions?**

Yes. It should be noted that the Scottish Information Commissioner has a power under section 44(3) of FOISA to issue a practice recommendation to a Scottish public authority in relation to the codes of practice and that when considering issuing a practice recommendation in relation to the s61 (records management) Code, he must consult the Keeper of the Records.



**Q15 Should the Bill allow the Keeper to publish the names and details of those public authorities found to be in breach of the provisions?**

Yes

**Q16 Do you consider that the Keeper should have an additional role to scrutinise public authorities in the management of their records and archives? If so, what should be the extent of that scrutiny?**

I suggest that the Keeper has power to assess compliance with the legislation, including on-site inspection and the co-operation of authorities with his enquiries.

**Q17 Should the Bill allow the Keeper to recognise or reward public authorities who are seen to adopt particularly successful records management practices? In what way might this be done?**

The Keeper should have a general duty to promote good practice. In terms of recognition or reward, I suggest publication of names and details of authorities which have good practice.

**Q18 To what extent would a scrutiny and enforcement role for the Keeper enhance or otherwise change the nature of the relationship between the National Archives of Scotland and the creators and potential depositors of public records?**

No view

**Q19 Do you think there is a place for peer assessment, where public authorities are scrutinised by other authorities, either within or across individual sectors?**

No view

**Q20 Do you consider that lasting and measurable improvements could be made to existing poor record keeping practice without legislation or sanctions? If so please explain how.**

We have had the s61 Code for more than five years now. This is more than a voluntary code, it is statutory guidance. Where there continue to be deficiencies in public authority practice, only legislation and sanctions could be expected to resolve them.

**Q21 Do you agree that the proposed legislation should not be retrospective, and if not, are there reasons why it should be?**

A records management plan will provide for regular review and disposal of all of an authority's records holding. So in due course, all older records should eventually be appraised.



**Q22 Both Shaw and the Keeper found failings in record keeping across the public sector and considered that new legislation should extend beyond the looked after children sector. Do you agree, or do you consider that this legislation should be restricted to the looked after children sector?**

Please see response to Qu 7 above.

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July 2010**

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