



SCOTTISH EXECUTIVE

Freedom of Information

**Second Report to the Scottish Parliament on Progress on
Implementation of the Freedom of Information (Scotland)
Act 2002**

May 2004

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Implementation of the Freedom of Information (Scotland)
Act 2002**

**Laid before the Scottish Parliament by the Scottish Ministers (in pursuance of section
75(3) of the Freedom of Information (Scotland) Act 2002)**

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FOREWORD

Foreword by Deputy Minister for Finance and Public Services

I am pleased to lay before Parliament the second report on progress on implementing the Freedom of Information (Scotland) Act 2002. I am also pleased to say that this will be the last report of this nature as the Act will be fully commenced by 1 January 2005

Since the Act received its Royal Assent on 28 May 2002 much progress has been made in putting in place the necessary infrastructure for the FOI regime. I would like to thank Kevin Dunion and his staff for all of their hard work in establishing the Office of the Scottish Information Commissioner. The timetable for the implementation of the Act was rightly regarded to be challenging and for it to be met it was of course essential that the Scottish Information Commissioner would be in a position to provide guidance to Scottish Public Authorities on the preparation of their publication schemes. That was done timeously and by the end of this calendar year all Scottish public authorities will have publication schemes in place. Publication schemes are an important demonstration of a public authority's commitment to openness.

In the recent past there have been a number of important dates on the road to the establishment of a Scottish FOI regime. The publication of "An Open Scotland" in November 1999, the Royal Assent to the Act in May 2002 and the appointment of the Scottish Information Commissioner in December 2002 are among the highlight dates. We are now only a matter of months away from the most important date of all i.e. the implementation of the legal right of access to information held by Scottish public authorities on 1 January 2005. It was encouraging to note the positive results of the research commissioned by the Office of the Scottish Information Commissioner on the preparedness of Scottish public authorities for meeting the requirements of the Act. This progress must be maintained as we approach January 2005 and the final building blocks in introducing an effective and distinctive FOI regime are put in place.

Tavish Scott

Introduction

Under section 75 (3) of the Freedom of Information (Scotland) Act 2002 the Scottish Ministers are required to lay before the Scottish Parliament an annual report on progress made towards bringing the provisions of the Act into force.

Chapter 1 of the report records the successful setting up of the Office of the Scottish Information Commissioner which is now fully in operation. It also details the work that the Office has been carrying out over the last year on providing guidance to Scottish public authorities on the preparation of their publication schemes and to approving the first tranche of schemes. The work of the Scottish Freedom of Information Implementation Group is covered in Chapter 2, and Chapter 3 outlines the progress made on the development of the Section 60 Code of Practice and proposals for charging under FOI. Chapter 4 considers other issues such as the development of a public records policy and proposed new environmental information regulations.

Progress on the work outlined in this report as it develops through the coming year can be monitored by visiting the FOI pages on the Scottish Executive's web-site at: www.scotland.gov.uk/foi.

1. Scottish Information Commissioner

Establishing the Office

1.1 In the last Ministerial report it was recorded that the Scottish Information Commissioner had been concentrating on establishing his office. By the late summer of 2003 Mr Dunion had more or less completed that work. The Commissioner's office is in St Andrews and currently there is a staff complement of 13. The successful establishment of such an office however extends to more than fulfilling these "housekeeping" duties. Mr Dunion and his staff have therefore been fully engaged in raising the public profile of the office and raising awareness of FOI. An important part of that work has been engaging with Scottish public authorities who are all due to have their publication schemes in place by the end of this year.

Publication Schemes

1.2 In last year's report we published the timetable for implementation of the Act. To enable public authorities to start their preparations for publication schemes the Scottish Information Commissioner issued extensive guidance in October 2003. Under this timetable the first tranche of public authorities including the Scottish Ministers, Local Authorities and the Police are due to have their publication schemes in place by around the time that this report is being published. Publication schemes for NHS public authorities and educational institutions are due to follow by 1 September and the remaining public authorities listed in Part 7 of Schedule 1 of the Act will have schemes in place by the end of November. In carrying out the work required to put together a publication scheme each public authority will have taken the first steps towards creating the open environment under which the new FOI regime will flourish.

