



# Freedom of Information (Scotland) Act 2002 2002 asp 13

## PART 1

### ACCESS TO INFORMATION HELD BY SCOTTISH PUBLIC AUTHORITIES

#### *Right to information*

#### **1 General entitlement**

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant”.
- (3) If the authority—
  - (a) requires further information in order to identify and locate the requested information; and
  - (b) has told the applicant so (specifying what the requirement for further information is),then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- (5) The requested information is not, by virtue of subsection (4), to be destroyed before it can be given (unless the circumstances are such that it is not reasonably practicable to prevent such destruction from occurring).
- (6) This section is subject to sections 2, 9, 12 and 14.

*Status: Point in time view as at 22/04/2011.*

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## 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that—
  - (a) the provision does not confer absolute exemption; and
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection (1), the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption—
  - (a) section 25;
  - (b) section 26;
  - (c) section 36(2);
  - (d) section 37; and
  - (e) in subsection (1) of section 38—
    - (i) paragraphs (a), (c) and (d); and
    - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

## 3 Scottish public authorities

- (1) In this Act, “Scottish public authority” means—
  - (a) any body which, any other person who, or the holder of any office which—
    - (i) is listed in schedule 1; or
    - (ii) is designated by order under section 5(1); or
  - (b) a publicly-owned company, as defined by section 6.
- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held—
  - (a) by the authority otherwise than—
    - (i) on behalf of another person; or
    - (ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom; or
  - (b) by a person other than the authority, on behalf of the authority.
- (3) Subsection (1)(a)(i) is subject to any qualification set out in schedule 1.
- (4) Information is not held by the Keeper of the Records of Scotland if it is contained in a record transferred to the Keeper by a public authority within the meaning of the Freedom of Information Act 2000 (c.36) unless it is information—
  - (a) to which subsections (2) to (5) of section 22 apply by virtue of subsection (6) of that section; or
  - (b) designated by that authority as open information for the purposes of this subsection.
- (5) Where the public authority mentioned in subsection (4) is the Secretary of State for Scotland and the information is contained in a record transferred as is mentioned in subsection (6) of section 22 the reference in subsection (4)(b) to “that authority” is to be construed as a reference to the Scottish Ministers.

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#### Commencement Information

- II** S. 3 partly in force; s. 3 not in force at Royal Assent see s. 75(1); s. 3(1) in force at 30.9.2002 by S.S.I. 2002/437, art. 2

#### 4 Amendment of schedule 1

- (1) The Scottish Ministers may by order amend schedule 1 by—
- (a) adding to that schedule a reference to—
    - (i) any body which; or
    - (ii) the holder of any office which,  
is not for the time being listed there and is either a part of the Scottish Administration or a Scottish public authority with mixed functions or no reserved functions; or
  - (b) removing from that schedule an entry for the time being listed there.
- (2) The reference in paragraph (a) of subsection (1) to an authority with mixed functions or no reserved functions is to be construed in accordance with paragraphs 1(4) and 2 of Part III of Schedule 5 to the Scotland Act 1998 (c.46).
- (3) An order under subsection (1) may relate to a specified person or office or to persons or offices falling within a specified description.

#### 5 Further power to designate Scottish public authorities

- (1) The Scottish Ministers may by order designate as a Scottish public authority for the purposes of this Act any person mentioned in subsection (2) who—
- (a) is neither for the time being listed in schedule 1 nor capable of being added to that schedule by order under section 4(1); and
  - (b) is neither a public body nor the holder of any public office.
- (2) The persons are those who either—
- (a) appear to the Scottish Ministers to exercise functions of a public nature; or
  - (b) are providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority.
- (3) An order under subsection (1) may designate a specified person or persons falling within a specified description.
- (4) An order under subsection (1) made by virtue of—
- (a) subsection (2)(a) must specify the functions of a public nature which appear to be exercised;
  - (b) subsection (2)(b) must specify the service being provided.
- (5) Before making an order under subsection (1), the Scottish Ministers must consult—
- (a) every person to whom the order relates; or
  - (b) persons appearing to them to represent such persons.

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## 6 Publicly-owned companies

- (1) A company is a “publicly-owned company” for the purposes of section 3(1)(b) if it is wholly owned—
  - (a) by the Scottish Ministers; or
  - (b) by any other Scottish public authority listed in schedule 1, other than an authority so listed only in relation to information of a specified description.
- (2) For the purposes of subsection (1), a company is wholly owned—
  - (a) by the Scottish Ministers if it has no members except—
    - (i) the Scottish Ministers or companies wholly owned by the Scottish Ministers; or
    - (ii) persons acting on behalf of the Scottish Ministers or of such companies; and
  - (b) by any other Scottish public authority if it has no members except—
    - (i) the authority or companies wholly owned by the authority; or
    - (ii) persons acting on behalf of the authority or of such companies.
- (3) In subsections (1) and (2), “company” includes any body corporate.

## 7 Public authorities to which Act has limited application

- (1) An order under section 4(1)(a) may, in adding an entry to schedule 1, list the authority only in relation to information of a specified description; and where an authority is so listed nothing in this Act applies to any other information held by the authority.
- (2) The Scottish Ministers may by order amend that schedule—
  - (a) by limiting the entry relating to an authority to information of a specified description; or
  - (b) by removing or amending any such limitation for the time being contained in an entry so relating.
- (3) Nothing in this Act applies to information held by a person designated as a Scottish public authority by order under subsection (1) of section 5 if the order is made by virtue of—
  - (a) subsection (2)(a) of that section and the information does not relate to the functions; or
  - (b) subsection (2)(b) of that section and the information does not relate to the service,  
specified in the order.
- (4) Nothing in this Act applies in relation to information—
  - (a) held by a publicly-owned company; and
  - (b) of a description specified in relation to that company in an order made for the purposes of this subsection by the Scottish Ministers.

## 8 Requesting information

- (1) Any reference in this Act to “requesting” information is a reference to making a request which—

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- (a) is in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) states the name of the applicant and an address for correspondence; and
  - (c) describes the information requested.
- (2) For the purposes of paragraph (a) of subsection (1) (and without prejudice to the generality of that paragraph), a request is to be treated as made in writing where the text of the request is—
- (a) transmitted by electronic means;
  - (b) received in legible form; and
  - (c) capable of being used for subsequent reference.

## 9 Fees

- (1) A Scottish public authority receiving a request which requires it to comply with section 1(1) may, within the time allowed by section 10 for so complying, give the applicant a notice in writing (in this Act referred to as a “fees notice”) stating that a fee of an amount specified in the notice is to be charged by the authority for so complying.
- (2) Subsection (1) is subject to section 19.
- (3) If a fees notice is given to the applicant, the authority is not obliged to give the requested information unless the fee is duly paid; and for the purposes of this subsection and section 10(2) due payment is payment within the period of three months beginning with the day on which the notice is given.
- (4) Subject to subsection (7), a fee charged under subsection (1) is to be determined by the authority in accordance with regulations made by the Scottish Ministers.
- (5) Without prejudice to the generality of subsection (4), the regulations may in particular provide that—
- (a) a fee is not to exceed such amount as may be specified in, or determined in accordance with, the regulations;
  - (b) a fee is to be calculated in such manner as may be so specified; and
  - (c) no fee is payable in a case so specified.
- (6) Before making the regulations, the Scottish Ministers are to consult the Commissioner.
- (7) Subsection (4) does not apply where provision is made, by or under any enactment, as to the fee that may be charged by the authority for the disclosure of the information.

### Commencement Information

- I2** [S. 9](#) wholly in force at 1.1.2005; [s. 9](#) not in force at Royal Assent, see [s. 75\(1\)](#); [s. 9](#) in force for certain purposes at 31.10.2003 by [S.S.I. 2003/477](#), [art 3\(2\)](#); [s. 9](#) wholly in force at 1.1.2005 by [S.S.I. 2004/203](#), [art. 3\(2\)](#)

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## 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after—
  - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
  - (b) in a case where section 1(3) applies, the receipt by it of the further information.
- (2) If—
  - (a) the authority is the Keeper of the Records of Scotland; and
  - (b) the information is information to which section 22(2) to (5) applies,
 subsection (1) applies with the substitution, for the reference to the twentieth working day, of a reference to the thirtieth working day.
- (3) Where the authority gives a fees notice to the applicant and the fee is duly paid, the working days in the period—
  - (a) beginning with the day on which that notice is given; and
  - (b) ending with the day on which the fee is received by the authority,
 are to be disregarded in calculating, for the purposes of subsection (1), the twentieth (or as the case may be the thirtieth) working day mentioned in that subsection.
- (4) The Scottish Ministers may by regulations provide that subsections (1) and (3) are to have effect as if references to the twentieth (or as the case may be the thirtieth) working day were references to such other working day, not later than the sixtieth, after receipt by the authority of the request as is specified in, or determined in accordance with, the regulations.
- (5) Regulations under subsection (4) may—
  - (a) prescribe different days in relation to different cases; and
  - (b) confer a discretion on the Scottish Information Commissioner, exercisable both at the request of the authority and where no such request has been made.

## 11 Means of providing information

- (1) Where, in requesting information from a Scottish public authority, the applicant expresses a preference for receiving it by any one or more of the means mentioned in subsection (2), the authority must, so far as is reasonably practicable, give effect to that preference.
- (2) The means are—
  - (a) the provision to the applicant, in permanent form or in another form acceptable to the applicant, of a copy of the information;
  - (b) such provision to the applicant of a digest or summary of the information; and
  - (c) the provision to the applicant of a reasonable opportunity to inspect a record containing the information.
- (3) In determining, for the purposes of subsection (1), what is reasonably practicable, the authority may have regard to all the circumstances, including cost; and where it determines that it is not reasonably practicable to give effect to the preference it must notify the applicant of the reasons for that determination.

