

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

EXPLANATORY NOTES

THE ACT – SECTION BY SECTION

Part 7 – Miscellaneous and supplemental

Section 62 – Power to make provision relating to environmental information

149. This section provides that the Scottish Ministers may make regulations to implement the “Aarhus Convention” – a United Nations Economic Commission for Europe (UNECE) Convention, which the UK (and all other European Union Member States) signed at Aarhus in Denmark in 1998.
150. The Convention deals with access to information, public participation in decision-making and access to justice in environmental matters. As the Convention goes further than the existing Environmental Information Regulations (EIRs) in some areas, and these are not sufficient to enable the United Kingdom to meet the requirements of the Convention, new regulations must be made. The Convention is not an EC instrument, and therefore a new power to make regulations is required (the power to make regulations under section 2(2) of the European Community Act 1972 cannot be utilised). It should be noted that these regulations will implement only those provisions of the Aarhus Convention which relate to access to environmental information.
151. This section will allow the creation of a revised free-standing access regime for environmental information, replacing the current EIRs (the [Environmental Information Regulations 1992 \(SI 1992/3240\)](#), as amended by the [Environmental Information \(Amendment\) Regulations 1998 \(SI 1998/1447\)](#)). The current Regulations – which will be revoked on the coming into force of the revised regime – implement Directive [90/313/EEC](#) on the Freedom of Access to Information in the Environment.
152. [Section 62\(3\)](#) gives the Scottish Ministers power to make regulations to implement those Articles of the Aarhus Convention which relate to the provision of access to environmental information. The regulations may include provisions for the purpose of dealing with matters arising from those Articles, or amendments to them. [Section 62\(4\)](#) permits the regulations to include provisions enabling charges to be made in connection with the disclosure of environmental information.
153. [Section 62\(4\)](#) also permits certain provisions of the Act to be applied to the regulations, with modifications. The regulations may also make provision for a code of practice to be issued by the Scottish Ministers to apply to any authority, persons or body (as defined in the Convention) subject to the regulations, and for the application of the Scottish Information Commissioner’s powers under sections 43 and 44, as modified if necessary. The regulations may also apply, with modifications, Part 4 of the Act (“Enforcement”), so that the Scottish Information Commissioner will be able to enforce the regulations. The regulations may also make provision for any transitional or

consequential provisions that are appropriate. Such regulations will be subject to negative resolution.

Section 63 – Disclosure of information to Scottish Public Services Ombudsman or to the UK Information Commissioner

154. This section provides that the Commissioner may, in certain circumstances, disclose information to the Scottish Public Services Ombudsman or the UK Information Commissioner.

Section 64 – Power to amend or repeal enactments prohibiting disclosure of information

155. This section provides that the Scottish Ministers may, under certain circumstances, by order repeal or amend an enactment prohibiting the disclosure of information. Any order made under this section will be subject to affirmative resolution.

Section 65 – Offence of altering etc. records with intent to prevent disclosure

156. Under section 68, the offence to alter, deface, block, erase, destroy or conceal records cannot be committed by the Scottish Parliament, Parliamentary corporation or the Scottish Administration, but can be committed by officials of those authorities.

Section 67 – Protection for actions for defamation

157. The purpose of this section is to ensure that a public authority cannot be held liable if it is required to disclose information under this Act for which an action for defamation could be taken against it. This only applies where the information containing the defamatory matter has been supplied to that authority by a third person. It does not apply where that disclosure can be shown to have been made with malicious intent.

Section 68 – Scottish Parliament and Scottish Administration

158. This section makes provision that although the Scottish Administration, the Scottish Parliament and the Parliamentary corporation as “authorities” are exempt from prosecution under the Act, individual members of staff acting on their behalf are not.

Section 69 – Exercise of rights by children

159. This section allows the provisions in the Act to be used by children.

Section 70 – Amendment of Public Records (Scotland) Act 1937

160. This section amends the Public Records (Scotland) Act 1937. Section 70(2) amends section 7 of that Act to provide that the Scottish Records Advisory Council – an independent advisory body established under the 1937 Act – may advise the Scottish Ministers on matters relating to the application of the Act to information contained in records held by the Keeper of the Records of Scotland. Section 70(3) adds a new duty on the Keeper to arrange that reasonable facilities are available to the public for inspecting and obtaining copies of records which he holds and which fall to be disclosed in accordance with the Act or are exempt under section 25(2)(b)(ii). In practice, such facilities and copying services already exist at the National Archives of Scotland. However, inspection of records held by the Keeper did not feature in the 1937 Act and this amendment will now make it a requirement for such facilities to be made available.

Section 71 – Amendment of Scottish Public Services Ombudsman Act 2002

161. This section adds the Scottish Information Commissioner to the list of bodies covered by the Scottish Public Sector Ombudsman and introduces schedule 4.

Section 72 – Orders and regulations

162. A statutory instrument made under each of the following sections is subject to annulment by resolution of the Scottish Parliament (this is known as negative resolution):
- section 4(1) (orders relating to the amendment of schedule 1, except those which list an authority in the way mentioned in section 7(1))
 - section 13(1) (regulations relating to fees for disclosure in certain circumstances)
 - section 62(3) (regulations relating to access to environmental information)
163. A statutory instrument made under any of the following sections has to be laid before and approved by resolution of the Scottish Parliament (this is known as affirmative resolution):
- section 4(1) (orders which list an authority in the way mentioned in section 7(1))
 - section 5(1) (orders designating further Scottish public authorities)
 - section 7(2) (orders limiting, or removing any limitation to, the extent to which the Act applies to a Scottish public authority listed in schedule 1)
 - section 7(4)(b) (orders describing information held by a publicly-owned company)
 - section 9(4) (regulations relating to fees and charges)
 - section 10(4) (regulations which vary the time in which a request must be handled)
 - section 12 (regulations relating to excessive cost provisions)
 - section 20(7) (regulations to vary the time limits within which an applicant may request a requirement for review)
 - section 21(6) (regulations to vary the time in which the requirement for review must be considered)
 - section 47(6) (regulations to vary the time in which the Commissioner must reach a decision on an appeal)
 - section 59(1) (orders to vary the periods after which certain exemptions do not apply)
 - section 64(1) (orders which amend or repeal prohibitions on disclosure)

Section 74 – Giving of notice

164. This section sets out, for the purposes of this Act, how notices are to be given, etc., and the details as to the timings of such processes.

Section 75 – Commencement

165. Section 75(1) brings into force all the provisions of the Act on such days as the Scottish Ministers may by order appoint, and no later than 31 December 2005. The Scottish Ministers may appoint a date after this if the Scottish Ministers accept a recommendation to do so is made to them by the Commissioner. Orders made under section 75(1)(b) may also contain transitional provisions, including provisions capable of having effect beyond that date.
166. Section 75(3) requires the Scottish Ministers to prepare and lay before the Scottish Parliament annual reports on the implementation of the Act, starting within 12 months from the date of Royal Assent and each year thereafter until all provisions are fully commenced.