

# **PUBLIC RECORDS (SCOTLAND) ACT 2011**

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## **EXPLANATORY NOTES**

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1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **SUMMARY OF THE ACT**

3. The Act is in three parts:
  - Part 1 – Records Management Plans
  - Part 2 – Transmission of Court Records
  - Part 3 – General

### **Part 1 – Records Management Plans**

4. **Part 1** of the Act imposes duties on certain public authorities, which are listed in the schedule to the Act, to produce, implement and review records management plans. A plan must set out the arrangements for the management of records created or held by the authority and records created or held by contractors who carry out any functions of the authority. Each plan must be agreed by the Keeper of the Records of Scotland (the Keeper). It may be returned if the Keeper considers that it fails to make proper arrangements for the records it covers. The Keeper must issue guidance on the form and content of plans and must prepare a model plan and must consult authorities and other persons before doing so. Authorities must have regard to the model plan and the guidance when preparing their own plans.
5. The Act gives the Keeper the power to review whether authorities are complying with their plans. The Keeper may issue action notices to authorities who are failing to meet their obligations under the Act. Authorities may make representations before an action notice is issued. If an authority fails to comply with an action notice, the Keeper may publicise the failure. The Keeper must also produce an annual report in relation to the Keeper's functions under the Act, including details of any authority which has failed to comply with an action notice and details of the failure.

### **Section 1 – Records management plans**

6. Subsection (1) requires certain authorities to produce a records management plan in relation to their public records and to submit this to the Keeper for agreement. Once the Keeper has agreed a plan, the authority must ensure its records are managed in accordance with the plan. Section 2 and the schedule define the public authorities to

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whom the duty applies. Section 3 defines public records. Section 4 deals with the submission and agreement process for plans. Section 13 contains definitions, including the meaning of “management” of public records.

7. Subsection (2) sets basic requirements about what a records management plan must contain. A plan may also make different provision for different kinds of public records, reflecting, for example, the authority’s assessment of the different levels of risk associated with the management of different kinds of public records (subsection (3)).
8. The Keeper must also issue guidance about the form and content of plans and authorities must have regard to that guidance (subsections (4) and (7)). The Keeper may issue different guidance in relation to different authorities (subsection (5)), for instance taking into account the nature of the functions they perform. Before issuing guidance, the Keeper must consult authorities affected by the guidance and any other persons the Keeper considers appropriate and must have regard to any views they express (subsection (6)).
9. Subsection (8) allows authorities to produce more than one plan where the Keeper requires or agrees this should happen. This could be used to require authorities, such as the Scottish Ministers, who exercise a large number of diverse functions to have different plans in relation to different functions.
10. Subsection (9) allows a group of authorities to have a single common plan where the Keeper requires or agrees that this should happen. This could be used to allow groups of authorities of the same description (e.g. procurators fiscal) or groups of different authorities which exercise related functions to have a common plan.
11. Together, subsections (8) and (9) could be relied on to allow a group of authorities to share one common plan for a particular function while each having separate plans for the rest of their functions. For example a group of local authorities may have one common plan for records relating to the care of looked after children.

***Section 2 – Authorities to which Part 1 applies***

12. Subsection (1) defines the authorities that must comply with the duties in Part 1 of the Act. The authorities are listed in the schedule. Some bodies are described rather than named individually, such as local authorities, Chief Constables of police forces and National Park authorities.
13. Subsection (2) allows the Scottish Ministers to add or remove authorities from the list in the schedule by order. Subsections (3) to (5) define the types of authorities which can be added to the list. The reference in subsection (3)(b) to an authority with mixed functions or no reserved functions is to be read in accordance with section 126 and paragraph 1 of Part III of Schedule 5 to the Scotland Act 1998. Orders under subsection (2) will be subject to affirmative procedure (see subsection (8)).
14. Subsection (7) allows orders amending the schedule to make consequential and other modifications to other legislation. If a new authority were to be added to the schedule, this power might be used to make consequential changes to any existing general records management duties which already applied to the authority.

***Section 3 – Meaning of “public records”***

15. This section defines “public records” for the purpose of Part 1 of the Act. Public records are the records which must be covered by the records management plan for an authority (see section 1).
16. Subsection (1)(b) provides that records which are created by contractors in carrying out functions of an authority are public records of the authority. This means that the records management plan for the authority must set out the arrangements for managing its contractors’ records as well as records created by the authority. “Contractor” is defined

in subsection (2). The definition covers persons who carry out functions on behalf of an authority. It does not cover persons who provide goods or services (such as supplying stationery) to an authority but do not deliver functions on its behalf.