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- (4) Subject to subsection (1), information given in compliance with section 1(1) may be given by any means which are reasonable in the circumstances.
- (5) Such tests of reasonable practicability as are imposed by this section are not to be construed as detracting from any duty which a [<sup>F1</sup>person has under or by virtue of section 29 of the Equality Act 2010 (provision of services etc)] (duty to make adjustments to practices, policies, procedures or physical features so that use of services by disabled persons is facilitated or made possible).

#### Textual Amendments

- F1** Words in s. 11(5) substituted by 2010 c. 15 Sch. 26 Pt. 2 para. 103 (as inserted) (1.10.2010) by [The Equality Act 2010 \(Consequential Amendments, Saving and Supplementary Provisions\) Order 2010 \(S.I. 2010/2279\)](#), art. 1(2), [Sch. 1 para. 6](#) (see S.I. 2010/2317, art. 2)

## 12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.
- (2) The regulations may provide that, in such circumstances as they may specify, where two or more requests for information are made to the authority—
  - (a) by one person;
  - (b) by different persons who appear to it to be acting in concert or whose requests appear to have been instigated wholly or mainly for a purpose other than the obtaining of the information itself; or
  - (c) by different persons in circumstances where the authority considers it would be reasonable to make the information available to the public at large and elects to do so,then if the authority estimates that the total cost of complying with both (or all) of the requests exceeds the amount prescribed, in relation to complying with either (or any) of those requests, under subsection (1), section 1(1) does not oblige the authority to comply with either (or any) of those requests.
- (3) The regulations may, in respect of an election made as mentioned in subsection (2)(c), make provision as to the means by which and the time within which the information is to be made available to the public at large.
- (4) The regulations may make provision as to—
  - (a) the costs to be estimated; and
  - (b) the manner in which those costs are to be estimated.
- (5) Before making the regulations, the Scottish Ministers are to consult the Commissioner.
- (6) References in this section to the cost of complying with a request are not to be construed as including any reference to costs incurred in fulfilling any such duty under or by virtue of the [<sup>F2</sup>Equality Act 2010] as is mentioned in section 11(5).

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### Textual Amendments

- F2** Words in s. 12(6) substituted by 2010 c. 15 Sch. 26 Pt. 2 para. 104 (as inserted) (1.10.2010) by [The Equality Act 2010 \(Consequential Amendments, Saving and Supplementary Provisions\) Order 2010 \(S.I. 2010/2279\)](#), art. 1(2), [Sch. 1 para. 6](#) (see S.I. 2010/2317, art. 2)

### Commencement Information

- I3** S. 12 wholly in force at 1.1.2005; s. 12 not in force at Royal Assent, see s. 75(1); s. 12 in force for certain purposes at 30.4.2004 and wholly in force at 1.1.2005 by [S.S.I. 2004/203](#), [art. 3](#), [Sch.](#)

## 13 Fees for disclosure in certain circumstances

- (1) A Scottish public authority may charge for the communication of any information—
  - (a) which by virtue of section 12(1) or (2) it is not obliged to communicate; and
  - (b) which it is not otherwise required by law to communicate,
 such fee as may be determined by it in accordance with regulations made by the Scottish Ministers.
- (2) Without prejudice to the generality of subsection (1), the regulations may in particular provide that a fee—
  - (a) is not to exceed such amount as may be specified in, or determined in accordance with, the regulations; and
  - (b) is to be calculated in such manner as may be so specified.
- (3) Before making the regulations, the Scottish Ministers are to consult the Commissioner.
- (4) Subsection (1) does not apply where provision is made, by or under any enactment, as to the fee that may be charged by the authority for the disclosure of the information.

## 14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.
- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

## 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).



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## *Responses to request*

### **16 Refusal of request**

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a “refusal notice”) which—
  - (a) discloses that it holds the information;
  - (b) states that it so claims;
  - (c) specifies the exemption in question; and
  - (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority’s claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority’s reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
- (3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.
- (4) A Scottish public authority which, in relation to a request for information, claims that section 12(1) applies must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice which states that it so claims.
- (5) A Scottish public authority which, in relation to such a request, claims that section 14 applies must, within that time, give the applicant a notice which states that it so claims; except that the notice need not be given if—
  - (a) the authority has, in relation to a previous identical or substantially similar such request, given the applicant a notice under this subsection; and
  - (b) it would in all the circumstances be unreasonable to expect it to serve a further such notice in relation to the current request.
- (6) Subsections (1), (4) and (5) are subject to section 19.

### **17 Notice that information is not held**

- (1) Where—
  - (a) a Scottish public authority receives a request which would require it either—
    - (i) to comply with section 1(1); or
    - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
  - (b) the authority does not hold that information,it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.
- (2) Subsection (1) is subject to section 19.
- (3) Subsection (1) does not apply if, by virtue of section 18, the authority instead gives the applicant a refusal notice.

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## **18 Further provision as respects responses to request**

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.
- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given by virtue of this section.

### *Content of certain notices*

## **19 Content of certain notices**

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars—

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

### *Review of refusal, etc.*

## **20 Requirement for review of refusal etc.**

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.
- (2) A requirement under subsection (1) is referred to in this Act as a “requirement for review”.
- (3) A requirement for review must—
  - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify—
    - (i) the request for information to which the requirement for review relates; and
    - (ii) the matter which gives rise to the applicant’s dissatisfaction mentioned in subsection (1).
- (4) For the purposes of paragraph (a) of subsection (3) (and without prejudice to the generality of that paragraph), a requirement for review is treated as made in writing where the text of the requirement is as mentioned in paragraphs (a) to (c) of section 8(2).
- (5) Subject to subsection (6), a requirement for review must be made by not later than the fortieth working day after—

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- (a) the expiry of the time allowed by or by virtue of section 10 for complying with the request; or
  - (b) in a case where the authority purports under this Act—
    - (i) to comply with a request for information; or
    - (ii) to give the applicant a fees notice, a refusal notice or a notice under section 17(1) that information is not held,but does so outwith that time, the receipt by the applicant of the information provided or, as the case may be, the notice.
- (6) A Scottish public authority may comply with a requirement for review made after the expiry of the time allowed by subsection (5) for making such a requirement if it considers it appropriate to do so.
- (7) The Scottish Ministers may by regulations provide that subsections (5) and (6) are to have effect as if the reference in subsection (5) to the fortieth working day were a reference to such other working day as is specified in (or determined in accordance with) the regulations.
- (8) Regulations under subsection (7) may—
- (a) prescribe different days in relation to different cases; and
  - (b) confer a discretion on the Scottish Information Commissioner.
- (9) In subsection (1), the reference to “actions” and “decisions” includes inaction and failure to reach a decision.

## **21 Review by Scottish public authority**

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.
- (2) If—
- (a) the authority is the Keeper of the Records of Scotland; and
  - (b) a different authority is, by virtue of section 22(4), to review a decision to which the requirement relates,
- subsection (1) applies with the substitution, for the reference to the twentieth working day, of a reference to the thirtieth working day.
- (3) A requirement for review may be withdrawn by the applicant who made it, by notice in writing to the authority, at any time before the authority makes its decision on the requirement.
- (4) The authority may, as respects the request for information to which the requirement relates—
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

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- (6) The Scottish Ministers may by regulations provide that subsections (1) and (5) and section 47(4)(b) are to have effect as if the reference in subsection (1) to the twentieth (or as the case may be the thirtieth) working day were a reference to such other working day as is specified in (or determined in accordance with) the regulations.
- (7) Regulations under subsection (6) may—
  - (a) prescribe different days in relation to different cases; and
  - (b) confer a discretion on the Scottish Information Commissioner.
- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if—
  - (a) the requirement is vexatious; or
  - (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.
- (9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.
- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

*Records transferred to the Keeper of the Records of Scotland*

## 22 **Special provisions relating to records transferred to Keeper**

- (1) Subsections (2) to (5) apply to information which—
  - (a) is contained in a record transferred to the Keeper of the Records of Scotland by a Scottish public authority; and
  - (b) has not been designated by the authority as open information for the purposes of this section.
- (2) The Keeper must, as soon as practicable after receiving a request for information to which this subsection applies, send a copy of that request to the authority which transferred the information; and it is for the authority, instead of the Keeper, to come to a decision as to whether the information is exempt information by virtue of any provision of Part 2 and to determine any question then arising by virtue of paragraph (a) or (b) of section 2(1) as respects the information.
- (3) After receiving the copy, the authority must, within such time as will make it practicable for the Keeper to comply with section 10 as respects the request, inform the Keeper of the decision mentioned in subsection (2) and of any determination required by virtue of that decision.
- (4) The Keeper must, as soon as practicable after receiving a requirement for review in which the specification under section 20(3)(c)(ii) relates to a decision made by the authority by virtue of subsection (2), send a copy of that requirement to the authority; and it is for the authority, instead of the Keeper, to review the decision and to do anything which is to be done under section 21(4).

