



# Freedom of Information (Scotland) Act 2002

2002 asp 13

## 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>F1</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 salary of such amount; and
  - 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>F2</sup> eight ] years as the Parliamentary corporation, at the time of appointment, may determine.
- [<sup>F3</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)—
- prohibit the Commissioner from holding any other specified office, employment or appointment or engaging in any other specified occupation,

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- (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;
  - (b) <sup>F4</sup> .....
  - (c) may be removed from office by Her Majesty [<sup>F5</sup> if subsection (4A) applies ]
  - <sup>F6</sup>(d) .....
- [<sup>F7</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>F8</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>F9</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>F10</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.

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- (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;
  - (b) any expenses [<sup>F11</sup> properly ] incurred by that officer in the exercise of functions under this Act [<sup>F12</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>F13</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

- F1** 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)
- F2** 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)
- F3** 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)
- F4** 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).
- F5** 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)
- F6** 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)
- F7** 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)
- F8** 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)
- F9** 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)
- F10** 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)
- F11** 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)

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- F12** 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)
- F13** 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)

### 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>F14</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>F15</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

- F14** 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)
- F15** 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)

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

- C1 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](#))

**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)**

- C2 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) a Community 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—

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- (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,
- 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.

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

- C3** 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 [F16 Laying and publication of reports]

- (1) The Commissioner must lay annually before the Parliament a general report on the exercise [F17 during the reporting year] of the functions conferred on that officer under this Act.
- [F18(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).
- [F19(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.
- [F20(3A) The Commissioner must arrange for the publication of each report laid before the Parliament under this section.]

#### Textual Amendments

- F16** 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)
- F17** 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)

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- F18** 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)
- F19** 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)
- F20** 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)**

- C4** 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>F21</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**

- F21** 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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