



Scottish Information
Commissioner
it's public knowledge

Katherine Byrne
Head of Freedom of Information Policy
Freedom of Information Unit
Scottish Government
Victoria Quay G-A North
EDINBURGH
EH6 6QQ

24 September 2009

Dear Katherine

Freedom of Information: Improving Openness

Thank you for providing me with the opportunity to comment on the consultation by Scottish Ministers on reducing the term of certain exemptions within the Freedom of Information (Scotland) Act 2002 (FOISA) and, in particular, on reducing the lifespan of eight exemptions contained in FOISA from 30 years to 15 years.

Questions

1. Do you agree that the definition of “historical record” in section 57 of FOISA should be amended to reduce the lifespan of the exemptions from 30 years to 15 years?

I welcome the proposals set out in the consultation paper and believe that the proposed amendment will further strengthen freedom of information in Scotland.

While it is relatively easy to think of cases where information which is older than 15 years old would continue to be exempt under other exemptions (e.g. personal data under the exemption in section 38 of FOISA), it is more difficult to think of cases where information which is subject to one or more of the eight exemptions in question should be withheld after 15 years.

The consultation paper makes the point that the majority of the exemptions in question are subject to the public interest test and I agree with the comment made in the paper that the older the record, the less likely it is that the public interest will lie in favour of withholding it from release.



Scottish Information
Commissioner
it's public knowledge

2. If you disagree with this proposal, what are your reasons for doing so?

Not applicable

3. Do you support a different lifespan, for example to reduce the lifespan of the exemptions to 20 years instead of 15? If so, why do you propose that period?

Not applicable

4. Please provide any other comments you may have on the proposals, in particular any practical examples of applying the exemptions to information after 15 years.

I would welcome clarification on whether the reduced lifespan would apply retroactively from the point of the amendment of the legislation, or whether it would only apply proactively, so that records created after the amendment would cease to be exempt in 15 years, but records created before the amendment would continue to be exempt for up to 30 years.

I would also be interested to know whether there are any plans to amend the Environmental Information (Scotland) Regulations 2004 (the EIRs) in order to reduce the lifespan of some of the exceptions contained in the EIRs. As you are aware, the EIRs have no equivalent of FOISA's "historical records" provisions, which means that exceptions can be cited in relation to information regardless of its age (although the older the information is, the less likely it is that substantial prejudice will result from its disclosure and the more likely it is that the public interest will favour disclosure).

Given the way FOISA and the EIRs interrelate, requests for environmental information require to be considered under both sets of legislation. It would therefore be possible for a public authority to cite the exemption in section 39(2) of FOISA (environmental information) to information which falls under one of the eight exemptions which are the subject of the consultation in order to ensure that the request is considered solely under the EIRs, where an exception may still be found to apply. In those circumstances, I would find it difficult to accept that the exemption in section 39(2) of FOISA should be applied to the environmental information.

I note that you aim to issue your conclusions on whether to amend FOISA by December 2009. I very much look forward to the publication of those conclusions.

If I can be of any further assistance with the consultation, please let me know.



Scottish Information
Commissioner
it's public knowledge

Respondent information form

I am not enclosing a “respondent information form” with this response, but am happy to confirm that I agree to my response, name and address being made available to the public; to the response being shared internally with other Scottish Government policy teams and to being contacted by the Scottish Government in relation to this consultation exercise in the future.

Yours faithfully

Kevin Dunion
Scottish Information Commissioner