2. Work of the Scottish Freedom of Information Implementation Group

2.1 The Scottish Freedom of Information Implementation Group (SFOIIG) has now been in operation for three years. Annual reports setting out details of the Group's work in these years can be found on the Scottish Executive's web site at www.scotland.gov.uk/foi. During the past year the Group has concentrated on two specific areas of work namely the development of the two Codes of Practice and the delivery of training materials to be made available to the Scottish public sector. The Group also recommended changes to its remit, membership and operation.

Development of Codes of Practices

2.2 More details of the development of these two Codes are described elsewhere in this report. Much of the ground work for the preparation of the two Codes was carried out by sub – groups of the SFOIIG.

2.3 At its meeting in June 2003 the Group endorsed the draft section 60 Code on functions under the Act produced by the sub group set up to develop the Code. The draft Code as endorsed by the Group contained all of the material required by the Act and also

contained additional guidance on issues such as vexatious requests, the public interest test and the duties placed on public authorities by the Disability Discrimination Act 1995. The draft code was subsequently published by the Executive for consultation (see paras. 3.2 to 3.4 of this report). The draft code can be found on the Executive's website at www.scotland.gov.uk/foi. A final version will be issued shortly – see para. 3.4 of this report.

Section 61 Code of Practice

2.4 Section 61 of the Act requires the Scottish Ministers to issue a Code of Practice as to the practice which, in their opinion, Scottish public authorities should follow in relation to the keeping, management and destruction of their records. Under section 61(5), the Scottish Ministers must consult the Scottish Information Commissioner (SIC) and the Keeper of the Records of Scotland before issuing or revising the Code.

2.5 The previous Annual Report mentioned that, after endorsement by the SFOIG Records Management Sub-Group, the Executive's draft Code was discussed at a consultation seminar on 19 March 2003. Following further revisions to take account of the seminar discussions, the Scottish Ministers formally consulted the SIC and the Keeper, as required by section 61(5), on 10 June 2003. In August both the Keeper and the SIC indicated that they were content with the draft Code, although the SIC made some comments on it. The Code was then revised to take account of those comments. The final version of the Code was published on 12 November 2003 on the Scottish Executive website at www.scotland.gov.uk/foi, and the FOI contacts in all Scottish public authorities were notified. A copy was laid before the Scottish Parliament in accordance with section 61(6) of the Act.

Model Action Plan

2.6 The Records Management Sub-Group developed a generic Model Action Plan (MAP) providing detailed operational guidance to assist Scottish public authorities to develop records management arrangements which comply with the Code. The MAP comprises a table of the steps required to comply with the Code, followed by detailed explanations of these steps. It recognises the variations in the size of sectors, the types of records created and held, and the records management methods used. Accordingly, it was developed as a *generic* plan which identifies common practice for use by all public authorities, but which could be used as the basis for sector-specific MAPs.

2.7 The Implementation Group endorsed the draft MAP on 14 February 2003, together with the Sub-Group's recommendation that the SIC should publish the generic MAP and approve sector-specific MAPs. However, in his letter about the draft Code, the SIC said that he did not consider it would be appropriate for him to publish the generic MAP, or approve sectoral MAPs, because he had not been involved in compilation of the MAP. Accordingly, the Implementation Group agreed at its meeting on 26 September that the Keeper of the Records of Scotland should publish the generic MAP and that the development of sector-specific MAPs should be encouraged where appropriate, but not given formal approval or endorsement. The final version of the generic MAP was published by the Keeper on 12 November on the National Archives of Scotland website at <http://www.nas.gov.uk/foi.htm>. The FOI contacts in all Scottish public authorities were notified at the same time as they were notified about publication of the Code.

