

Freedom of Information (Amendment) (Scotland) Bill: Response to call for written evidence



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Response by Rosemary Agnew, Scottish Information Commissioner

The submission below details the response of Rosemary Agnew, Scottish Information Commissioner, to the call for written evidence issued by the Scottish Parliament Finance Committee in relation to the Freedom of Information (Amendment) (Scotland) Bill.

A response is provided in relation to each of the questions raised in the call for evidence.

General

Q1. What is your general view on the purpose of the Bill and broadly, are you supportive of it?

1. I am broadly supportive of the Bill. I recognise and welcome the positive enhancements that key elements will bring to the effective operation of freedom of information (FOI) in Scotland.
2. However, I have some reservations in relation to one key aspect of the Bill, which is seeking to introduce an additional absolute exemption.

Q2. Did you take part in the Scottish Government's consultation on the Bill, and how have your views been reflected?

3. A formal response to the consultation¹ was made by Kevin Dunion, my predecessor as Scottish Information Commissioner. That response was informed by the experience of the Commissioner's office in enforcing and promoting FOI since 2005. As the current Scottish Information Commissioner, I have considered that response carefully and share many of the same views as already submitted by my office.
4. In terms of whether the views of this office have been reflected in the Bill, I am pleased to note that generally they have: the Bill as introduced includes a number of revisions which will, in my view, further strengthen and enhance the provisions of Scotland's FOI Act. These include:
 - the decision to amend the time limit within which a prosecution under section 65 may be commenced from 12 months from the commission of the offence to 6 months from the discovery of the offence.
 - the addition of section 38 to the list of exemptions to which section 18 applies, ensuring that public authorities can refuse to confirm or deny whether personal data is held in circumstances where doing so would be contrary to the public interest. This measure was proposed and discussed in Mr Dunion's Special Report to the Scottish Parliament² of January 2012. I am also aware that it has been an area of concern for a number of Scottish public authorities.
 - the decision to clarify the wording of section 25(3), also proposed in the Special Report. Again, I am aware that the current wording has caused difficulties in interpretation for both public authorities and my staff, and this additional clarity is welcomed.

¹ Available at: www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.asp

² Available at: www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReport2012.asp



5. It is disappointing that Ministers have chosen to retain the amendment to section 2 of the FOI Act, which will create a new absolute exemption for senior members of the Royal Family.

Q3. The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?

6. In broad terms, and as noted above, I am of the view that, in most respects, the Bill will serve to strengthen and clarify FOI rights in Scotland. The proposed amendments to sections 18 and 25 will add clarity to key elements of the legislation, while the amendments to section 59 and section 65 will serve to strengthen rights to access information.
7. However, the proposed amendment to section 2 of the FOI Act will neither strengthen or clarify, nor protect FOI rights. It is my considered view that it will instead have the effect of unnecessarily restricting rights and create a worrying precedent with the introduction of a wide-ranging absolute exemption which sets aside the public interest.

Royal exemption

Q4. In response to the Scottish Government's consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?

8. The Scottish Government's Policy Memorandum on the Bill notes that few respondents to the consultation commented specifically on the amendment to section 2. While this was certainly the case it should not, in my view, be interpreted as evidence that the section 2 amendment is not significant. Rather, it is more likely to be indicative of the fact that relatively few Scottish public authorities will hold information to which the Royal Family exemption under section 41(a) might be applied.
9. My principal concern with the amendment to section 2 is that it creates an absolute exemption that sets aside the need for a public interest test for information that may be appropriate to release in the public interest. In doing so it erodes the right to information enshrined in the Act. I am also concerned about the sweeping scope of the exemption, **relating** as it does to communications with senior royals. It is my belief that in being so wide, this will potentially restrict access under the FOI Act to any and every subject simply because it is in correspondence, or in information which relates to correspondence. This will have a detrimental effect on FOI and FOI rights in Scotland. I will summarise my reasons for this below.

