



FREEDOM OF INFORMATION: IMPROVING OPENNESS

**CONSULTATION BY SCOTTISH MINISTERS ON REDUCING THE
TERM OF CERTAIN EXEMPTIONS WITHIN THE FREEDOM OF
INFORMATION (SCOTLAND) ACT 2002**

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Purpose

The Freedom of Information (Scotland) Act 2002 ('FOISA') enables the public to access information which is held by Scottish public authorities. Generally speaking, the information requested must be provided unless it falls under one or more of 17 exemptions which are set out in FOISA.

This consultation seeks views on whether the lifespan of certain 'exemptions' in FOISA should be reduced from 30 years to 15 years. This would allow information to be available at an earlier date.

The consultation responses will inform Scottish Ministers' thinking on the principle and term of any reduction in the lifespan of exemptions. As indicated in this paper, although Scottish Ministers' preliminary view is that a 15 year lifespan may be appropriate, we welcome views on the practical implications of this. In particular whether reduction to another period is appropriate, and if so the reasons for this.

Background

1. The Scottish Government is committed to operating its business transparently, and proactively publishing information where possible. In particular, we have recently instructed the National Archives of Scotland ('NAS') to make publicly available the bulk of the historic Scottish Government files it holds once the information is 15 years old. As a result, by the end of 2010 an additional 13,000 files will be accessible through the public search-rooms at NAS.

2. **We believe that the practice of making records routinely available after 15 years should be extended across the whole of the Scottish public sector.** Over 4 years since FOISA came into force there has been a shift in the culture among public authorities towards greater openness and accountability. The public now rightly expect earlier access to information. A long lifespan for some exemptions therefore seems to us to be out of step with these changes.

3. We therefore propose to allow earlier access to most information by reducing the lifespan of those exemptions in FOISA which currently apply for 30 years. The changes to these exemptions could be brought about through an amending Order under section 57 of FOISA. This would change their 'lifespan' to 15 years, after which time it would no longer be possible to withhold specified types of information from release.

4. However the public bodies which are subject to FOISA are wide ranging and numerous, and we recognise that other authorities may have different views on the appropriate lifespan of the 30 year exemptions. They may, for example, deal with very different types of information than central government and have different views on the period for which exemptions should be applied. Also the users of FOI will have their own views on the appropriate lifespan of exemptions and so this consultation seeks the views of all those with interests in FOISA.

5. At this time although we are focusing on an amendment which would reduce the lifespan of the current 30-year exemptions, and not those exemptions which apply for 60 or 100 years, or in perpetuity¹, we also welcome the views of anyone who has particular comments on the appropriate lifespan of those additional exemptions.

The legal context

6. FOISA provides a general entitlement for anyone to request information that is held by Scottish public authorities. If it is held by the authority the information must be provided unless certain conditions or any of the 17 exemptions apply which are described in FOISA in sections 25 to 41. The application of these exemptions is not mandatory, and if a public authority chooses to do so it may still release the information. Some exemptions are subject to a 'public interest test', where the authority has to make a judgement about whether release would be in the best public interest despite the exemptions applying.

7. Eight of the most commonly used exemptions can be applied by public authorities to withhold information until it is 30 years old ("the 30 year exemptions"). If applied the information does not have to be provided to a requester until the time limit has expired. We propose to reduce this timescale to 15 years.

8. Section 57 of FOISA provides that records become 'historical records' after 30 years. Section 58(1) then sets out those exemptions which cannot apply once a record has become a 'historical record', ie at 30 years. Under section 59 of FOISA Scottish Ministers have the power to amend by order the definition of 'historical record' contained in section 57, by reducing the time period to less than 30 years.

9. The exemptions that would be affected by this amendment are listed below and set out in detail in pages 5-9. Most of these exemptions are subject to the 'public interest test'. It is the Scottish Government's experience that the older the record, the less likely the public interest is to lie in favour of withholding it from release.

10. The scope of the powers contained in section 59 are such that the order cannot be selective about which of the exemptions specified below it would apply to. It can only amend the definition of 'historical record' and so all of the exemptions listed below would be affected. Annex A provides more detail about the terms of each of these exemptions.

¹ Exemptions under sections 25, 26, 27, 31, 32, 33(2), 34, 35, 38, 39 and 41(b) of FOISA.

The exemptions in FOISA affected by the proposal are:

Section 28 Relations within the UK

Section 29 Formulation of Scottish Administration policy

Section 30 Prejudice to the effective conduct of public affairs

Section 33(1) Commercial interests and the economy

Section 36 Confidentiality

Section 37 Court records

Section 40 Audit functions

Section 41(a) Communications with Her Majesty, other members of the Royal Family, or with the Royal Household

The wider picture

11. For the reasons described below, in practical terms the proposed amendment to FOISA may affect relatively few requests for information.

- A small proportion of the records created by a public authority are retained in the long-term. Most records are produced in the course of routine administrative operations and are destroyed at regular intervals. The Scottish Government, for example, preserves just 1-2% of its records at the National Archives of Scotland.
- Most requests for information which are made under FOISA are, in our experience, for records which were created in recent years. People are naturally most concerned with current issues. This is borne out by the Scottish Information Commissioner's experience, who has rarely had to consider an appeal case concerning historical information.
- We suspect that even where requests are made for older information, for example after 20 years, an authority may choose not to apply exemptions.

