

# **FREEDOM OF INFORMATION (SCOTLAND) ACT 2002**

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## **EXPLANATORY NOTES**

### **THE ACT – SECTION BY SECTION**

#### **Part 1 – Access to information held by Scottish public authorities**

##### ***Section 1 – General entitlement***

14. This section confers a general right of access to information held by a Scottish public authority (the authority).
15. A person making a request for information to a Scottish public authority is referred to as the applicant. If the information requested is held by that authority, then the applicant is entitled to be given it by the authority. Provisions limiting an authority's obligations under this section appear in section 1(3), in sections 2, 9, 12 and 14, and in Part 2 ("exempt information"). Sections 9, 12 and 14 relate to the nature of the request itself and the circumstances in which an authority is not obliged to comply with it. The provisions in section 1(3) and in section 2, which refers to Part 2, relate to the nature of the information requested.
16. Section 1(3) enables the authority to request any further information necessary in order to identify and locate the information. Section 8 of the Act requires that an applicant describe the information requested, and, although the Act does not prescribe the way in which this must be done, it is in an applicant's interest to describe the information requested in as much detail as possible to assist the authority to be able to identify and locate it. The applicant is not required to cite the Act in submitting a request for information.
17. The information communicated to an applicant is to be the information held by an authority at the time the request is received, except that an authority is allowed to make 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. This is intended to support day-to-day records management arrangements. Requested information is not to be destroyed unless it would not be reasonably practicable to prevent such destruction from occurring.

##### ***Section 2 – Effect of exemptions***

18. This section sets out the circumstances where the general entitlement to obtain information will apply to information which is exempt by virtue of a provision in Part 2. Section 2 deals with the application of the public interest test to such information.
19. The general entitlement to information which is exempt by virtue of any provision of Part 2 applies only to the extent that the provision does not confer absolute exemption and to the extent that, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

*These notes relate to the Freedom of Information (Scotland)  
Act 2002 (asp 13) which received Royal Assent on 28 May 2002*

If the public interest in maintaining the exemption outweighs that in disclosing the information, the information need not be disclosed.

20. Where a provision confers absolute exemption, the public interest in disclosure need not be considered. The provisions in Part 2 conferring absolute exemption are:
- section 25 (information otherwise accessible)
  - section 26 (prohibitions on disclosure)
  - section 36(2) (information obtained from a person where its disclosure would constitute a breach of confidence actionable by that person)
  - section 37 (court records etc.)
  - section 38(1)(a) (personal data of which the subject is the applicant)
  - section 38(1)(c) (personal census information)
  - section 38(1)(d) (health records of the deceased)
  - section 38(1)(b) (personal data), where the first condition referred to in that paragraph is satisfied by virtue of section 38(2)(a)(i) or 38(2)(b).
21. This ensures that the Act does not interfere with other statutory provisions (such as the Data Protection Act 1998) which allow information to be withheld; and that it does not require the disclosure of information which concerns an ongoing action in court, or of information which is otherwise accessible (and where it would be inappropriate to require the provisions of the Act to apply).

### ***Section 3 – Scottish public authorities***

22. This section defines the term “Scottish public authority” and specifies that certain information is outwith the scope of the Act.
23. “Scottish public authority” means any body (or other person or office-holder) which is listed in schedule 1, designated by order under section 5(1), or which is a publicly-owned company as defined by section 6.
24. Section 3(2) defines when, for the purposes of the Act, information is considered to be “held” by an authority. This does not extend to information held on behalf of another person, but does extend to information held by a person other than the authority on behalf of the authority.
25. Section 3(2)(a)(ii) provides that information is not caught by the Act if the authority is holding it in confidence, having received it from a UK Government Department. This mirrors the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999. In terms of the 1998 Act, such information does not come under the devolved competence.
26. Unless subject to section 22, or designated as open information for the purposes of section 3(4), information is not regarded as held by the Keeper of the Records of Scotland if it has been transferred by a public authority within the meaning of the Freedom of Information Act 2000. The effect of designating information as open information for the purposes of section 3(4) is to bring that information within the scope of the Act where this would not otherwise have been the case.

### ***Section 4 – Amendment of [schedule 1](#)***

27. This section makes provision as to future amendment of schedule 1.
28. [Section 4\(1\)](#) provides that the Scottish Ministers may by order amend schedule 1 by adding a body or the holder of any office which is either a part of the Scottish Administration or is a Scottish public authority with mixed functions or no reserved

functions. An order may also remove an authority from schedule 1. Such an order will be subject to negative resolution, unless it adds an authority but limits the extent of the information available in the way mentioned in section 7(1), in which case it will be subject to affirmative resolution.

29. The references to an authority with mixed functions or no reserved functions are to be read in accordance with Part III of Schedule 5 to the Scotland Act 1998. (A Scottish public authority with mixed functions is an authority whose functions relate to reserved and devolved matters, unless the authority is designated – by order under section 88 of the Scotland Act 1998 – a cross-border public authority.)