The FOI Act currently contains appropriate protections

10. Experience of this office suggests to me that the current protections for information relating to senior members of the Royal Family are adequate and appropriate. As currently worded, the FOI Act enables protection of the privacy of senior royals, particularly in relation to personal data. Under the terms of section 41(a), information is exempt if it relates to a communication with a member of the Royal Family or the Royal Household. This exemption is only set aside in circumstances where the public interest in disclosing information is outweighed by that of non-disclosure.
11. Further protections also exist in terms of the exemptions relating to personal data (section 38(1)(b) of the FOI Act) and confidentiality (section 36(2)). Other FOI exemptions may also apply, depending on the nature and content of the relevant communications. It is also the case that the public interest in protecting the constitutional convention which underpins section 41(a) is very strong, and this has been evidenced by the decisions both from my office, and from my counterpart, the UK Information Commissioner.



12. The combined effect of these exemptions means that information relating to the Royal Family and Royal Household is extremely well protected under Scotland's FOI law.
13. This amendment, if enacted, will serve only one function over and above the current provisions. It would prevent the release of information in circumstances where the public interest in the release of information is strong enough to outweigh the public interest in maintaining the aforementioned constitutional convention. The amendment is therefore in **direct conflict** with the public interest, and for this reason I would urge Members to consider carefully whether such an amendment is desirable and appropriate before proceeding.

The proposed exemption will be extremely wide-ranging

14. The amendment, if enacted, would have the effect of creating Scotland's most wide-ranging absolute exemption in terms of its scope.
15. Presently, the FOI Act contains a limited number of exemptions which are absolute. As set out in the policy memorandum which accompanied the FOI Bill in 2001³, these exemptions are "...essentially technical in nature, and support the effective operation of the Bill – for example, exempting absolutely information which is otherwise accessible – or recognise existing legal obligations and enactments – for example statutory bars on disclosure or the Data Protection Act 1998 (which deals with access to certain personal data)."
16. The exemption proposed by the section 2 amendment will mark a clear divergence from this principle. It is neither technical in nature, nor will its introduction support the effective operation of FOI in Scotland.
17. An additional common feature shared by the current absolute exemptions is that each clearly and narrowly defines the information which will fall within its scope. Current absolute exemptions largely apply to information contained within a specific type of document (e.g. a court record), or where release would breach an existing law (e.g. section 26, section 36(2), section 38(1)(b)). The absolute exemption created by the proposed amendment will again mark a divergence from this principle.
18. The proposed exemption will not be restricted only to information contained in communications with senior royals, but will also absolutely exempt any information which **relates** to those communications in any way. This will include all information detailing e.g. the number of times communications have taken place, the departments or individuals within a public authority who have been involved in communications, or details of the cost to the authority of such communications.
19. As a result, the amendment will create a provision which requires absolute secrecy in relation to any aspect of communications with senior royals in all circumstances – regardless of how far removed the information is from the content of communications, or of the weight of the public interest in favour of release.

The amendment will create a fresh inconsistency in the handling of requests under Scottish legislation

20. The Scottish Government's consultation report sets out that the amendment is appropriate in order to "adopt a consistent approach" with the United Kingdom Government. In creating this consistency between UK and Scottish Government legislation, however, the amendment, if enacted, will simultaneously create a greater inconsistency for Scottish public authorities in the way requests for information are handled under Scottish law.
21. At present, there are two main routes of access to (non-personal) information in Scotland. When a requester is seeking access to environmental information, the request is made under the Environmental Information

³ Freedom of Information (Scotland) Bill - Policy Memorandum (SP Bill 36-PM), paragraph 60.



(Scotland) Regulations 2004 (the EIRs), while requests for all other information are dealt with under the FOI Act.