FOI Training Strategy

2.8 In 2001 the Group prepared a strategy for providing training and awareness materials on FOI to Scottish public authorities. As part of this strategy the Scottish Executive in 2003 commissioned from Masons, the Solicitors, the design and development of a flexible core training pack of resources for use across the whole of the Scottish public sector. Masons accordingly designed and developed core training materials for the use by Scottish public authorities. The materials consist of a leaflet template, an open learning workbook and a trainer's pack. The materials were piloted at workshops and developed with a cross public sector verification group. The materials are available from the Scottish Executive's web site at www.scotland.gov.uk/foi. These materials are intended to be of significant value to authorities in preparing to meet their responsibilities under the Act.

Changes to remit, membership and operation of Group

2.9 The Group agreed that as much of the technical work required in preparation of FOI had been completed (training strategy, Code of Practice on Records Management etc) there should be some changes to its structure and operation. In particular members considered that the Group should engage more effectively with external stakeholders.

2.10 The Group therefore agreed that its membership should be widened to include representatives from user groups. There was also support for a proposal first raised by the Scottish Campaign for Freedom of Information in Scotland that the Group meetings would be held in public. With regard to the remit of the Group it was agreed that in order to encourage ownership of FOI amongst public authorities the preparation of best practice guidance should be the responsibility for specific sectors. The SFOIIG could however provide a forum for the exchange of approaches and experiences and also for the cross fertilisation of ideas.

2.11 The Secretariat to the Group also separately obtained the views of stakeholders on the membership and operation of the Group and these too supported a widening of the membership of the Group. Ministers subsequently agreed that the membership of the Group should be widened to include the interests of user groups; that meetings of the group be held in public and that the remit of the Group should be as follows :-

- To provide a forum for the exchange of experiences and ideas on freedom of information issues in Scotland;
- To oversee the fostering of a culture of openness across the Scottish public sector;
- To review progress on the above after the Freedom of Information (Scotland) Act 2002 has been in operation for one year; and
- To report and advise the Deputy Minister for Finance and Public Services on the above.

3. Consultations

3.1 During the past year the Scottish Executive has consulted on the Section 60 Code of Practice and is currently consulting on draft fees regulations.

Section 60 Code of Practice on Functions

3.2 With the assistance of the Scottish Freedom of Information Implementation Group (SFOIIG) and others, a draft code was issued for consultation in July 2003. The draft was issued to a wide range of bodies which had previously expressed interest in FOI and to Scottish public authorities covered by the Act, as well as being available on the Scottish Executive's FOI web-pages.

3.3 The consultation period ended on 31 October 2003. A total of 123 responses to the consultation were received. Responses came from a wide variety of people and organisations including individual members of the public, local authorities, health bodies and environmental organisations. In general, respondents welcomed the draft Code and the guidance it provides. The implementation of Freedom of Information raises complex issues. The responses covered many of these. Responses also covered issues which arise from those who will wish to use the rights to be afforded to them by the legislation. A summary of the responses received to the consultation on the draft Code can be found on the Executive's website at www.scotland.gov.uk/foi.

3.4 A revised section 60 Code of Practice which takes on board some of the responses received from the consultation exercise is currently being prepared. As required by section 60(3) of the FOI Act we will consult with the Scottish Information Commissioner prior to laying the Code before Parliament.

Fees

3.5 Draft fees Regulations and guidance for Scottish Public Authorities were published for consultation on 8 March 2004. Charging for information under FOI will be discretionary. However, during the passage of the Bill Ministerial commitments were given setting out the framework for charging that would be taken forward in regulations made under sections 9, 12 and 13 of the FOI Act. These provided for the first £100 of costs to be borne by the public authority and for 10% of additional costs up to an upper cost limit to be passed to the applicant. The draft fees regulations published on 8 March reflect these commitments.