### ***Section 5 – Further power to designate Scottish public authorities***

30. This section provides that the Scottish Ministers may by order designate as a Scottish public authority for the purposes of the Act any person who is neither listed in schedule 1 (nor capable of being added to that schedule under section 4(1)), is neither a public body nor the holder of a public office, and who appears to the Scottish Ministers to exercise functions of a public nature or is providing, under contract to a Scottish public authority, any service whose provision is a function of that authority.
31. An order under this section would be subject to affirmative resolution.

### ***Section 6 – Publicly-owned companies***

32. This section provides that, for the purposes of section 3(1)(b), a company is a “publicly-owned company” if it is wholly owned by the Scottish Ministers or by any other Scottish public authority or authorities listed in schedule 1 (except where the schedule 1 entry regarding the authority is limited to certain information).
33. Section 3(2) sets out the circumstances where, for the purposes of section 3(1), a company will be considered wholly owned by the Scottish Ministers or by any other Scottish public authority or authorities.
34. Publicly-owned companies are, under the terms of section 3(1)(b), subject to the Act’s provisions.

### ***Section 7 – Public authorities to which Act has limited application***

35. Under this section, the Scottish Ministers will be able to provide that any authority brought within the scope of the Act under section 4 would only be subject to the Act’s provisions in relation to certain specified information. The authority’s obligations under this Act would not extend to any other information which that authority held.
36. Under section 7(2), where an authority is already listed in schedule 1, the Scottish Ministers may make an order limiting the public authority’s obligations under the Act to information relating to a specific function or activities. The Scottish Ministers may also make an order removing or amending any such limitation listed in schedule 1. Such an order would be subject to affirmative resolution.
37. Section 7(3) restricts the application of the Act in respect of an organisation designated as a “Scottish public authority” under section 5. Section 7(4) provides that an order can be made restricting the application of the Act in respect of a publicly-owned company (within the meaning of section 6). Such an order would also be subject to affirmative resolution.

### ***Section 8 – Requesting information***

38. This section details the three conditions that must be fulfilled in order that a request for information is handled in accordance with the provisions of the Act.

39. The first condition is that the applicant has to submit their request in writing or in another form with some permanency capable of being used for subsequent reference. In this context, “in writing” covers a request transmitted by electronic means (for example by e-mail), provided that it is legible to the receiving authority and capable of being used for subsequent reference. “Writing” is defined in Schedule 2 to the [Scotland Act 1998 \(Transitory and Transitional Provisions\) \(Publication and Interpretation etc. of Acts of the Scottish Parliament\) Order 1999 \(No.1379\)](#).
40. A request must also state the name and a correspondence address for the applicant, but the identity of the applicant is otherwise unlikely to be of concern to the authority except in the case of vexatious or repeated requests (section 14) or determining whether or not the request is for personal information (section 38). The supplying of the name and address of the applicant provides a contact point for the authority should it require additional information from the applicant to assist it in identifying and locating the information requested. It also gives an address to which the authority can send the requested information.
41. The final requirement is that the applicant describes the information requested.

### ***Section 9 – Fees***

42. This section provides the Scottish Ministers with powers to make regulations setting out the fee structure in accordance with which charges may be made for the provision of information under this Act. Such regulations will be subject to affirmative resolution. An authority will request payment for the provision of information by way of a “fees notice” and is not obliged to provide the information until payment is received. Payment must be received within 3 months of the issuing of the fees notice if the request is to be further actioned.
43. Under section 9(7), the charging structure set out in regulations under this section would not apply where the information was being disclosed by or under another enactment with its own charging scheme – in this situation, the existing scheme would continue to apply.

### ***Section 10 – Time for compliance***

44. This section sets out the timescales within which an authority must comply with a request for information under the Act.
45. An authority must respond promptly to a request for information meeting the criteria under the Act. In any event, it must respond no later than the twentieth working day from the date of receipt of the original request, or from the date of receipt of any additional information requested by the authority.
46. Where the Keeper of the Records of Scotland receives a request for information which falls to be considered under section 22, the Keeper must respond no later than the thirtieth working day from the date of receipt of the original request, or from the date of receipt of any additional information requested by the Keeper. On receipt of a request for information which the transferring authority has not indicated is open, the Keeper will forward a copy of the request to the originating public authority. It is for that authority to decide whether an exemption in Part 2 applies and, where section 2 applies, whether there is an overriding public interest in disclosure, and to advise the Keeper accordingly.
47. In instances when the authority requests a fee from an applicant, the period from the date of issue of the fee request to the date the fee is received is disregarded from the 20 working day timescale (or as the case may be 30 working days).
48. The definition of a “working day” is contained in section 73 of the Act.

49. The Scottish Ministers may make regulations to vary the period (up to a maximum of 60 working days) within which an authority must comply with a request. Those regulations could provide different periods in different cases or give discretion to the Scottish Information Commissioner. Such regulations would be subject to affirmative resolution.

### ***Section 11 – Means of providing information***

50. This section provides that, where an applicant expresses a preference for the information held by an authority to be supplied in any of the means specified in section 11(2), that authority must supply it by the means requested, provided it is “reasonably practicable” so to do, giving reasons if it does not. In determining what is reasonably practicable, an authority may have regard to all the circumstances, including costs. The applicant is not limited to one option. It will ultimately be for the Scottish Information Commissioner to determine what is reasonably practicable in the circumstances.
51. Section 11(5) provides that this section does not in any way detract from an authority’s obligations under the Disability Discrimination Act 1995 with respect to those applicants with a disability.