22. The provisions of the EIRs, which originate from an EU Directive, contain no specific exceptions for information relating to communications with the Royal Family, and such requests are considered in terms of the existing EIR provisions. Requests for relevant environmental information must be considered in terms of e.g. 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 personal data).
23. Each of the EIRs' 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 will be required in relation to any royal communications that contain environmental information.
24. While the proposed amendment will make information that relates to communications with senior royals absolutely exempt from release under FOI, where those communications relate to the environment, the information may still be subject to disclosure in the public interest. This is inconsistent, could be confusing to both requesters and Scottish public authorities, and creates process inefficiencies at a time when funding to public authorities is being squeezed.
25. The amendment will, therefore, create a fresh divergence for Scottish public authorities in the way requests for relevant information must be considered under the FOI Act and the EIRs.

The amendment would be inconsistent with international good practice principles

26. If enacted, the amendment will also result in a departure from internationally-recognised good practice in FOI law. The Commonwealth Principles and Guidelines on the Right to Know⁴ agreed in 1999 that “*the right of access may be subject to only such exemptions, which are narrowly drawn, permitting government to withhold information on when disclosure would harm essential interests...provided that withholding information is not against the public interest*”.
27. More recently, the Organisation of American States (OAS), which brings together the 35 independent nation states of North and South America, agreed a model FOI law in April 2010. This model law emphasises the importance of the public interest override in relation to each of the law's exceptions, stating, under Article 44, that authorities may not “*refuse to disclose that record...unless the harm to the interest protected by the relevant exception outweighs the general public interest in disclosure*”⁵. The guidance notes on the model law clarifies that “*non-disclosure must have a direct effect on the exercise of a particular exception, be proportionate to the public or private interest protected, and interfere to the least extent possible with the effective exercise of the right of access.*”⁶

The Westminster amendment was not subject to full scrutiny

28. The Scottish Government has set out that the Royal Family amendment has been introduced in order to ensure consistency with the Constitutional Reform and Governance Act 2010.
29. It is worth noting that the amendment to the Royal Family exemption was added to the Constitutional Reform and Governance Bill at a late stage – with the relevant clause being introduced at report stage on 2 March 2010, and the Bill receiving Royal Assent on 8 April 2010. As a result, these amendments were not subject to

⁴ *Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know*, March 1999; Available at: www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/commonwealth_expert_grp_on_the_rti_99-03-00.pdf

⁵ *Model Inter-American Law on Access to Information*, Article 44, April 2010; Available at: www.oas.org/dil/CP-CAJP-2840-10_Corr1_eng.pdf

⁶ *Commentary and Guide for Implementation for the Model Inter-American Law on Access to Information*, Page 11, April 2010; Available at: www.oas.org/dil/CP-CAJP-2841-10_eng.pdf



consultation and, as noted in House of Commons' Briefing Note on the Bill⁷, did not receive full scrutiny in the House of Lords due to the imminence of the 2010 general election.

30. The Lords Constitution Committee went as far as expressing its concern about the inadequate scrutiny of the Bill in general, setting out that:

*"It is inexcusable that the Government should have taken so long to prepare this Bill that it has effectively denied both Houses of Parliament – and especially this House – the opportunity of subjecting this important measure of constitutional reform to the full scrutiny which it deserves."*⁸

31. In these circumstances, it is particularly appropriate that Parliament applies careful scrutiny to the rationale underpinning this amendment, while also examining its impact on both FOI principles in Scotland and the information rights of the Scottish public.

Historical periods

Q5. In response to the Scottish Government's consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?

32. Like Mr Dunion, I am of the view that the amendment to allow greater flexibility in relation to the lifespan of exemptions is appropriate and desirable.
33. While I note that a small number of respondents raised concerns that the proposed amendment may add to the complexity of the legislation and increase the administrative burden for authorities, it is my view that the positive impact of this amendment may also alleviate many of these concerns. A reduced time-period for an exemption will serve to reduce the administrative impact of FOI in many circumstances, as it will remove the requirement for authorities to consider the detailed application of particular exemptions once information has reached the specified age. In those circumstances the exemption can simply be set aside and, providing that no other "live" exemptions apply, the information released.
34. I note also the Government's commitment that any order made following the amendment of section 59 will be subject to consultation and affirmative Parliamentary procedure, and I am confident that these measures will allow any relevant concerns to be identified, considered and addressed.
35. I would also repeat the call made in the consultation response from this office that a similar amendment to the Environmental Information (Scotland) Regulations 2004 (the EIRs) would also be desirable; in order to ensure that the public's rights of access under these two interrelated regimes continue to be as consistent as possible.