*Status: Point in time view as at 22/04/2011.*

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- (5) After receiving the requirement, the authority must, within such time as will make it practicable for the Keeper to comply with subsection (5) of section 21 as respects the requirement, inform the Keeper of what it has done under subsection (4) of that section and provide a statement of its reasons for so doing; and it is that information and statement which the Keeper shall, in the notice in writing, give in so complying.
- (6) Subsections (2) to (5) also apply to information which is contained in a record transferred to the Keeper, before 1st July 1999, by the Secretary of State for Scotland and is not designated by the Scottish Ministers as open information for the purposes of section 3(4); but for the purposes of that application references in subsections (2) to (5) to “the authority” are to be construed as references to the Scottish Ministers.

### *Publication schemes*

## **23 Publication schemes**

- (1) A Scottish public authority must—
  - (a) adopt and maintain a scheme (in this Act referred to as a “publication scheme”) which relates to the publication of information by the authority and is approved by the Commissioner;
  - (b) publish information in accordance with that scheme; and
  - (c) from time to time review that scheme.
- (2) A publication scheme must specify—
  - (a) classes of information which the authority publishes or intends to publish;
  - (b) the manner in which information of each class is, or is intended to be, published; and
  - (c) whether the published information is, or is intended to be, available to the public free of charge or on payment.
- (3) In adopting or reviewing its publication scheme the authority must have regard to the public interest in—
  - (a) allowing public access to information held by it and in particular to information which—
    - (i) relates to the provision of services by it, the cost to it of providing them or the standards attained by services so provided; or
    - (ii) consists of facts, or analyses, on the basis of which decisions of importance to the public have been made by it;
  - (b) the publication of reasons for decisions made by it.
- (4) The authority must publish its publication scheme but may do so in such manner as it thinks fit.
- (5) The Commissioner may—
  - (a) when approving a publication scheme, provide that the approval expires at the end of a specified period; and
  - (b) at any time give notice to an authority revoking, as from the end of the period of six months beginning at that time, approval of its publication scheme.
- (6) The Commissioner, when—
  - (a) refusing to approve a proposed publication scheme; or

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- (b) revoking approval of a publication scheme,  
must state the reason for doing so.

#### Commencement Information

- I4** S. 23 wholly in force at 1.1.2005; s. 23 not in force at Royal Assent, see s. 75(1); s. 23 in force for certain purposes at 31.10.2003 by S.S.I. 2003/477, art 3(3); s. 23 wholly in force at 1.1.2005 by S.S.I. 2004/203, art. 3(2)

## 24 Model publication schemes

- (1) The Commissioner may, in relation to Scottish public authorities falling within particular classes—
- (a) prepare and approve model publication schemes; or
  - (b) approve such schemes prepared by other persons.
- (2) If an authority which falls within the class to which an approved model publication scheme relates adopts that scheme without modification, no further approval of the Commissioner is required so long as that model scheme remains approved; but the approval of the Commissioner is required in relation to any modification of the scheme by an authority.
- (3) The Commissioner may—
- (a) when approving a model publication scheme, provide that the approval expires at the end of a specified period; and
  - (b) at any time publish, in such manner as the Commissioner thinks fit, a notice revoking, as from the end of the period of six months beginning at that time, approval of such a scheme.
- (4) The Commissioner, when—
- (a) refusing to approve—
    - (i) under subsection (1)(b), a proposed model scheme; or
    - (ii) any such modification as is mentioned in subsection (2),
 must state the reason for doing so; or
  - (b) revoking approval of a model publication scheme, must include in the notice under subsection (3)(b) a statement of the reason for doing so.

## PART 2

### EXEMPT INFORMATION

## 25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- (2) For the purposes of subsection (1), information—
- (a) may be reasonably obtainable even if payment is required for access to it;
  - (b) is to be taken to be reasonably obtainable if—

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- (i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or
  - (ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by, members of the public on request, whether free of charge or on payment.
- (3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

## 26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)—

- (a) is prohibited by or under an enactment;
- (b) is incompatible with <sup>F3</sup> an EU ] obligation; or
- (c) would constitute, or be punishable as, a contempt of court.

### Textual Amendments

**F3** Words in Act substituted (22.4.2011) by [The Treaty of Lisbon \(Changes in Terminology\) Order 2011 \(S.I. 2011/1043\)](#), arts. 2, 3, 6 (with art. 3(2)(3), 4(2), 6(4)(5))

### Modifications etc. (not altering text)

**C1** S. 26 excluded (1.12.2007) by [Statistics and Registration Service Act 2007 \(c. 18\)](#), ss. 40(3), 74; S.I. 2007/3388, art. 2(f)

## 27 Information intended for future publication

- (1) Information is exempt information if—
- (a) it is held with a view to its being published by—
    - (i) a Scottish public authority; or
    - (ii) any other person,at a date not later than twelve weeks after that on which the request for the information is made;
  - (b) when that request is made the information is already being held with that view; and
  - (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).
- (2) Information obtained in the course of, or derived from, a programme of research is exempt information if—
- (a) the programme is continuing with a view to a report of the research (whether or not including a statement of that information) being published by—
    - (i) a Scottish public authority; or
    - (ii) any other person; and

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- (b) disclosure of the information before the date of publication would, or would be likely to, prejudice substantially—
  - (i) the programme;
  - (ii) the interests of any individual participating in the programme;
  - (iii) the interests of the authority which holds the information; or
  - (iv) the interests of the authority mentioned in sub-paragraph (i) of paragraph (a) (if it is a different authority from that which holds the information).

## 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.

## 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;



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“Ministerial communications” means any communications between Ministers and includes, in particular, communications 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 a 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.

### **30 Prejudice to 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 deliberation;or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

### **31 National security and defence**

- (1) Information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.
- (2) A certificate signed by a member of the Scottish Executive certifying that such exemption is, or at any time was, required for the purpose of safeguarding national security is conclusive of that fact.
- (3) Without prejudice to the generality of subsection (2), a certificate under that subsection may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.
- (4) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially—
  - (a) the defence of the British Islands or of any colony; or
  - (b) the capability, effectiveness or security of any relevant forces.
- (5) In subsection (4)—
  - (a) in paragraph (a), “British Islands” and “colony” are to be construed in accordance with Schedule 1 to the Interpretation Act 1978 (c.30); and
  - (b) in paragraph (b), “relevant forces” means—
    - (i) the armed forces of the Crown; and
    - (ii) any forces co-operating with those forces, or any part of the armed forces of the Crown or of any such co-operating forces.

### **32 International relations**

- (1) Information is exempt information if—

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- (a) its disclosure under this Act would, or would be likely to, prejudice substantially—
    - (i) relations between the United Kingdom and any other State;
    - (ii) relations between the United Kingdom and any international organisation or international court;
    - (iii) the interests of the United Kingdom abroad; or
    - (iv) the promotion or protection by the United Kingdom of its interests abroad; or
  - (b) it is confidential information obtained from—
    - (i) a State other than the United Kingdom; or
    - (ii) an international organisation or international court.
- (2) For the purposes of subsection (1), information obtained from a State, organisation or court is confidential at any time while—
- (a) the terms on which that information was obtained require it to be held in confidence; or
  - (b) the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
- (3) In subsection (1)—
- “international court” means an international court which—
- (a) is not an international organisation; and
  - (b) is established—
    - (i) by a resolution of an international organisation of which the United Kingdom is a member; or
    - (ii) by an international agreement to which the United Kingdom is a party;
- “international organisation” means—
- (a) an international organisation whose members include any two or more States; or
  - (b) an organ of such an international organisation;
- “State” includes—
- (a) the government of any State; and
  - (b) any organ of such a government,
- and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.

### **33 Commercial interests and the economy**

- (1) 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 interests of any person (including, without prejudice to that generality, a Scottish public authority).
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially—
- (a) the economic interests of the whole or part of the United Kingdom; or
  - (b) the financial interests of an administration in the United Kingdom.

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- (3) In subsection (2), “administration in the United Kingdom” has the same meaning as in section 28(2).

### **34 Investigations by Scottish public authorities and proceedings arising out of such investigations**

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of—
- (a) an investigation which the authority has a duty to conduct to ascertain whether a person—
    - (i) should be prosecuted for an offence; or
    - (ii) prosecuted for an offence is guilty of it;
  - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or
  - (c) criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.
- (2) Information is exempt information if—
- (a) 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) but not for the time being concluded; or
  - (b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out—
    - (i) by virtue of a duty to ascertain; or
    - (ii) for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.
- (3) Information held by a Scottish public authority is exempt information if—
- (a) it was obtained or recorded by the authority for the purposes of investigations (other than such investigations as are mentioned in subsection (1)) which are, by virtue either of Her Majesty’s prerogative or of powers conferred by or under any enactment, conducted by the authority for any purpose specified in section 35(2); and
  - (b) it relates to the obtaining of information from confidential sources.
- (4) Information is exempt information if obtained or recorded by a Scottish public authority for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of such investigations as are mentioned in subsection (1) or (3).

### **35 Law enforcement**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially—
- (a) the prevention or detection of crime;
  - (b) the apprehension or prosecution of offenders;
  - (c) the administration of justice;
  - (d) the assessment or collection of any tax or duty (or of any imposition of a similar nature);

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- (e) the operation of the immigration controls;
  - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained;
  - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
  - (h) any civil proceedings—
    - (i) brought; and
    - (ii) arising out of an investigation conducted, for any such purpose, by or on behalf of any such authority, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment.
- (2) The purposes are—
- (a) to ascertain whether a person has failed to comply with the law;
  - (b) to ascertain whether a person is responsible for conduct which is improper;
  - (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
  - (d) to ascertain a person's fitness or competence in relation to—
    - (i) the management of bodies corporate; or
    - (ii) any profession or other activity which the person is, or seeks to become, authorised to carry on;
  - (e) to ascertain the cause of an accident;
  - (f) to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration;
  - (g) to protect the property of a charity from loss or mismanagement;
  - (h) to recover the property of a charity;
  - (i) to secure the health, safety and welfare of persons at work; and
  - (j) to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work.