3.7 As mentioned above in addition to the draft fees regulations the consultation exercise also included draft guidance to Scottish public authorities on their operation of the fees regulations. This guidance will form part of the Code of Practice on functions. Whilst the Code is non statutory it will be taken into account by the Scottish Information Commissioner in his role of promoting and enforcing the Act. If it appears to the Commissioner that an authority is failing to take account of the guidance in the section 60 Code including that covering the setting of fees, he may issue a "practice recommendation" specifying the steps that the authority should, in his opinion, take to promote conformity. The consultation period on the draft regulations and guidance is due to finish at the end of May. The draft regulations and supporting guidance can be found on the Executive's website at <http://www.scotland.gov.uk/consultations/government/cocf-00.asp>.

4. Other issues

Commencement of Provisions of Act

4.1 Last year we reported that the Freedom of Information (Scotland) Act 2002 (Commencement No. 1) Order 2002 (SSI 2002/437) had come into force on 30 September. We are now pleased to report that we have completed the trilogy of orders necessary to bring the Act into force. The Commencement No. 2 Order (SSI 2003/477) was made on 2 October 2003 and the No. 3 Order (SSI 2004/203 (C.14)) on 29 April 2004. The overall result is that all provisions in the Act will come into force on or by 1 January 2005, one year in advance of the backstop in the Act. Each Order gives effect to different provisions on relevant dates as follows: -

Provisions Commenced	Purpose of Provisions	Coming into Force Date
<i>No. 2 Order – SSI 2003/477</i>		
Section 23	To allow those bodies listed in parts 1, 2, 3 and 6 of Schedule 1 to the Act to prepare publication schemes.	31 October 2003
	As above for bodies listed in parts 4 and 5	1 December 2003
	As above for bodies listed in part 7	1 March 2004
Sections 50, 51, 53 and 54	Enforcement provisions but only for the purpose of the processing of publication schemes required under section 23	31 October 2003
Section 9	To allow fees regulations under section 9(4) to be made	31 October 2003
Section 55	To allow immunity from civil liability for public authorities in respect of any failure to comply with any duty imposed under the Act	31 October 2003
Section 56	To allow for appeals against any decision made by the Scottish Information Commissioner	31 October 2003
Section 63	To allow the Scottish Information Commissioner to share information with the Scottish Public Services Ombudsman and the Information Commissioner.	31 October 2003
Section 66	Saving for existing powers of disclosure	31 October 2003
Section 68	To allow exemption of the Scottish Parliament and the Scottish Administration from prosecution under the Act.	31 October 2003

No 3. Order – SSI 2004/203 (C.14)		
Section 12	Excessive cost of compliance but only for the purpose of facilitating the making of fees regulations	30 April 2004
Section 44	To enable the Scottish Information Commissioner to issue practice recommendations where publication schemes are not complied with by public authorities before 1 January 2005.	30 April 2004
Section 46	To enable the Scottish Information Commissioner to produce his first annual report.	30 April 2004
Sections 50, 51, 53 and 54	To allow the Scottish Information Commissioner to enforce publication of information held in a publication scheme prior to 1 January 2005	30 April 2004
Section 74	Giving of notice etc	30 April 2004
	All remaining provisions for all remaining purposes	1 January 2005

Amendments to Schedule 1 and Orders under section 5 of the Act

4.2 Over the coming year it will be necessary to amend Schedule 1 of the Act (which lists the Scottish public authorities covered by the Act. This amendment will add any new public authorities established since the Act was approved and remove or adjust the references to any public authorities who are no longer in operation or have been subject to restructuring. We will also lay an order under section 5 of the Act which provides Scottish Ministers with the power to designate a person who is exercising functions of a public nature or are providing under contract made with a Scottish public authority any service which is a function of the authority. Before making that order however we will in October of this year be consulting on the criteria which Ministers will use when deciding which persons may be suitable for inclusion in such an order. Under section 5 (5) of the Act we will before making such an order also be required to consult with any persons included in the order.

Statutory Bars

4.3 Section 64 of the Act provides the Scottish Ministers with order making powers to repeal or amend existing bars to the disclosure of information contained in other legislation.