### ***Section 12 – Excessive cost of compliance***

52. This section provides that a Scottish public authority need not comply with a request for information if the authority estimates that the cost of complying would exceed an amount set out in regulations made under this section. Such regulations will be subject to affirmative resolution. Section 12(2) allows the regulations to provide that an authority may aggregate the costs of requests for information in specified circumstances where two or more requests are made to the authority by one person or by different persons in certain circumstances.
53. If the authority estimates that the total cost of dealing with such requests would exceed the upper cost threshold set in the regulations, then the authority is not required to comply with either or any of the requests.
54. The regulations may make provision as to the costs to be estimated and the manner in which those costs are to be estimated. For example, the regulations could specify a maximum rate for photocopying costs. The regulations may also make provision as to the manner in which and the time within which information is to be made available publicly under section 12(2)(c).

### ***Section 13 – Fees for disclosure in certain circumstances***

55. This section provides that a Scottish public authority may charge a fee, determined in accordance with regulations made under section 13(1), for the communication of information which, by virtue of section 12(1) or (2), it is not obliged to communicate and which it is not otherwise required by law to communicate. Such regulations will be subject to negative resolution. Section 13(2) sets out that the regulations may provide that a fee is not to exceed a particular amount and is to be calculated in a manner specified in the regulations.
56. This section does not affect any existing statutory provisions regarding charges for the disclosure of information.

### ***Section 14 – Vexatious or repeated requests***

57. This section provides that section 1(1) does not oblige an authority to comply with vexatious requests.
58. Section 14(2) provides that an authority does not have to comply with repeated or substantially similar requests from the same person other than at reasonable intervals.

***Section 15 – Duty to provide advice and assistance***

59. Section 15(1) places a “duty to assist” on a Scottish public authority. This provision applies both to applicants enquiring in advance of submitting an application and once an application has been made.

***Section 16 – Refusal of request***

60. This section details the manner in which an authority is required to provide a refusal of a request for information.
61. If an authority considers it is not required to disclose the information requested because of any exemption in Part 2, it must, within the period set under section 10, provide the applicant with a notice in writing. A refusal notice must specify the four matters listed at section 16(1)(a) to (d). Such a notice must also state the public interest reasons for withholding the information in the case of those exemptions which also require the public interest test to be considered. The refusal notice does not require the disclosure of information which itself would be exempt.
62. If an authority considers it is not required to disclose the information because it estimates that to do so would incur excessive cost under section 12, then it must also provide the applicant with a refusal notice as above.
63. An authority must also issue a refusal notice if it considers a request for information is vexatious or a repeated request under section 14. However, an authority is not obliged to do this if it has already done so in response to an identical or substantially similar request and to do so would clearly be unreasonable.
64. A refusal notice for non-disclosure of information which is exempt, or where disclosure would incur excessive cost, or where the request is considered vexatious or a repeated request, must also specify the details of complaints procedure operated by that authority, of the right of internal review (conferred by section 20(1)), and of the right of appeal to the Scottish Information Commissioner (conferred by section 47(1)).

***Section 17 – Notice that information is not held***

65. If an authority receives a request for information it does not hold, it is still required to provide notice in writing to that effect, within the period set under section 10. Special rules apply where information is not held and a refusal notice is given under section 18 (see below).

***Section 18 – Further provision as respects responses to request***

66. An authority may, under certain circumstances, give a refusal notice under this section where the authority considers that to reveal whether the information exists or is held would be contrary to the public interest.
67. This provision applies in respect of the following exemptions:
- section 28 (relations within the United Kingdom)
  - section 29 (formulation of Scottish Administration policy etc.)
  - section 30 (prejudice to effective conduct of public affairs)
  - section 31 (national security and defence)
  - section 32 (international relations)
  - section 33 (commercial interests and the economy)
  - section 34 (investigations by Scottish public authorities and proceedings arising out of such investigations)

- section 35 (law enforcement)
- section 39(1) (health and safety)
- section 41 (communications with Her Majesty, etc. and honours)

### ***Section 19 – Content of certain notices***

68. This section requires that a fees notice issued under section 9(1), or a refusal notice issued under sections 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or under section 17(1) must contain particulars of the procedure provided by the authority for dealing with complaints and of the right to request a review and to appeal to the Commissioner.

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

69. This section details the process by which a dissatisfied applicant can require a Scottish public authority to review the way it has dealt with a request.
70. Any applicant dissatisfied with the handling of their request for information can require an authority to review its conduct in relation to any aspect of the request. Under section 20(3), the applicant's requirement for review must be in writing or in another form capable of being used for subsequent reference; contain the name and a correspondence address for the applicant; contain details of the initial request; and indicate why a review is being requested.
71. Under section 20(5), an applicant would need to submit the requirement for review either (a) within 40 working days of the expiry of the 20 working day (or in the case of the Keeper, 30 working day) period set for responding to the original request, or (b) within 40 working days of the authority's response to the original request outwith that 20 working day (or in the case of the Keeper, 30 working day) period. However, under section 20(6) public authorities have the discretion to accept a requirement for review received after expiry of these time limits.
72. Section 20(7) allows the Scottish Ministers to make regulations to vary this timescale.