### **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.

### **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;

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- (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).

**Modifications etc. (not altering text)**

- C2** S. 37(1)(b) excluded (7.6.2005) by [Inquiries Act 2005 \(c. 12\)](#), **ss. 18(4)**, 51 (with [ss. 44](#), 50); [S.I. 2005/1432](#), **art. 2**

## **38 Personal information**

- (1) Information is exempt information if it constitutes—
  - (a) personal data of which the applicant is the data subject;
  - (b) personal data and either the condition mentioned in subsection (2) (the “first condition”) or that mentioned in subsection (3) (the “second condition”) is satisfied;
  - (c) personal census information; or
  - (d) a deceased person’s health record.
- (2) The first condition is—
  - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
    - (i) any of the data protection principles; or
    - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
  - (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

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- (3) The second condition is that, by virtue of any provision of Part IV of that Act, the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).
- (4) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to that Act are to be disregarded.
- (5) In this section—
- “the data protection principles” means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;
  - “data subject” and “personal data” have the meanings respectively assigned to those terms by section 1(1) of that Act;
  - “health record” has the meaning assigned to that term by section 1(1) of the Access to Health Records Act 1990 (c.23); and
  - “personal census information” means any census information—
    - (a) as defined in section 8(7) of the Census Act 1920 (c.41); or
    - (b) acquired or derived by virtue of sections 1 to 9 of the Census (Great Britain) Act 1910 (c.27),
 which relates to an identifiable person or household.
- (6) In section 8(7) of the Census Act 1920 (penalties), in the definition of “personal census information”, at the end there is added “ but does not include information which, by virtue of section 58(2)(b) of the Freedom of Information (Scotland) Act 2002 (asp 13) (falling away of exemptions with time), is not exempt information within the meaning of that Act ”.

### 39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.
- (2) Information is exempt information if a Scottish public authority—
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
  - (b) would be so obliged but for any exemption contained in the regulations.
- (3) Subsection (2)(a) is without prejudice to the generality of section 25(1).

#### Modifications etc. (not altering text)

- C3** S. 39(2)(3) applied (1.1.2005) by [The Environmental Information \(Scotland\) Regulations 2004 \(S.S.I. 2004/520\)](#), [reg. 20](#) (with [reg. 3](#))

### 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—

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- (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.

#### **41 Communications with Her Majesty etc. and honours**

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; or
- (b) the exercise by Her Majesty of Her prerogative of honour.

### **PART 3**

#### **THE SCOTTISH INFORMATION COMMISSIONER**

#### **42 The Scottish Information Commissioner**

- (1) For the purposes of this Act there is to be an officer known as the Scottish Information Commissioner (in this Act referred to as the “Commissioner”) who is to be an individual appointed by Her Majesty on the nomination of the Parliament.

[<sup>F4</sup>(1A) A person is disqualified from appointment as the Commissioner if the person is, or holds office in, or is an employee or appointee of, another Scottish public authority.

- (1B) The Commissioner may not, without the approval of the Parliamentary corporation, also be, or hold office in, or be an employee or appointee of, another Scottish public authority.]

- (2) The Commissioner is entitled to—
  - (a) a salary of such amount; and
  - (b) such allowances,as the Parliamentary corporation may determine.

- (3) Subject to subsection (4), the Commissioner is to hold office for such period not exceeding [<sup>F5</sup> eight ] years as the Parliamentary corporation, at the time of appointment, may determine.

[<sup>F6</sup>(3A) The Commissioner is to hold office otherwise on such terms and conditions as the Parliamentary corporation may determine.

- (3B) Those terms and conditions may, without prejudice to subsection (1A)—
  - (a) prohibit the Commissioner from holding any other specified office, employment or appointment or engaging in any other specified occupation,
  - (b) provide that the Commissioner's holding of any such office, employment or appointment or engagement in any such occupation is subject to the approval of the Parliamentary corporation.

- (3C) In subsection (3B), “specified” means specified in the terms and conditions of office or within a description so specified.]

- (4) The Commissioner—
  - (a) may be relieved of office by Her Majesty at that officer's request;

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- (b) <sup>F7</sup> .....
- (c) may be removed from office by Her Majesty [<sup>F8</sup> if subsection (4A) applies ]
- <sup>F9</sup>(d) .....

[<sup>F10</sup>(4A) This subsection applies if—

- (a) the Parliamentary corporation is satisfied that the Commissioner has breached the terms and conditions of office and the Parliament resolves that the Commissioner should be removed from office for that breach, or
- (b) the Parliament resolves that it has lost confidence in the Commissioner's willingness, suitability or ability to perform the functions of the Commissioner,

and, in either case, the resolution is voted for by a number of members not fewer than two thirds of the total number of seats for members of the Parliament.]

[<sup>F11</sup>(5) A person who has held office as Commissioner is ineligible for reappointment at any time.]

- (6) The validity of any actings of the Commissioner is not affected by a defect in the nomination by the Parliament for that officer's appointment.
- (7) The Commissioner, in the exercise of that officer's functions (except the function of preparing accounts), is not subject to the direction or control of the Parliamentary corporation, of any member of the Scottish Executive or of the Parliament; but this subsection is without prejudice to [<sup>F12</sup> sections 42(9C) and 46(2A) and paragraphs 3(4), 4A, 6(2), 7 and 8 ] of schedule 2.
- (8) Where the office of Commissioner is vacant, the Parliamentary corporation may appoint a person (who may or may not be a member of the Commissioner's staff) to discharge the functions of that office until a new Commissioner is appointed.
- (9) A person appointed under subsection (8)—
  - (a) may be relieved of that appointment at that person's request;
  - (b) may be removed from office by the Parliamentary corporation by notice in writing given by it;
  - (c) in other respects, holds office on such terms and conditions as the Parliamentary corporation may determine; and
  - (d) while holding that appointment, is to be treated for all purposes, except those of subsections (1) to (6) and those of paragraph 2 of schedule 2, as the Commissioner.

[<sup>F13</sup>(9A) The Commissioner may obtain advice, assistance or any other service from any person who, in the opinion of the Commissioner, is qualified to give it.

(9B) The Commissioner may pay to that person such fees and allowances as the Commissioner determines.

(9C) Any payment under subsection (9B) is subject to the approval of the Parliamentary corporation.]

(10) Any function of the Commissioner may be exercised on behalf of that officer by any person (whether or not a member of that officer's staff) authorised by the Commissioner to do so (and to the extent so authorised).

(11) The Parliamentary corporation is to pay—

- (a) the salary and allowances of the Commissioner;



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- (b) any expenses [<sup>F14</sup> properly ] incurred by that officer in the exercise of functions under this Act [<sup>F15</sup> so far as those expenses are not met out of sums received and applied by that officer under section 43(6) ] ; and
- (c) any sums payable by virtue of subsection (9)(a) to (c) to, or in respect of, a person who—
  - (i) is appointed under subsection (8); or
  - (ii) has ceased to hold office by virtue of having been so appointed.

[<sup>F16</sup>(11A) Subsection (11)(b) does not require the Parliamentary corporation to pay any expenses incurred by the Commissioner which exceed or are otherwise not covered by a budget or, as the case may be, revised budget approved under paragraph 4A of schedule 2.

(11B) However, the Parliamentary corporation may pay those expenses.

(11C) The Parliamentary corporation is to indemnify the Commissioner in respect of any liabilities incurred by the Commissioner in the exercise of the Commissioner's functions under this Act.]

(12) Schedule 2 to this Act has effect with respect to the Commissioner.

#### Textual Amendments

- F4** S. 42(1A)(1B) inserted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 1\(a\)](#) (with s. 31(6), sch. 7)
- F5** Word in s. 42(3) substituted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 1\(b\)](#) (with s. 31(6), sch. 7)
- F6** S. 42(3A)-(3C) inserted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 1\(c\)](#) (with s. 31(6), sch. 7)
- F7** S. 42(4)(b) repealed (1.10.2006) by [The Employment Equality \(Age\) Regulations 2006 \(S.I. 2006/1031\)](#), reg. 49(2), [Sch. 9](#) (with regs. 44-46).
- F8** Words in s. 42(4)(c) substituted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 1\(d\)](#) (with s. 31(6), sch. 7)
- F9** S. 42(4)(d) repealed (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 1\(e\)](#) (with s. 31(6), sch. 7)
- F10** S. 42(4A) inserted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 1\(f\)](#) (with s. 31(6), sch. 7)
- F11** S. 42(5) substituted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 1\(g\)](#) (with s. 31(6), sch. 7)
- F12** Words in s. 42(7) substituted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 1\(h\)](#) (with s. 31(6), sch. 7)
- F13** S. 42(9A)-(9C) inserted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 2](#) (with s. 31(6), sch. 7)
- F14** Word in s. 42(11)(b) inserted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 3\(a\)](#) (with s. 31(6), sch. 7)
- F15** Words in s. 42(11)(b) inserted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 3\(b\)](#) (with s. 31(6), sch. 7)
- F16** S. 42(11A)-(11C) inserted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 4](#) (with s. 31(6), sch. 7)

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### 43 General functions of Commissioner