We reported last year that work had begun to identify Scottish legislation containing provisions which may prohibit the disclosure of information by Scottish public authorities. Over the course of this year we have been working closely with the Department of Constitutional Affairs (DCA) who are conducting a similar exercise in connection with the removal of statutory bars in Westminster legislation. We will continue this liaison with DCA as a co-ordinated and timed approach to laying an amending order is important, particularly in the area of pre-devolution Westminster legislation, where it may be necessary to give effect to the repeal or amendment in the Scottish Parliament.

Scottish Public Records Strategy

4.4 In October 2003, the Executive announced that it was developing a Scottish Public Records Strategy which will take a fundamental look at existing legislation, guidance, standards and practices relating to Scottish public records, together with the roles and functions of the key stakeholders and how they are resourced. When completed, the Strategy will set out measures for managing Scottish public records in the 21st Century, ensuring that the appropriate records are kept, maintained, preserved and are accessible to the public. It will seek to improve the quality and consistency of records management and archive arrangements across the public sector. Thus the Strategy will build on the foundations of the Code and MAP, and support FOI into the future.

4.5 As a first step, the Executive held a series of informal workshops with representatives of key stakeholders (public authorities, users of records and archives, records managers and archivists, etc) between November 2003 and February 2004. We are now using the outcome of the workshops to help us prepare a formal consultation paper for issue later this summer. The aim is to complete development of the Strategy by the spring of 2005, and implement the parts which do not require legislation during the rest of 2005 and into 2006. For those parts which do require legislation, the Executive hopes to introduce a Public Records Bill when a suitable legislative opportunity arises. Further information on the Strategy, including a summary of the workshop discussions, is available on the Executive's website at www.scotland.gov.uk/foi.

Consultation on Access to Environmental Information Regulations

4.6 Section 62 of the FOI Act provides the power for Scottish Ministers to make the new Environmental Information Regulations (EIRs). The keeping of a separate regime for environmental information acknowledges the existing arrangements, the separate origins of the policy in international forums and the slightly wider range of bodies which the Aarhus Convention requires. However it is important that the new EIRs are aligned as closely as possible with the wider Freedom of Information (FOI) regime in order to help Scottish public authorities administer the two regimes and to make it easier for the public to understand. Making environmental information available to the public is considered vital in contributing towards the achievement of sustainable development.

4.7 The Environmental Information Regulations 1992, implementing European Directive 1990/313/EC, set requirements for the release of information about the environment by bodies across the UK. The new regulations will also enable Scotland to comply with the Aarhus Convention and with the new Aarhus-based EU Directive 2003/4/EC on public access to environmental information. A consultation on access to environmental information was issued on 2 April 2004 and the closing date for responses to the exercise is 30 June 2004. The consultation documents can be found on the Executive's web site at <http://www.scotland.gov.uk/consultations/environment/ateic-00.asp>.

Code of Practice on Access to Scottish Executive Information

4.8 The Code of Practice on Access to Scottish Executive Information will remain in force until the rights of access to information afforded by the Freedom of Information (Scotland) Act 2002 come into force on 1 January 2005. The Code continues to support the policy of Scottish Ministers' towards providing access to information held by the Scottish Executive and other public authorities. From 1 October 2003 responsibility for investigating complaints that the Code's provisions had not been complied with passed from the Scottish Public Services Ombudsman to the Scottish Information Commissioner.

5. Conclusions

5.1 This report has set out the implementation work that has been carried out in the past year. This year has seen the completion of the establishment of the Office of the Scottish Information Commissioner. The timetable for the preparation and approval of the publication schemes for public authorities is running to schedule. Substantial progress has been made during the past year on the development of the underpinning codes of practice and also a fees regime. This work will be completed well before the end of this year and in good time for the full implementation of the Act on 1 January 2005. The past year has also seen the provision of comprehensive FOI training materials to Scottish public authorities. The Scottish Freedom of Information Implementation Group, which has been an important driver of the implementation process, has now been reinforced with the appointment of members representing the interests of user groups. With much of the structure underpinning the FOI legislation now in place we remain on course for having the full FOI regime in place by 1 January 2005.