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

73. This section sets out the procedures to be followed by a Scottish public authority in dealing with an applicant's requirement for review under section 20. An authority must respond to a requirement for review within 20 working days of receiving it, and can confirm the initial decision, arrive at a different decision or simply arrive at a decision (where the complaint is that none was reached in the first instance). The Keeper of the Records of Scotland is allowed 30 working days where the case is one covered by section 22(4), that is where another authority besides the Keeper has a role to play in carrying out the necessary review.
74. In responding to the applicant, the authority is required by section 21(5) to set out what decision has been reached and the reasons for arriving at that decision. The authority must also set out for the applicant the procedures for an application to the Scottish Information Commissioner and an appeal to the Court of Session (section 21(10)).
75. Regulations may be made by the Scottish Ministers under section 21(6) to vary the 20 (or in the case of the Keeper when the second condition in section 21(2) is met, the 30) working day timescale. Such regulations will be subject to affirmative resolution.
76. Under section 21(8) an authority is not required to carry out a review where it believes the request to be "vexatious" or "repeated" in terms of section 14 (a request which is identical or substantially similar to a previous request by the same applicant, where no reasonable period of time has passed since the previous request). If an authority decides that it is not obliged to conduct a review, it must still respond to the applicant within

the 20 working day period (30 working day period for the Keeper) indicating that it considers the requirement for review to be vexatious or repeated and also set out for the applicant the procedures for an application to the Scottish Information Commissioner and an appeal to the Court of Session.

77. An applicant can at any time by written notice withdraw a requirement for review.

### ***Section 22 – Special provisions relating to records transferred to the Keeper***

78. This section addresses the situation where the Keeper of the Records of Scotland receives a request for information which has been transferred to him by a Scottish public authority and which has not been designated by that authority as open information for the purposes of this section, or where the Keeper receives a requirement for review that relates to a relevant decision taken by the transferring authority. In those circumstances, the Keeper must, as soon as practicable, send a copy of the request to the transferring authority.
79. Where a request for information is involved, it is for the remitting authority to decide whether the information is exempt by virtue of any provision in Part 2 and, in cases where it is, to determine whether there is an overriding public interest in disclosure. The remitting authority must advise the Keeper of its decision in sufficient time to enable the Keeper to comply with the requirement, as set down in section 10, for the Keeper to respond within 30 working days from receipt of the request for information.
80. Where the Keeper receives a relevant requirement for review, it is for the remitting authority to review the decision it took under section 22(2) and to advise the Keeper accordingly in such time as will enable the Keeper to give notice in writing to the applicant within the 30 working day period. The Keeper will include information and any statement provided by the remitting authority in his notice to the applicant.
81. Records transferred to the Keeper by the Secretary of State for Scotland before 1 July 1999 are treated as falling within the provisions of this section and the Scottish Ministers are deemed to be the remitting authority in respect of such records.

### ***Section 23 – Publication schemes***

82. This section places a duty on Scottish public authorities to adopt and maintain a scheme which relates to the publication of information by the authority, to publish information in accordance with it and to review it from time to time. Subject to the need to obtain the approval of the Commissioner, and to the requirements set out in this section, each authority is free to draw up its own scheme and so can tailor its proposals to its particular circumstances.
83. Section 23(2) requires an authority to specify the classes of information which it publishes or intends to publish, the manner of publication and whether the information is available to the public free of charge or on payment. A publication scheme is intended to be a guide to the authority's publications and the scheme can be general in nature or specific.
84. Section 23(3) requires an authority, when adopting or reviewing a scheme, to have particular regard to the public interest (a) in allowing the public to have access to information held by it and (b) in the publication of reasons for decisions made by it.
85. Sections 23(5) and (6) concern the approval of publication schemes. The Commissioner may refuse to approve a scheme, approve it only for a specified period, or revoke a previous approval. The Commissioner must give a reason for refusing to approve or for revoking the approval of a scheme.
86. Material made generally available in accordance with a publication scheme would be exempt under section 25 from the right of access. As such, the Scottish public authority would not be obliged to provide information dealt with in a publication scheme under



the conditions set out in Part 1 of the Act, but instead under the conditions governing the disclosure of information under the publication scheme.

### ***Section 24 – Model publication schemes***

87. This section provides for the adoption of model publication schemes by certain kinds of Scottish public authority. Section 24(1) and (2) give an authority the option of adopting a model publication scheme, which may have been prepared by the Commissioner, or others, rather than preparing their own. This would enable better use to be made of resources, so that the Commissioner would not have to approve a large number of draft schemes and authorities could work together in preparing model schemes. A model scheme could be adopted by an authority with or without modifications. If modifications are proposed, the further approval of the Commissioner is required in relation to those modifications.
88. Sections 24(3) and (4) contain provisions for approval, refusal to approve and revocation of approval of schemes which are comparable to those for individual schemes, except that when revoking a previous approval of a model publication scheme the Commissioner must publish a notice to this effect including a statement of reasons for revocation.