- (1) The Commissioner, with a view in particular to promoting the observance by Scottish public authorities of the provisions of—
  - (a) this Act; and
  - (b) the codes of practice issued under sections 60 and 61,
 is to promote the following of good practice by those authorities.
- (2) The Commissioner—
  - (a) must determine what information it is expedient to give the public concerning the following matters—
    - (i) the operation of this Act;
    - (ii) good practice;
    - (iii) other matters within the scope of that officer’s functions,
 and must secure the dissemination of that information in an appropriate form and manner; and
  - (b) may give advice to any person as to any of those matters.
- (3) The Commissioner may assess whether a Scottish public authority is following good practice.
- (4) The Commissioner may from time to time make proposals to the Scottish Ministers for the exercise by them of their functions under sections 4 and 5 of this Act.
- (5) The Commissioner may determine and charge [<sup>F17</sup> reasonable sums for anything done or provided by the Commissioner in the performance of, or in connection with, the Commissioner's functions].
- (6) Any sum received by the Commissioner by virtue of subsection (5) is to be retained by that officer and applied to meet expenditure incurred in [<sup>F18</sup> doing or providing whatever is charged for].
- (7) The Commissioner must from time to time consult the Keeper of the Records of Scotland about the promotion under subsection (1) of the observance by Scottish public authorities of the provisions of the code of practice issued under section 61.
- (8) In this section “good practice”, in relation to a Scottish public authority, means such practice in the discharge of its functions under this Act as appears to the Commissioner to be desirable, and includes (but is not limited to) compliance with the requirements of this Act and the provisions of the codes of practice issued under sections 60 and 61.

#### Textual Amendments

**F17** Words in s. 43(5) substituted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 5\(a\)](#) (with s. 31(6), [sch. 7](#))

**F18** Words in s. 43(6) substituted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 5\(b\)](#) (with s. 31(6), [sch. 7](#))

#### Modifications etc. (not altering text)

**C4** S. 43(1)-(3)(5)-(8) applied (with modifications) (1.1.2005) by [The Environmental Information \(Scotland\) Regulations 2004 \(S.S.I. 2004/520\)](#), [reg. 18\(5\)\(6\)](#) (with [reg. 3](#))

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#### 44 Recommendations as to good practice

- (1) If it appears to the Commissioner that the practice of a Scottish public authority in relation to the exercise of its functions under this Act does not conform with the code of practice issued under section 60 or 61, the Commissioner may give the authority a recommendation (in this Act referred to as a “practice recommendation”).
- (2) A practice recommendation must—
  - (a) be in writing and specify the code and the provisions of that code with which, in the Commissioner’s opinion, the authority’s practice does not conform; and
  - (b) specify the steps which that officer considers the authority ought to take in order to conform.
- (3) The Commissioner must consult the Keeper of the Records of Scotland before giving a practice recommendation to a Scottish public authority (other than the Keeper) in relation to conformity with the code of practice issued under section 61.

#### Modifications etc. (not altering text)

- C5 S. 44 applied (with modifications) (1.1.2005) by [The Environmental Information \(Scotland\) Regulations 2004 \(S.S.I. 2004/520\)](#), [reg 18\(5\)\(6\)](#) (with [reg. 3](#))

#### 45 Confidentiality of information obtained by or furnished to Commissioner

- (1) A person who is or has been the Commissioner, a member of the Commissioner’s staff or an agent of the Commissioner must not disclose any information which—
  - (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of this Act; and
  - (b) is not at the time of the disclosure, and has not previously been, available to the public from another source,unless the disclosure is made with lawful authority.
- (2) For the purposes of subsection (1), disclosure is made with lawful authority only if, and to the extent that—
  - (a) the disclosure is made with the consent of the person from whom the information was so obtained or by whom it was so furnished;
  - (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under a provision of this Act;
  - (c) the disclosure is made for the purpose of, and is necessary for, the discharge of—
    - (i) a function under this Act; or
    - (ii) <sup>F3</sup> an EU ] obligation;
  - (d) the disclosure is made for the purpose of proceedings, whether criminal or civil and whether arising under, or by virtue of, this Act or otherwise; or
  - (e) either—
    - (i) in a case where the person mentioned in paragraph (a) is a Scottish public authority, had that person received on the day of disclosure a request for the information that person; or
    - (ii) in any other case, had the Commissioner received on that day such a request the Commissioner,

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would, by virtue of section 1(1), have been under an obligation to give it.

- (3) A person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence.
- (4) A person guilty of an offence under subsection (3) is liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum; or
  - (b) on conviction on indictment, to a fine.

#### Textual Amendments

**F3** Words in Act substituted (22.4.2011) by [The Treaty of Lisbon \(Changes in Terminology\) Order 2011 \(S.I. 2011/1043\)](#), arts. 2, 3, 6 (with art. 3(2)(3), 4(2), 6(4)(5))

#### Modifications etc. (not altering text)

**C6** S. 45 applied (with modifications) (1.1.2005) by [The Environmental Information \(Scotland\) Regulations 2004 \(S.S.I. 2004/520\)](#), [reg 18\(5\)\(6\)](#) (with reg. 3)

## 46 <sup>[F19]</sup>Laying and publication of reports]

- (1) The Commissioner must lay annually before the Parliament a general report on the exercise <sup>[F20]</sup> during the reporting year ] of the functions conferred on that officer under this Act.

<sup>[F21]</sup>(1A) Each report must be so laid within 7 months after the end of the reporting year.

(1B) In this section, “reporting year” means the year beginning on 1 April.]

- (2) The report mentioned in subsection (1) (without prejudice to the generality of that subsection) must record the number of occasions, during the period covered by the report, on which the Commissioner failed to reach a decision on an application under section 47(1) (being an application on which a decision fell to be made) within the period of four months specified in section 49(3)(b).

<sup>[F22]</sup>(2A) In preparing a report under subsection (1), the Commissioner must comply with any direction given by the Parliamentary corporation as to the form and content of the report.]

- (3) The Commissioner may from time to time lay before the Parliament such other reports with respect to the functions conferred on that officer under this Act as that officer thinks fit.

<sup>[F23]</sup>(3A) The Commissioner must arrange for the publication of each report laid before the Parliament under this section.]

#### Textual Amendments

**F19** S. 46 title substituted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 6\(d\)](#) (with s. 31(6), sch. 7)

**F20** Words in s. 46(1) inserted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 6\(a\)](#) (with s. 31(6), sch. 7)

**F21** S. 46(1A)(1B) inserted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), [sch. 4 para. 6\(b\)](#) (with s. 31(6), sch. 7)

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**F22** S. 46(2A) inserted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), **sch. 4 para. 6(c)** (with s. 31(6), sch. 7)

**F23** S. 46(3A) inserted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), **sch. 4 para. 6(d)** (with s. 31(6), sch. 7)

**Modifications etc. (not altering text)**

**C7** S. 46 applied (with modifications) (1.1.2005) by [The Environmental Information \(Scotland\) Regulations 2004 \(S.S.I. 2004/520\)](#), **reg 18(5)(6)** (with reg. 3)

[<sup>F24</sup>**46A Strategic plans**

- (1) The Commissioner must, in respect of each 4 year period, lay before the Parliament a plan (referred to in this section as a “strategic plan”) setting out how the Commissioner proposes to perform the Commissioner's functions during the 4 year period.
- (2) A strategic plan must, in particular, set out—
  - (a) the Commissioner's objectives and priorities during the 4 year period,
  - (b) how the Commissioner proposes to achieve them,
  - (c) a timetable for doing so, and
  - (d) estimates of the costs of doing so.
- (3) Before laying a strategic plan before the Parliament, the Commissioner must provide a draft of it to and invite, and (if any are given) consider, comments on it from—
  - (a) the Parliamentary corporation,
  - (b) the Keeper of the Records of Scotland, and
  - (c) such other persons as the Commissioner thinks appropriate.
- (4) The reference in subsection (3)(c) to other persons includes a committee of the Parliament.
- (5) The Commissioner must lay each strategic plan before the Parliament not later than the beginning of the 4 year period to which the plan relates.
- (6) The Commissioner must arrange for the publication of each strategic plan laid before the Parliament.
- (7) The Commissioner may, at any time during a 4 year period, review the strategic plan for the period and lay a revised strategic plan before the Parliament.
- (8) Subsections (2) to (7) apply to a revised strategic plan as they apply to a strategic plan.
- (9) In that application, the reference in subsection (5) to the 4 year period is a reference to the period to which the revised strategic plan relates.
- (10) In this section, “4 year period” means the period of 4 years beginning on 1 April next following the coming into force of this section and each subsequent period of 4 years.]