Q6. The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?

36. The assessment set out by the Scottish Government in its Financial Memorandum appears to be reasonable and proportionate. As noted under paragraph 30 of the Memorandum, no prosecutions have yet been brought under section 65 of the Act. As such, considerations about cost can only be speculative. The costs provided by the Government for any such action represent the most accurate estimate currently available.

⁷ *Public records, freedom of information and the Royal Family*, SN/PC/05377, March 2011; Available at: www.parliament.uk/briefing-papers/SN05377.pdf

⁸ Lords Constitution Committee Constitutional Reform and Governance Bill Eleventh Report HC 98 2009-10



37. The point should, of course, be made that these costs are avoidable. A risk-based approach to records management should seek to minimise the likelihood of records being altered or destroyed (intentionally or otherwise) and on the very rare occasions they are, that a full audit trail exists to minimise costs related to the application of section 65.
38. It is extremely important that offences in relation to the alteration or destruction of records to prevent disclosure can be effectively prosecuted, where appropriate. Such a measure is essential in ensuring that public confidence in Scotland's FOI regime is retained and enhanced.
39. Again, I would repeat the call that a similar amendment to the EIRs be introduced, to ensure that the public's rights under these two pieces of legislation are as consistent as possible.

Q7. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

40. There were no relevant comments made in relation to the financial assumptions of the Bill.

Closing Comments

41. A key feature of Scotland's FOI legislation is that the extension of the Act does not require a change to the primary legislation - section 5 of the FOI Act. The power to designate Scottish public authorities was introduced to ensure that Ministers can be flexible and responsive in ensuring the on-going designation of bodies, as appropriate. This was clearly the original intention of Parliament, with the then Deputy First Minister informing Parliament as far back as 2002 that "*Provisions allow providers of services to the public to be added to the bill case-by-case and I reassure Parliament that that power will be exercised.*"⁹
42. A number of respondents to the Government's consultation set out their disappointment that Ministers had not used the opportunity presented by the FOI Amendment Bill to designate additional bodies that carry out public functions. This was a feature of the responses from UNISON, Glasgow City Council, Consumer Focus Scotland, the Campaign for Freedom of Information in Scotland and Professor Colin Reid of the University of Dundee's School of Law who, in his response, described designation as "*the most serious issue in need of attention*".
43. It is extremely important that Scotland's FOI Act remains vibrant, live and applicable to the public it serves, and it is in this context that I support wholeheartedly the protection of FOI rights through the designation of additional bodies. As the models for the delivery of public services evolve and change, it is vitally important that the public's right to the information held about those services is protected.
44. I am particularly keen to support the Scottish Government in progressing this issue and I urge Ministers to take action to ensure that FOI rights are retained and enhanced, and the principles underpinning FOI protected.
45. I note the statement from January 2011 which set out Ministers' belief that it would be "*premature to extend coverage before the deficiencies in the Act could be put right*"¹⁰. Now that action has been taken on this matter - in the form of the Bill currently under consideration - I trust that the Government will move swiftly, and I look forward to the time when review of the bodies in scope of our FOI law becomes a matter of routine and our FOI legislation extends to all public functions.

Rosemary Agnew
Scottish Information Commissioner
27 July 2012

⁹ Scottish Parliament Official Report 24 April 2002, Col 11111/2

¹⁰ Scottish Government news release 26 January 2011; Available at: www.scotland.gov.uk/News/Releases/2011/01/26154714.