### **Part 2 – Exempt information**

89. Part 2 of the Act sets out the categories of information which are exempt from the general entitlement to information held by Scottish public authorities. Other than for those exemptions which are defined in section 2 as being absolute exemptions, the public interest test in that section must be considered. Part 5 of the Act sets out certain provisions covering periods after which information ceases to be exempt.

### ***Section 25 – Information otherwise accessible***

90. This section provides an absolute exemption for information which is otherwise accessible to the applicant. The exemption covers information which is available on the payment of a fee or charge, and information available by virtue of other legislation. An example would be birth, death or marriage certificates available under other legislation. The exemption also sets out that information (other than information which the authority is statutorily obliged to make available, or information held by the Keeper of the Records) cannot be exempt on the basis that is reasonably obtainable merely because it is available from the authority which holds it – unless it is made available in accordance with that authority's publication scheme and any payment required is specified in or determined in accordance with the scheme.
91. Section 25(2)(b)(ii) sets out the circumstances when information held by the Keeper of the Records of Scotland is to be taken to be reasonably obtainable, and hence exempt.
92. Essentially, the exemption provides that the full provisions of the Act need not apply to information which is otherwise accessible to the applicant.

### ***Section 26 – Prohibitions on disclosure***

93. This section provides an absolute exemption (i.e. the public interest test does not apply) for information the disclosure of which by a Scottish public authority is subject to a prohibition on disclosure. An authority withholding information from disclosure under the terms of this exemption would be expected to state what enactment or Community obligation etc. prevented its disclosure.

### ***Section 27 – Information intended for future publication***

94. Section 27 provides that information may, in certain circumstances, be exempt if it is information intended for future publication. The public interest test in section 2 applies.

***Section 28 – Relations within the United Kingdom***

95. This section exempts information if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and other such administrations as defined in the section. The public interest test in section 2 applies.

***Section 29 – Formulation of Scottish Administration policy etc.***

96. This section exempts as a class information held by the Scottish Administration if it relates to the formulation of Scottish Administration policy; and sets out the circumstances when statistical information and factual background information may be exempt. The public interest test in section 2 applies.

***Section 30 – Prejudice to effective conduct of public affairs***

97. This section exempts information if its disclosure would prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers, or where its disclosure would inhibit substantially the free and frank provision of advice or exchange of views. The public interest test in section 2 applies.

***Section 31 – National security and defence***

98. This section exempts information if exemption is required for the purpose of safeguarding national security; and information the disclosure of which would, or would be likely to, prejudice substantially the defence of the British Islands. The public interest test in section 2 applies.

***Section 32 – International relations***

99. This exemption protects information whose disclosure would substantially prejudice the effectiveness of the conduct of international relations. The public interest test in section 2 applies.

***Section 33 – Commercial interests and the economy***

100. This section protects against the disclosure of commercially sensitive information, including trade secrets. It also protects against the disclosure of information which could be damaging to the economic interests of the United Kingdom. The public interest test in section 2 applies.

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

101. This section covers a range of information associated with investigations carried out by Scottish public authorities. The public interest test in section 2 applies.

***Section 35 – Law enforcement***

102. This exemption covers a range of information relating to law enforcement. It also applies to information relating to relevant civil proceedings brought by or on behalf of Scottish public authorities. The public interest test in section 2 applies.

***Section 36 – Confidentiality***

103. Essentially section 36(1), to which the public interest test in section 2 applies, provides an equivalent in Scotland for information for which “legal professional privilege” may be claimed in England.

104. Section 36(2) exempts absolutely information obtained from another person if its disclosure would constitute a breach of confidence actionable by that person or any other person.

***Section 37 – Court records, etc.***

105. This section provides an absolute exemption for information (except 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) contained in court records of proceedings or other relevant legal documents, where that information is held by a Scottish public authority solely because it is contained in such a document.

***Section 38 – Personal information***

106. This section deals with personal information (much of which may in any event be available to the individual concerned under the Data Protection Act 1998). Section 38(1) exempts absolutely personal data, of which the applicant is the subject, personal census information and the health records of a deceased person. Section 38(1)(b) exempts personal data relating to a third party (i.e. not the applicant), but only if it meets either of the conditions mentioned in section 38(2) and (3). This is an absolute exemption in circumstances where the conditions in section 38(2) and (3) are met. Where these conditions are not met the public interest test at section 2 applies.

***Section 39 – Health, safety and the environment***

107. Section 39(2) exempts information if that information is required to be made available by virtue of environmental information regulations (EIRs) made under section 62. Environmental information is exempt if an authority is obliged to release the information requested in accordance with those regulations or would be so obliged but for an exemption under those regulations. Access to environmental information held by a Scottish public authority will be available first under those regulations, rather than under the Act. However, the Act would still continue to have some significance as regards environmental information, since it places a duty on public authorities to consider the release of that information which is exempt under the EIRs, where it is in the public interest so to do. The public interest test in section 2 applies.