**Textual Amendments**

**F24** S. 46A inserted (1.4.2011) by [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(asp 11\)](#), s. 31(5), **sch. 4 para. 7** (with s. 31(6), sch. 7)

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## PART 4

### ENFORCEMENT

#### Modifications etc. (not altering text)

**C8** Pt. 4 applied (with modifications) (1.1.2005) by [The Environmental Information \(Scotland\) Regulations 2004 \(S.S.I. 2004/520\)](#), [reg. 17\(1\)\(2\)](#) (with [reg. 3](#))

#### 47 Application for decision by Commissioner

- (1) A person who is dissatisfied with—
  - (a) a notice given under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice,
 may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must—
  - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify—
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
    - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).
- (3) For the purposes of paragraph (a) of subsection (2) (and without prejudice to the generality of that paragraph), an application under that subsection is treated as made in writing where the text of the application is as mentioned in paragraphs (a) to (c) of section 8(2).
- (4) Subject to subsection (5), an application to the Commissioner under subsection (1) must be made—
  - (a) where the application concerns a matter mentioned in paragraph (a) of subsection (1), before the expiry of six months after the date of receipt by the applicant of the notice complained of; or
  - (b) where the application concerns a matter mentioned in paragraph (b) of that subsection, before the expiry of six months after the period allowed in section 21(1) for complying with a requirement for review has elapsed.
- (5) The Commissioner may consider an application under subsection (1) made after the expiry of the time allowed by subsection (4) for the making of that application if, in the opinion of the Commissioner, it is appropriate to do so.
- (6) The Scottish Ministers may by regulations provide—

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- (a) that a paragraph of subsection (4) is to have effect as if the reference in that paragraph to six months were a reference to such other period of months (being a period of not less than six months) as is specified in (or determined in accordance with) the regulations; and
  - (b) that subsection (5) is to have effect accordingly.
- (7) Regulations under subsection (6) may—
- (a) prescribe different periods of months in relation to different cases; and
  - (b) confer a discretion on the Commissioner.
- (8) This section is subject to section 48.

**Modifications etc. (not altering text)**

**C9** S. 47 applied (with modifications) (31.12.2009) by [The INSPIRE \(Scotland\) Regulations 2009 \(S.S.I. 2009/440\)](#), [reg. 12\(2\)\(a\)](#), Sch.

**48 When application excluded**

No application may be made to the Commissioner for a decision under section 47(1) as respects a request for review made to—

- (a) the Commissioner;
- (b) a procurator fiscal; or
- (c) the Lord Advocate, to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland.

**Modifications etc. (not altering text)**

**C10** S. 48 applied (with modifications) (31.12.2009) by [The INSPIRE \(Scotland\) Regulations 2009 \(S.S.I. 2009/440\)](#), [reg. 12\(2\)\(b\)](#), Sch.

**49 Commissioner's decision**

- (1) The Commissioner must make a decision in relation to an application made in accordance with section 47(1) which is not excluded by section 48 unless—
- (a) in the opinion of the Commissioner, the application is frivolous or vexatious; or
  - (b) in the opinion of the Commissioner, the application appears to have been withdrawn or abandoned.
- (2) In a case where the Commissioner determines that subsection (1) does not require a decision to be made, that officer must give the applicant and the Scottish public authority in question notice in writing within one month of receipt of the application, or within such other period as is reasonable in the circumstances, specifying—
- (a) that no decision falls to be made in relation to the application; and
  - (b) the reasons why that is the case.
- (3) In any other case, the Commissioner must—

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- (a) give that authority notice in writing of the application and invite its comments; and
  - (b) if no settlement has in the meantime been effected, reach a decision on the application before the expiry of four months after receiving it, or before the expiry of such other period as is reasonable in the circumstances.
- (4) The Commissioner may endeavour to effect a settlement between the applicant and that authority before the expiry of the period allowed by subsection (3) for reaching a decision on the application.
- (5) The Commissioner must give the applicant and that authority, within the time allowed by subsection (3), notice in writing (referred to in this Act as a “decision notice”) of any decision under paragraph (b) of that subsection.
- (6) Where the Commissioner decides that that authority has not dealt with a request for information in accordance with Part 1 of this Act, the notice under subsection (5) must specify—
- (a) the provision of that Part with which the authority has failed to comply and the respect in which it has so failed;
  - (b) the steps which, in the opinion of the Commissioner, the authority must take to comply with the provision; and
  - (c) the time within which those steps must be taken.
- (7) The time specified under subsection (6)(c) must not expire before the end of the period within which an appeal may be brought under section 56 against the decision of the Commissioner and, if such an appeal is brought, no step which is affected by the appeal need be taken before the cause is finally determined.
- (8) A notice under subsection (2) or (5) must contain particulars of the right of appeal conferred by section 56.
- (9) This section is subject to section 52.

**Modifications etc. (not altering text)**

**C11** S. 49 applied (with modifications) (31.12.2009) by [The INSPIRE \(Scotland\) Regulations 2009 \(S.S.I. 2009/440\)](#), [reg. 12\(2\)\(c\)](#), Sch.

**50 Information notices**

- (1) Where the Commissioner—
- (a) has received an application under section 47(1); or
  - (b) reasonably requires information—
    - (i) for the purpose of determining whether a Scottish public authority has complied or is complying with the provisions of this Act; or
    - (ii) for the purpose of determining whether the practice of a Scottish public authority conforms with the code of practice issued under section 60 or 61,
- that officer may give the authority notice in writing (referred to in this Act as “an information notice”) requiring it, within such time as is specified in the notice, to give the officer, in such form as may be so specified, such



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information relating to the application, to compliance with this Act or to conformity with the code of practice as is so specified.

- (2) An information notice must contain—
  - (a) in a case mentioned in paragraph (a) of subsection (1) a statement that the Commissioner has received an application under section 47(1); or
  - (b) in a case mentioned in paragraph (b) of that subsection, a statement of—
    - (i) the purpose mentioned in that paragraph for which that officer regards the specified information as relevant;
    - (ii) the officer’s reasons for so regarding the information; and
    - (iii) the time within which the information is to be given.
- (3) An information notice must contain also particulars of the right of appeal conferred by section 56.
- (4) The time specified under subsection (2)(b)(iii) in an information notice must not expire before the end of the period within which an appeal may be brought under section 56 against the notice; and, if such an appeal is brought, the information need not be given pending the determination or withdrawal of the appeal.
- (5) A Scottish public authority is not obliged by virtue of this section to give the Commissioner information in respect of—
  - (a) a communication between professional legal adviser and client in connection with the giving of legal advice to the client with respect to that client’s obligations under this Act; or
  - (b) a communication between professional legal adviser and client, or between such adviser or client and another person, made in connection with or in contemplation of proceedings under or arising out of this Act and for the purpose of such proceedings.
- (6) In subsection (5), references to the client of a professional legal adviser include references to a person representing such client.
- (7) Subject to subsection (5), neither—
  - (a) an obligation to maintain secrecy; nor
  - (b) any other restriction on disclosure,however arising or imposed, affects the duty to comply with an information notice.
- (8) The Commissioner may cancel an information notice by notice in writing given to the authority.
- (9) In this section, “information” includes unrecorded information.

**Modifications etc. (not altering text)**

**C12** S. 50 applied (with modifications) (31.12.2009) by [The INSPIRE \(Scotland\) Regulations 2009 \(S.S.I. 2009/440\)](#), [reg. 12\(2\)\(d\)](#), Sch.

**Commencement Information**

**I5** S. 50 wholly in force at 30.4.2004; s. 50 not in force at Royal Assent see [s. 75\(1\)](#); s. 50 in force for certain purposes at 31.10.2003 by [S.S.I. 2003/477](#), [art. 3\(4\)](#); s. 50 wholly in force at 30.4.2004 by [S.S.I. 2004/203](#), [art. 3\(1\)](#), Sch.

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## 51 Enforcement notices

- (1) If the Commissioner is satisfied that a Scottish public authority has failed to comply with a provision of Part 1 of this Act, the Commissioner may give the authority a notice (referred to in this Act as “an enforcement notice”) requiring the authority to take, within such time as is specified in the notice, such steps as are so specified for so complying.
- (2) An enforcement notice must contain—
  - (a) a statement of the provision with which the Commissioner is satisfied that the authority has failed to comply and the respect in which it has not done so; and
  - (b) particulars of the right of appeal conferred by section 56.
- (3) The time specified under subsection (1) must not expire before the end of the period within which an appeal may be brought under section 56 against the notice and, if such an appeal is brought, the notice need not be complied with before the cause is finally determined.
- (4) The Commissioner may cancel an enforcement notice by notice in writing given to the authority.
- (5) This section is subject to section 52.

### Modifications etc. (not altering text)

**C13** S. 51 applied (with modifications) (31.12.2009) by [The INSPIRE \(Scotland\) Regulations 2009 \(S.S.I. 2009/440\)](#), [reg. 12\(2\)\(e\)](#), Sch.

### Commencement Information

**I6** S. 51 wholly in force at 30.4.2004; s. 51 not in force at Royal Assent see [s. 75\(1\)](#); s. 51 in force for certain purposes at 31.10.2003 by [S.S.I. 2003/477](#), [art. 3\(4\)](#); s. 51 wholly in force at 30.4.2004 by [S.S.I. 2004/203](#), [art. 3\(1\)](#), Sch.

## 52 Exception from duty to comply with certain notices

- (1) This section applies to a decision notice or enforcement notice which—
  - (a) is given to the Scottish Administration; and
  - (b) relates to a perceived failure, in respect of one or more requests for information, to comply with section 1(1) in respect of information which, by virtue of section 29, 31(1), 32(1)(b), 34, 36(1) or 41(b), is exempt information.
- (2) A decision notice or enforcement notice to which this section applies ceases to have effect, in so far as it relates to the perceived failure, if, not later than the thirtieth working day following the effective date, the First Minister of the Scottish Executive, after consulting the other members of that Executive, signs and gives the Commissioner a certificate stating that the First Minister has on reasonable grounds formed, after such consultation, the opinion both that—
  - (a) there was no such failure; and
  - (b) the information requested is of exceptional sensitivity.
- (3) The First Minister is, by not later than the tenth working day after such a certificate—
  - (a) is given, to lay a copy of it before the Parliament; and

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(b) is given in relation to a decision notice, to inform the person to whose application the notice relates of the reasons for the opinion formed, except that the First Minister is not obliged to provide information under paragraph (b) if, or to the extent that, compliance with that paragraph would necessitate the disclosure of exempt information.