Description of the exemptions in FOISA affected by the proposal

Section 28 Relations within the United Kingdom

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.

- (2) In subsection (1), “administration in the United Kingdom” means –
- (a) the Government of the United Kingdom
 - (b) the Scottish Administration
 - (c) the Executive Committee of the Northern Ireland Assembly; or
 - (d) the National Assembly for Wales.

Section 29 Formulation of Scottish Administration policy etc.

(1) Information held by the Scottish Administration is exempt information if it relates to –

- (a) the formulation or development of government policy;
 - (b) Ministerial communications;
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice; or
 - (d) the operation of any Ministerial private office.
- (2) Once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of –
- (a) paragraph (a) of subsection (1), as relating to the formulation or development of the policy in question; or
 - (b) paragraph (b) of that subsection, as relating to Ministerial communications.
- (3) In determining any question under section 2(1)(b) as respects information which is exempt information by virtue of subsection (1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
- (4) In this section –
- “government policy” means
- (a) the policy of the Scottish Administration; and
 - (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

“the Law Officers” means the Lord Advocate, the Solicitor General for Scotland, the Advocate General for Scotland, the Attorney General, the Solicitor General and the Attorney General for Northern Ireland;

“Ministerial communications” means any communications between Ministers and includes, in particular, communication relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet); and

“Ministerial private office” means any part of the Scottish Administration which provides personal administrative support to t Minister.

- (5) In the definitions of “Ministerial communications” and Ministerial private office” in subsection (4), “Minister” means a member of the Scottish Executive or a junior Scottish Minister.

Section 30 Prejudice to the effective conduct of public affairs

Information is exempt information if its disclosure under this Act –

- (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;
- (b) would, or would be likely to, inhibit substantially –
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberations; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

Section 33(1) Commercial interests and the economy

Information is exempt information if –

- (a) it constitutes a trade secret; or
- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interest of any person (including, without prejudice to that generality, a Scottish public authority).

Section 36 Confidentiality

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

Section 37 Court records, etc.

(1) Information is exempt information if it is contained in –

(a) a document –

- (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter;
- (ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or
- (iii) created by a court or a member of its administrative staff for the purposes of , or in the course of , such proceedings; or

(b) a document –

- (i) lodged with, or otherwise placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration; or
- (ii) created by such a person for such purposes,

and a Scottish public authority holds the information solely because it is contained in such a document.

(2) In this section-

“court” includes a tribunal or body exercising the judicial power of the State; and

“inquiry” means an inquiry or hearing held under a provision contained in, or made under, an enactment.

(3) This section does not apply to information held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14).

Section 40 Audit functions

Information is exempt information if its disclosure under this Act would, or would be likely to , prejudice substantially the exercise of a Scottish public authority’s functions in relation to –

(a) the audit of the accounts of other Scottish public authorities; or

(b) the examination of the economy, efficiency and effectiveness with which such authorities use their resources in discharging their functions.

Section 41(a) Communications with Her Majesty etc.

Information is exempt information if it relates to –

- (a) communications with Her Majesty, with other members of the Royal Family, or with the Royal Household.

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 listed above from 30 years to 15 years?**

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

- 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?**

- 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.**

Responding to this consultation paper

We are inviting written responses to this consultation paper by 30th September 2009. **Please send your response with the completed Respondent Information Form (see "Handling your Response" below) to:**

foi@scotland.gsi.gov.uk

or

Freedom of Information Unit
Scottish Government
Victoria Quay G-A North
Edinburgh
EH6 6QQ

If you have any queries contact Brian Rigby on 0131 244 5148.

We would be grateful if you could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

The Scottish Government now has an email alert system for consultations (**SEconsult**: <http://www.scotland.gov.uk/consultations/seconsult.aspx>). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** which forms part of this consultation as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form), these will be made available to the public in the Scottish Government Library by 22nd October 2009. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next ?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on whether to amend the Freedom of Information (Scotland) Act 2002. We aim to issue our conclusions on whether to amend FOISA by December 2009. If Scottish Ministers decide to proceed with an amending order this will be laid before the Scottish Parliament early in 2010.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the Freedom of Information Unit at the contact details shown above (under 'Responding to this consultation paper').



RESPONDENT INFORMATION FORM:

Consultation on reducing the term of certain exemptions within the Freedom of Information (Scotland) Act 2002

Please Note That This Form **Must** Be Returned With Your Response To Ensure That We Handle Your Response Appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

Forename

2. Postal Address

<input type="text"/>		
<input type="text"/>		
<input type="text"/>		
<input type="text"/>		
Postcode	Phone	Email

3. Permissions

I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes

No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate Yes No

The Scottish Government consultation process

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses². Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (eg, analysis of response reports) can be accessed at: [Scottish Government consultations](http://www.scotland.gov.uk/consultations) (<http://www.scotland.gov.uk/consultations>)

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

² <http://www.scotland.gov.uk/consultations>

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.