***Section 40 – Audit functions***

108. This section exempts information, the disclosure of which would, or would be likely to, prejudice substantially the exercise of a Scottish public authority's auditing functions. The section relates to the audit of the accounts of other public authorities, or examinations into the economy, efficiency and effectiveness with which they use their resources in the discharge of their public functions. The section would not extend to the internal auditing functions of authorities. The public interest test in section 2 applies.

***Section 41 – Communications with Her Majesty, etc. and honours***

109. This section exempts as a class information relating to communications with Her Majesty, the Royal Family or the Royal Household; or relates to the award of any honour or dignity by Her Majesty. The public interest test in section 2 applies.

**Part 3 – The Scottish Information Commissioner**

***Section 42 – The Scottish Information Commissioner***

110. This section provides as to the appointment of the Scottish Information Commissioner and the basis on which that office is held.
111. Under section 42(1) the Commissioner will be appointed by Her Majesty on the nomination of the Parliament. The Parliamentary corporation will determine the

Commissioner's salary, allowances and other terms and conditions. The Commissioner will hold office for a term not exceeding 5 years and for no longer than 2 terms unless re-appointment for a third is desirable in the public interest. The Commissioner retires at the end of the calendar year in which the age of 65 is reached, and can be removed from office by Her Majesty following a resolution of the Parliament passed by a majority of no less than two thirds of the total number of members of the Parliament.

112. Under section 42(7) the Commissioner is not subject to the direction or control of the Parliament, the Parliamentary corporation or any member of the Scottish Executive, except in relation to the preparation of accounts (which, under paragraph 5 of schedule 2, must be in accordance with any directions provided by the Scottish Ministers) and the appointment of staff (which, under paragraph 3(4) of schedule 2, requires the approval of the Parliamentary corporation).

### ***Section 43 – General functions of Commissioner***

113. This section places a duty on the Commissioner to promote good practice and enforce Scottish public authorities' compliance with the Act, their publication schemes and codes of practice. The Commissioner is also obliged, where he or she considers it expedient, to disseminate information to the public about the Act. The Commissioner is permitted to charge fees for such services. Section 43(4) provides that the Commissioner may also make recommendations to the Scottish Ministers regarding bodies which could be included within the scope of the Act under sections 4 and 5. This section also places a duty on the Commissioner from time to time to consult with the Keeper of the Records of Scotland about the promotion of observance by authorities of the code of practice as to the keeping, management and destruction of records (issued by the Scottish Ministers under section 61).

### ***Section 44 – Recommendations as to good practice***

114. This section enables the Commissioner to take action where he or she considers that the practices of a Scottish public authority in relation to its functions under the Act do not conform with a code of practice issued under section 60 or 61. The Commissioner may issue a "practice recommendation", specifying the provisions with which the Commissioner considers the authority's practice does not conform and the steps the authority should take to so conform. The Commissioner is required to consult with the Keeper of the Records of Scotland before issuing a practice recommendation which relates to a failure to conform with the code of practice (issued under section 61) as to the keeping, management and destruction of records.

### ***Section 45 – Confidentiality of information obtained by or furnished to Commissioner***

115. This section sets out the conditions governing the disclosure of information held by the Commissioner. The Commissioner, or a member of his or her staff, or an agent of the Commissioner will not be able to disclose information furnished to the Commissioner under this Act and which is not available in the public domain, unless that disclosure is made with lawful authority.
116. The Commissioner will be considered to have lawful authority where the circumstances set out at Section 45(2) are present, including where disclosure is required under this Act (as a consequence of an FOI request made to the Commissioner). Sections 45(3) and 45(4) create a criminal offence of knowingly or recklessly disclosing information without the lawful authority mentioned in section 45(2).

### ***Section 46 – Laying of reports***

117. This section requires the Commissioner to lay annual reports before the Scottish Parliament and enables him or her to lay such other reports as he or she thinks appropriate.

## **Part 4 – Enforcement**

### ***Section 47 – Application for decision by Commissioner***

118. This section sets out the circumstances in which an applicant can apply to the Scottish Information Commissioner for a decision as to whether a Scottish public authority has dealt with a request for information in accordance with Part 1 of the Act. Application to the Commissioner will be available where an applicant is dissatisfied with a notice given under section 21(5) or (9) following a review by the authority of its original decision, or where the public authority concerned failed to give such a notice. Section 47(2) sets out the form in which an application is to be made to the Commissioner, and the information which must be included in any application. An application must be in writing or in another form capable of being used for subsequent reference. Section 47(4) sets out the timescales within which any such application must be made. The Scottish Ministers may, by regulations, extend this timescale. Such regulations will be subject to affirmative resolution.

### ***Section 48 – When application excluded***

119. Under this section, an applicant will not be able to appeal to the Commissioner for a decision under section 47(1) as respects a request for review made to the Scottish Information Commissioner, a procurator fiscal, or 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).

120. Section 48 excludes appeal to the Commissioner for a decision under section 47(1), but the Commissioner, the Lord Advocate and procurators fiscal are subject to the other duties and obligations set out in this Act.