(4) In subsection (2), “the effective date”, in relation to a notice, means—

- (a) the day on which the notice was given to the Scottish Administration; or
- (b) where an appeal under section 56 is brought, the day on which the cause is finally determined.

### 53 Failure to comply with notice

(1) If a Scottish public authority has failed to comply with—

- (a) so much of a notice given to it by the Commissioner under subsection (5) of section 49 as, by virtue of subsection (6)(b) of that section, requires steps to be taken by the authority;
- (b) an information notice; or
- (c) an enforcement notice,

the Commissioner may certify in writing to the court that the authority has failed to comply with the notice.

(2) For the purposes of this section, a Scottish public authority which, in purported compliance with an information notice—

- (a) makes a statement which it knows to be false in a material respect; or
- (b) recklessly makes a statement which is false in a material respect,

is to be taken to have failed to comply with the notice.

(3) Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the authority, and after hearing any statement that may be offered in defence, may deal with the authority as if it had committed a contempt of court.

(4) In this section, “the court” means the Court of Session.

#### Modifications etc. (not altering text)

**C14** S. 53 applied (with modifications) (31.12.2009) by [The INSPIRE \(Scotland\) Regulations 2009 \(S.S.I. 2009/440\)](#), [reg. 12\(2\)\(f\)](#), Sch.

#### Commencement Information

**I7** S. 53 wholly in force at 30.4.2004; s. 53 not in force at Royal Assent see [s. 75\(1\)](#); s. 53 in force for certain purposes at 31.10.2003 by [S.S.I. 2003/477](#), [art. 3\(4\)](#); s. 53 wholly in force at 30.4.2004 by [S.S.I. 2004/203](#), [art. 3\(1\)](#), Sch.

### 54 Powers of entry and inspection

Schedule 3, which makes provision as to powers of entry and inspection, has effect.

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**Modifications etc. (not altering text)**

**C15** S. 54 applied (with modifications) (31.12.2009) by [The INSPIRE \(Scotland\) Regulations 2009 \(S.S.I. 2009/440\)](#), [reg. 12\(2\)\(g\)](#), Sch.

**Commencement Information**

**I8** S. 54 wholly in force at 30.4.2004; s. 54 not in force at Royal Assent see [s. 75\(1\)](#); s. 54 in force for certain purposes at 31.10.2003 by [S.S.I. 2003/477](#), [art. 3\(4\)](#); s. 54 wholly in force at 30.4.2004 by [S.S.I. 2004/203](#), [art. 3\(1\)](#), Sch.

**55 No civil right of action against Scottish public authority**

- (1) This Act does not confer a right of action in civil proceedings in respect of failure by a Scottish public authority to comply with a duty imposed by, under or by virtue of this Act.
- (2) Subsection (1) does not affect the powers of the Commissioner under section 53(1).

**Modifications etc. (not altering text)**

**C16** S. 55 applied (with modifications) (31.12.2009) by [The INSPIRE \(Scotland\) Regulations 2009 \(S.S.I. 2009/440\)](#), [reg. 12\(2\)\(h\)](#), Sch.

**56 Appeal against notices under Part 4**

An appeal, on a point of law, to the Court of Session may be made—

- (a) against a decision by the Commissioner under subsection (2) of section 49, by the person who applied for that decision;
- (b) against a decision by the Commissioner under subsection (3)(b) of that section—
  - (i) by that person; or
  - (ii) by the Scottish public authority in respect of which the decision was made; or
- (c) against the decision which resulted in the giving of—
  - (i) an information notice; or
  - (ii) an enforcement notice,
 to a Scottish public authority, by that authority.

**Modifications etc. (not altering text)**

**C17** S. 56 applied (with modifications) (31.12.2009) by [The INSPIRE \(Scotland\) Regulations 2009 \(S.S.I. 2009/440\)](#), [reg. 12\(2\)\(i\)](#), Sch.

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## PART 5

### HISTORICAL RECORDS

#### 57 The expression “historical record”

- (1) For the purposes of this Part, a record becomes a “historical record” at the end of that period of thirty years which commences at the beginning of the calendar year following that in which the record is created.
- (2) Where records created at different dates are for administrative purposes kept together in one file or other assemblage, all the records in that file or assemblage are to be treated for the purposes of this Part as created when the latest of those records is created.

#### 58 Falling away of exemptions with time

- (1) Information contained in a historical record cannot be exempt information by virtue of any of sections 28 to 30, 33(1), 36, 37, 40 and 41(a).
- (2) Information cannot be exempt information by virtue of—
  - (a) section 41(b) after the end of that period of sixty years; or
  - (b) section 34(2)(b), 35 or 38(1)(c) or (d) after the end of that period of one hundred years,which commences at the beginning of the calendar year following that in which the record containing the information is created.

#### 59 Power to vary periods mentioned in sections 57 and 58

- (1) The Scottish Ministers may by order amend subsection (1) of section 57 or paragraph (a) or (b) of subsection (2) of section 58 so as to substitute for the number of years for the time being mentioned in the provision in question such other number of years (not being a number which exceeds that mentioned in the provision as originally enacted) as may be specified in the order.
- (2) An order under subsection (1) may contain such transitional provisions and savings as the Scottish Ministers think fit.

## PART 6

### CODES OF PRACTICE

#### 60 Code of practice as to functions under this Act

- (1) The Scottish Ministers are to issue, and may from time to time revise, a code of practice providing guidance to Scottish public authorities as to the practice which it would, in the opinion of the Ministers, be desirable for the authorities to follow in connection with the discharge of the authorities’ functions under this Act.
- (2) The code must, in particular, include provision relating to—
  - (a) the provision of advice and assistance by the authorities to persons who propose to make, or have made, requests for information;

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- (b) the transfer of requests by one of the authorities to another by which the information requested is or may be held;
  - (c) consultation with persons to whom information requested relates or with persons whose interests are likely to be affected by the disclosure of such information;
  - (d) the inclusion in contracts entered into by the authorities of terms relating to the disclosure of information;
  - (e) the provision by the authorities of procedures for dealing with complaints about the handling by the authorities of requests for information; and
  - (f) the collection and recording by the authorities of statistics as respects the discharge by them of their functions under this Act.
- (3) The code may make different provision for different Scottish public authorities.
- (4) Before issuing or revising the code, the Scottish Ministers are to consult the Commissioner.
- (5) The Scottish Ministers must lay the code, and any revised code made under this section, before the Parliament.

## **61 Code of practice as to the keeping, management and destruction of records**

- (1) The Scottish Ministers are to issue, and may from time to time revise, a code of practice providing guidance to Scottish public authorities as to the practice which it would, in the opinion of the Ministers, be desirable for the authorities to follow in connection with the keeping, management and destruction of the authorities' records.
- (2) The code may also include guidance as to the practice—
- (a) to be adopted in relation to the transfer of records to the Keeper of the Records of Scotland;
  - (b) of reviewing records before they are so transferred; and
  - (c) to be adopted where one Scottish public authority holds records on behalf of another such authority.
- (3) In exercising their functions under this section, the Scottish Ministers are to have regard to the public interest in allowing public access to information held by Scottish public authorities.
- (4) The code may make different provision for different Scottish public authorities.
- (5) Before issuing or revising the code the Scottish Ministers are to consult—
- (a) the Commissioner; and
  - (b) the Keeper of the Records of Scotland.
- (6) The Scottish Ministers must lay the code, and any revised code made under this section, before the Parliament.

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## PART 7

### MISCELLANEOUS AND SUPPLEMENTAL

#### 62 Power to make provision relating to environmental information

- (1) In this section “the Aarhus Convention” means the Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters signed at Aarhus on 25th June 1998.
- (2) For the purposes of this section, “the information provisions” of the Aarhus Convention are Article 4, together with Articles 3 and 9 so far as relating to that Article.
- (3) The Scottish Ministers may, in relation to information held by or requested from any Scottish public authority, by regulations make such provision as they consider appropriate—
  - (a) for the purpose of implementing the information provisions of the Aarhus Convention or any amendment of those provisions made in accordance with Article 14 of the Convention; and
  - (b) for the purpose of dealing with matters arising out of, or related to, the implementation of those provisions or of any such amendment.
- (4) Regulations under subsection (3) may in particular—
  - (a) enable charges to be made for making information available in accordance with the regulations;
  - (b) provide that any obligation imposed by the regulations in relation to the disclosure of information is to have effect notwithstanding any enactment or rule of law;
  - (c) make provision for the issue by the Scottish Ministers of a code of practice;
  - (d) provide for sections 43 and 44 to apply in relation to such a code with such modifications as may be specified in the regulations;
  - (e) provide for all or any of the provisions of Part 4 to apply, with such modifications as may be so specified, in relation to compliance with any requirement of the regulations; and
  - (f) contain such transitional or consequential provision (including provision modifying any enactment) as the Scottish Ministers consider appropriate.

#### 63 Disclosure of information to Scottish Public Services Ombudsman or to Information Commissioner

The Commissioner may disclose to—

- (a) the Scottish Public Services Ombudsman any information obtained by, or furnished to, the Commissioner under or for the purposes of this Act if it appears to the Commissioner that the information relates to a matter which is, or could be, the subject of an investigation by the Ombudsman under the Scottish Public Services Ombudsman Act 2002 (asp 11); or
- (b) the Information Commissioner any information so obtained or furnished if it appears to the Commissioner that the information so relates as is mentioned in paragraph (a) or (b) of section 11AA(1) of the Parliamentary Commissioner Act 1967 (c.13) (disclosure of information by Parliamentary Commissioner to Information Commissioner).