### ***Section 49 – Commissioner’s decision***

121. This section sets out the Commissioner’s obligations in relation to an application made in accordance with section 47(1), providing this is not excluded by section 48. The Commissioner is not obliged to make a decision if he or she is of the opinion that the request is frivolous or vexatious, or has been withdrawn or abandoned. However, the Commissioner is still obliged to provide notification with reasons.

122. In any other case the Commissioner must invite comments from the authority and reach a decision within four months (or such other period as is reasonable in the circumstances) of receiving the application. The Commissioner may also mediate a settlement between the applicant and the authority.

123. Where the Commissioner finds that an authority has not dealt with a request in accordance with Part 1 of this Act, such a decision notice must contain details of the failure, the remedy and the time within which such action must be taken. Such timescales must not expire before the end of the period within which an authority may appeal to the Court of Session under section 56.

### ***Section 50 – Information notices***

124. This section enables the Commissioner to obtain from a Scottish public authority information (including unrecorded information) that he or she requires to deal with an application under section 47 or to determine on whether an authority has complied, or is complying, with the provisions of the Act or a code of practice issued under section 60 or 61. A written notice under this section is referred to as an “information notice”.

125. [Sections 50\(2\)](#) and [\(3\)](#) specify the contents of an information notice, which must include the time within which the information is to be given and details of any right of appeal which may be available to the authority under section 56. The time limit specified in the notice must not expire before the time for an authority to appeal under section 56

expires. Should an authority decide to exercise the right of appeal under that section, then the notice need not be complied with before that appeal is concluded.

126. Sections 50(5) and (6) set out that an authority is not required to supply the Commissioner with information relating to communications between a legal adviser and client (or a person representing a client) about the client's compliance with the Act or about any proceedings arising from it.
127. Section 50(7) provides that the information requested by the Commissioner in an information notice cannot be withheld on the basis of any obligation to maintain secrecy, or of any other restriction on disclosure. This is subject to the limitation relating to the professional legal adviser and client relationship set out at section 50(5).

### ***Section 51 – Enforcement notices***

128. This section enables the Commissioner to issue an “enforcement notice” to a Scottish public authority which the Commissioner is satisfied has failed to comply with a provision of Part 1 of the Act. The notice specifies the steps the authority is to take in order to comply.
129. An enforcement notice must also set out the time by which these steps must be taken and details of any right of appeal which may be available to the authority under section 56. The time limit specified in the notice must not expire before the time for an authority to appeal under section 56 expires. Should an authority decide to exercise the right of appeal under that section, then the notice need not be complied with before that appeal is concluded.
130. The Commissioner can also cancel an enforcement notice.

### ***Section 52 – Exception from duty to comply with certain notices***

131. This section sets out the conditions under which the First Minister can, after consulting the other Scottish Ministers, sign and give a certificate to the Commissioner stating that the First Minister has, on reasonable grounds and after such consultation, formed the opinion that there has been no failure to comply with section 1(1) and that the information requested is of exceptional sensitivity.
132. Under section 52(1) such a certificate can apply only to a decision or enforcement notice given to the Scottish Administration and where the information in question is exempt by virtue of section 29, 31(1), 32(1)(b), 34, 36(1) or 41(b).
133. The certificate must be issued within 30 working days of the Commissioner's notice being given to the Scottish Administration or, where an appeal is brought on a point of law under section 56, of the day on which the cause is finally determined.

### ***Section 53 – Failure to comply with notice***

134. This section sets out the sanctions for non-compliance with a decision notice, information notice or enforcement notice issued by the Scottish Information Commissioner, providing that the Court of Session may hold a Scottish public authority in contempt of court.
135. Where an authority fails to comply with any notice issued by the Commissioner, the Commissioner will be entitled to refer the matter to the Court of Session.
136. In relation to information notices (which, under section 50, allow the Commissioner to obtain information to support consideration of cases appealed to his or her office), an authority will be deemed to have failed to comply with the notice where it knowingly or recklessly makes a false statement.
137. Where the Commissioner refers an authority to the Court of Session, the authority will be entitled to offer a statement of defence, including presenting witnesses.

***Section 54 – Powers of entry and inspection***

138. This section introduces schedule 3 which makes provision for the Commissioner's powers of entry and inspection.

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

139. This section ensures that the legislation does not create any right to sue for damages for breach of a statutory duty. It does not affect the Commissioner's powers in section 53(1).

***Section 56 – Appeal against notices under Part 4***

140. This section provides that an appeal against the Commissioner's decision, on a point of law, can be made to the Court of Session in the circumstances listed.

**Part 5 – Historical records**

***Section 57 – The expression “historical record”***

141. This section defines, for the purpose of this Part of the Act, the expression “historical record” as a record which is 30 years old, counting from the calendar year following that in which it was created. Where records are kept in a file, the period of 30 years (and any other period defined in section 58) is reckoned from the calendar year following that in which the most recent record was created.