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#### **Modifications etc. (not altering text)**

- C18** S. 63 applied (with modifications) (1.1.2005) by [The Environmental Information \(Scotland\) Regulations 2004 \(S.S.I. 2004/520\)](#), **reg 18(5)(6)** (with reg. 3)
- C19** S. 63 applied (31.12.2009) by [The INSPIRE \(Scotland\) Regulations 2009 \(S.S.I. 2009/440\)](#), **reg. 12(3)**, Sch.

### **64 Power to amend or repeal enactments prohibiting disclosure of information**

- (1) If it appears to the Scottish Ministers that by virtue of section 26(a) a relevant enactment is capable of preventing the disclosure of information under section 1, they may by order repeal or amend that enactment, in so far as it relates to any Scottish public authority, so as to remove or relax the prohibition.
- (2) In subsection (1)—
- “relevant enactment” means an Act of Parliament, or Act of the Scottish Parliament, which receives Royal Assent before the end of the calendar year in which this Act receives Royal Assent or any subordinate legislation made before the date on which this Act receives Royal Assent; and
- “information” includes unrecorded information.
- (3) An order under subsection (1) may do all or any of the following—
- make such modifications of enactments as, in the opinion of the Scottish Ministers, are consequential upon, or incidental to, the repeal or amendment of the relevant enactment;
  - contain such transitional provisions and savings as appear to them to be appropriate;
  - make different provision in relation to different cases.

### **65 Offence of altering etc. records with intent to prevent disclosure**

- (1) Where—
- a request for information is made to a Scottish public authority; and
  - the applicant is, under section 1, entitled to be given the information or any part of it,
- a person to whom this subsection applies who, with the intention of preventing the disclosure by the authority of the information, or part, to which the entitlement relates, alters, defaces, blocks, erases, destroys or conceals a record held by the authority, is guilty of an offence.
- (2) Subsection (1) applies to the authority and to any person who is employed by, is an officer of, or is subject to the direction of, the authority.
- (3) A person guilty of an offence under subsection (1) is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.

### **66 Saving for existing powers of disclosure**

Nothing in this Act is to be taken to limit the powers of a Scottish public authority to disclose information held by it.



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**67 Protection from actions for defamation**

Where, in compliance with a request for information, information supplied to a Scottish public authority by a third party is communicated by the authority, under section 1, to the applicant, the publication to the applicant of any defamatory matter contained in the information so supplied is privileged unless that publication is shown to have been made with malice.

**68 Scottish Parliament and Scottish Administration**

Section 65 and paragraph 10 of schedule 3 apply to—

- (a) a member of the staff of, or a person acting on behalf of, the Parliament or the Parliamentary corporation; or
- (b) a member of the staff of the Scottish Administration,

as they apply to any other person; but none of those bodies is liable to prosecution under this Act.

**69 Exercise of rights by children**

- (1) Where a question falls to be determined as to the legal capacity of a person who has not attained the age of sixteen years to exercise any right conferred by any provision of this Act, any such person is to be taken to have that capacity who has a general understanding of what it means to exercise the right.
- (2) Without prejudice to the generality of subsection (1), a person who has attained the age of twelve years is to be presumed to be of sufficient age and maturity to have such understanding as is mentioned in that subsection.

**70 Amendment of Public Records (Scotland) Act 1937**

- (1) The Public Records (Scotland) Act 1937 (c.43) is amended as follows.

<sup>F25</sup>(2) .....

- (3) After section 12 there is inserted—

**“12A Duty to afford facilities for inspection etc. of certain records**

It shall be the duty of the Keeper to arrange that reasonable facilities are available to the public for—

- (a) inspecting; and
- (b) obtaining copies of,

such records held by the Keeper as either fall to be disclosed in accordance with the Freedom of Information (Scotland) Act 2002 (asp 13) or comprise information which is exempt information (within the meaning of that Act) by virtue of section 25(2)(b)(ii) of that Act.”

**Textual Amendments**

**F25** S. 70(2) repealed (1.8.2010) by [Public Services Reform \(Scotland\) Act 2010 \(asp 8\)](#), [ss. 4\(5\)\(a\)](#), [134\(7\)](#); [S.S.I. 2010/221](#), [art. 3\(2\)](#), [sch.](#)

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### Commencement Information

- 19** S. 70 partly in force; s. 70 not in force at Royal Assent see s. 75(1); s. 70(1)(2) in force at 30.9.2002 by S.S.I. 2002/437, **art. 2**

## 71 Amendment of Scottish Public Services Ombudsman Act 2002

- (1) In Part 2 of schedule 2 to the Scottish Public Services Ombudsman Act 2002 (asp 11) (persons listed as liable to investigation under that Act), after paragraph 45 there is inserted—
- “45A The Scottish Information Commissioner.”.
- (2) Schedule 4 to this Act, which contains amendments to that Act consequential on the provisions of this Act, has effect.

## 72 Orders and regulations

- (1) Any power of the Scottish Ministers to make an order or regulations under this Act is exercisable by statutory instrument.
- (2) A statutory instrument—
- (a) made in exercise of any of the powers conferred by sections 4(1) (except in the case mentioned in subsection (3)), 13(1) or 62(3) is subject to annulment in pursuance of a resolution of the Parliament;
  - (b) containing an order under section 4(1) (but only in the case so mentioned), 5(1), 7(2) or (4)(b), 59(1) or 64(1) or regulations under section 9(4), 10(4), 12, 20(7), 21(6) or 47(6) is not made unless a draft of the instrument has been—
    - (i) laid before; and
    - (ii) approved by resolution of, the Parliament.
- (3) The case is that the instrument contains an order under paragraph (a) of section 4(1) and lists an authority in the way mentioned in section 7(1).

## 73 Interpretation

In this Act, unless the context requires a different interpretation—

- “the Commissioner” means the Scottish Information Commissioner;
- “body” includes an unincorporated association;
- “decision notice” has the meaning given by section 49(5);
- “enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;
- “enforcement notice” has the meaning given by section 51(1);
- “exempt information” means information which is so described in any provision of Part 2;
- “fees notice” has the meaning given by section 9(1);
- “information” (subject to sections 50(9) and 64(2)) means information recorded in any form;
- “information notice” has the meaning given by section 50(1);

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“Minister of the Crown” has the same meaning as in the Ministers of the Crown Act 1975 (c.26);

“the Parliamentary corporation” means the Scottish Parliamentary Corporate Body;

“publication scheme” has the meaning given by section 23(1)(a);

“refusal notice” has the meaning given by section 16(1) (including that section as read with section 18(2));

“requirement for review” has the meaning given by section 20(2);

“Scottish public authority” has the meaning given by section 3(1);

“subordinate legislation” has the same meaning as in the Interpretation Act 1978 (c.30) but includes an instrument made under an Act of the Scottish Parliament; and

“working day” means any day other than a Saturday, a Sunday, Christmas Day or a day which, under the Banking and Financial Dealings Act 1971 (c.80), is a bank holiday in Scotland.

#### **74 Giving of notice etc.**

(1) In this Act, any reference to—

(a) a notice being given is to be construed as a reference to its being—

(i) delivered; or

(ii) posted; and

(b) a request for information, a requirement for review or an application being made, or a certificate being given, is to be construed as a reference to its being—

(i) delivered;

(ii) posted; or

(iii) transmitted by electronic means.

(2) For the purposes of any provision of this Act, a thing—

(a) posted is presumed not to be received until the third day after the day of posting; and

(b) transmitted by electronic means is presumed to be received on the day of transmission.

#### **75 Commencement**

(1) This section and sections 72 and 76 come into force on Royal Assent; and the other provisions of this Act come into force—

(a) on such day as the Scottish Ministers may by order appoint, that day being, subject to paragraph (b), a day no later than 31st December 2005; or

(b) if the Commissioner recommends to the Scottish Ministers that a day after 31st December 2005 and specified in the recommendation be so appointed and they accept that recommendation, then on the specified day as so appointed,

and different days may be so appointed (or as the case may be recommended and appointed) for different provisions, for different persons or categories of person and for different purposes.

(2) An order under paragraph (b) of subsection (1) may contain such transitional provisions and savings (including provisions capable of having effect after the coming

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into force of provisions of this Act other than this section and sections 72 and 76) as the Scottish Ministers consider appropriate.

(3) During—

- (a) that period of twelve months which begins with the date of Royal Assent; and
- (b) each subsequent period of twelve months until all the provisions of this Act are fully in force,

the Scottish Ministers are to prepare, and lay before the Parliament, a report of their proposals (including their response to any recommendations made under subsection (1)(b)) for bringing fully into force the provisions of this Act.

#### Subordinate Legislation Made

- P1** S. 75(1) power partly exercised: 30.9.2002 appointed for specified provisions by [S.S.I. 2002/437](#), **art. 2**;  
S. 75(1) power partly exercised: 31.10.2003 appointed for specified provisions by [{S.S.I. 2003/477}](#), art. 3;  
S. 75(1) power fully exercised: 30.4.2004 appointed for specified provisions and 1.1.2005 appointed for all remaining provisions by [{S.S.I. 2004/203}](#), art. 3, Sch.

## 76 Short title

This Act may be cited as the Freedom of Information (Scotland) Act 2002.

**Status:**

Point in time view as at 22/04/2011.

**Changes to legislation:**

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