***Section 58 – Falling away of exemptions with time***

142. The effect of this section is to disapply some of the exemptions in Part 2 in the case of information contained in a historical record, thereby extending the scope of the right of access in section 1 in these cases. Information contained in a file in which the most recent record is 30 years old or more cannot be exempt under the following sections:
- section 28 (relations within the United Kingdom)
  - section 29 (formulation of Scottish Administration policy etc.)
  - section 30 (prejudice to the effective conduct of public affairs)
  - section 33(1) (commercial interests)
  - section 36 (confidentiality)
  - section 37 (court records, etc.)
  - section 40 (audit functions) and
  - section 41(a) (communications with Her Majesty)
143. The exemption for information relating to honours (section 41(b)) is disappplied at the end of 60 years commencing at the beginning of the calendar year following that in which the record containing the information is created. The exemptions for information relating to sections 34(2)(b) (investigations into the cause of death), 35 (law enforcement) and 38(1)(c) or (d) (certain personal information) fall away after 100 years, on the same basis.
144. All other exemptions continue to apply in perpetuity.

***Section 59 – Power to vary periods in sections 57 and 58***

145. This section allows the Scottish Ministers to vary, by order, the period in section 57(1) after which a record becomes a historical record, or the periods in section 58(2) – but the

period as varied can never exceed the period mentioned in these sections as originally enacted. An order under this section will be subject to affirmative resolution.

## **Part 6 – Codes of practice**

### ***Section 60 – Code of practice as to functions under this Act***

146. This section requires the Scottish Ministers to issue, and from time to time revise, a code of practice setting out guidance which the Scottish Ministers consider it desirable for Scottish public authorities to follow in the discharge of their duties under this Act.
147. [Section 60\(2\)](#) specifies particular matters which must be included in the code: the advice and assistance that should be given to applicants, the transferring of requests, consultation with third parties, contractual terms, procedures for dealing with complaints and the collection and recording of statistics by authorities.

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

148. This section requires the Scottish Ministers to issue a code of practice providing guidance to Scottish public authorities as to the keeping, management and destruction of the authorities' records.

## **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.

### **Schedules**

#### ***Schedule 1 – Scottish Public Authorities (introduced by section 3(1)(a)(i))***

167. This schedule lists “Scottish public authorities” for the purposes of the Act. The listing of “The Scottish Ministers” at paragraph 1 covers all Departments of the Scottish Executive, as well as the following agencies:
- the Crown Office;
  - the Fisheries Research Service;
  - Historic Scotland;
  - the Scottish Agricultural Science Agency;
  - the Scottish Court Service;
  - the Scottish Fisheries Protection Agency;
  - the Scottish Public Pensions Agency;
  - the Scottish Prison Service; and
  - the Student Awards Agency for Scotland.
168. The Scottish Parliament, local authorities, non-Departmental Public Bodies (NDPBs), NHS bodies, the Police, and Further and Higher Education institutions are all specified as Scottish public authorities. Further persons or office-holders may be designated by order under sections 4 and 5.

#### ***Schedule 2 – The Scottish Information Commissioner (introduced by section 42(12))***

169. This schedule sets out various matters relating to the Scottish Information Commissioner.
170. [Paragraph 1](#) provides that the Commissioner, and his or her staff and property, are independent of the Crown and do not have any status, immunity or privileges of the Crown.
171. [Paragraph 2](#) provides that the Parliamentary corporation may make arrangements for the payment of pensions, allowances or gratuities to former Commissioners (including compensation for loss of office).
172. [Paragraph 3](#) provides that the Commissioner may appoint staff, on such terms and conditions as that officer may determine, and (2) may make arrangements for the payment of pensions, allowances or gratuities to former members of staff (including compensation for loss of employment). However, the Commissioner will require the approval of the (4) Parliamentary corporation in these matters.
173. [Paragraph 4](#) provides that the Commissioner, or a member of his or her staff, will be designated by the Parliamentary corporation as accountable officer for the office of the Commissioner. The functions of the accountable officer are to sign accounts, ensure propriety and regularity of finances, and ensure that resources are used economically, efficiently and effectively. The accountable officer is answerable to the Parliament for the exercise of the functions provided for under this paragraph.

*These notes relate to the Freedom of Information (Scotland)  
Act 2002 (asp 13) which received Royal Assent on 28 May 2002*

174. **Paragraph 5** provides that the Commissioner must prepare and keep accounts, in accordance with any directions the Scottish Ministers may give, and send a copy of the annual accounts to the Auditor General for Scotland for auditing. The Commissioner's audited accounts must be made publicly available, subject to certain conditions. The Commissioner's financial year runs from 1<sup>st</sup> April to 31<sup>st</sup> March.
175. The Commissioner is provided with powers in paragraph 6 to do anything which appears necessary or expedient for the purpose of, or in connection with, or which appears conducive to, the exercise of the functions of the Commissioner, and in particular may acquire or dispose of land and other property, and enter into contracts.

***Schedule 3 – Powers of Entry and Inspection (introduced by section 54)***

176. This schedule sets out the circumstances in which the Commissioner, where that officer suspects a contravention of the Act, may seek a warrant enabling that officer to enter and search premises and seize material.

***Schedule 4 – Consequential amendments to Scottish Public Services Ombudsman Act 2002 (introduced by section 71(2))***

177. This schedule adds the Commissioner to the scope of the Scottish Public Services Ombudsman Act 2002 and provides for the exchange of information between the Ombudsman and the Commissioner.