17. Subsection (1)(c) provides that records which come into the possession of authorities or contractors in carrying out the authority's functions are also public records. Examples might include correspondence, reports, evidence or statistics which relate to the functions. The authority must ensure that these records are managed in accordance with its records management plan. This subsection also covers historical records of a predecessor authority (e.g. a former local authority's archive).

#### ***Section 4 – Agreement of plans***

18. This section sets out the procedures for obtaining the Keeper's agreement to plans. The procedures apply to an authority's initial submission of a records management plan and to the submission of any revised plans.
19. Subsection (1) obliges public authorities to submit a proposed records management plan by a date set by the Keeper. Subsection (2) allows the Keeper to set requirements as to the form and manner in which a plan must be submitted. The Keeper may set different dates and different requirements for different authorities (subsection (9)).
20. The Keeper must agree a proposed plan or return if it does not set out "proper arrangements" for managing the authority's records (subsection (3)). "Proper arrangements" may vary according to the authority concerned and it is for the Keeper to decide if the test is met in each case (subsections (4) and (9)). When deciding whether to agree or return a plan, subsection (5) also requires the Keeper to have regard to the model records management plan produced under section 8, the guidance issued under section 1(4), the nature of the authority and its public records and any representations made by the authority.
21. The Keeper must notify an authority before returning its proposed plan, give the authority an opportunity to make representations and have regard to these representations before making a final decision (subsection (6)). Subsection (7) makes provision about what is to happen where the Keeper returns a proposed plan.

#### ***Section 5 – Review of plans***

22. This section requires authorities to keep their plans under review and to review them when required to do so by the Keeper under subsection (1)(b). Subsection (8) allows the Keeper to set different review dates for different authorities. This could be used to allow the Keeper to consider revised plans on a phased basis.
23. The Keeper may not require an authority to review its plan less than five years after the date on which it was last agreed (subsections (2) to (4)). There is one exception to this rule, which allows the Keeper to require an authority to review its plan at any time, following a records management review under section 6.
24. Where the Keeper requires an authority to review its plan, subsection (5) requires the authority to submit any revised plan to the Keeper for agreement in accordance with section 4. If an authority decides that it does not need to make any changes to its plan as a result of the review the plan must still be submitted for agreement by the Keeper in accordance with section 4.
25. Subsection (6) enables authorities to revise their plans and submit revised plans to the Keeper at any time.

#### ***Section 6 – Records management reviews***

26. Subsection (1) allows the Keeper to undertake a review of whether an authority is complying with its records management plan. This could be used where the Keeper

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becomes aware of a possible failure by a particular authority to comply. Alternatively the Keeper may decide to undertake a general review of compliance by a group of authorities (see subsection (6)).

27. Subsection (2) requires authorities to assist the Keeper in carrying out records management reviews if requested to do so. This might include, for example, providing information or documents.
28. After carrying out a records management review, the Keeper may make recommendations to the authority and may require the authority to review its plan under section 5 (subsection (3)).

***Section 7 – Action notices***

29. This section allows the Keeper to issue an action notice to an authority which is failing in its obligations under Part 1 of the Act. An action notice could be issued in relation to a failure to prepare a records management plan, a failure to comply with a plan, a failure to assist in a review or any other failure under the Act. Subsection (2) sets out the information which must be included in an action notice.
30. Subsection (3) requires the Keeper to notify an authority before issuing an action notice, to give the authority an opportunity to make representations and to have regard to these before making his decision.
31. Where an authority fails to comply with the action notice, subsection (5) allows the Keeper to publicise the failure.

***Section 8 – Model records management plan***

32. This section obliges the Keeper to produce and publish a model records management plan and keep the model plan under review (subsections (1) and (4)). Authorities must have regard to the model plan when preparing and revising their own plans (see subsection (3)).
33. Before issuing the model records management plan or a revised model plan, the Keeper must consult authorities and such other persons as appropriate and must have regard to the views they express (subsections (2) and (5)).

***Section 9 - Guidance***

34. This section allows the Keeper to provide further guidance to authorities on their obligations under Part 1 of the Act and requires authorities to have regard to such guidance. Such guidance would be in addition to the guidance about the form and content of records management plans which the Keeper is obliged to issue under section 1(4). Subsection (2) allows the Keeper to issue different guidance in relation to different authorities, for instance taking into account the nature of the functions they perform.
35. Before issuing guidance, the Keeper must consult authorities affected by the guidance and such other persons as appropriate and must have regard to any views they express (subsection (3)).

***Section 10 – Application of Part 1 in relation to sheriff court records and JP court records***

36. This section provides that the sheriff principal for each sheriffdom is responsible for carrying out duties in relation to the records of sheriff courts and justice of the peace courts in the sheriffdom under Part 1 of the Act. The provision effectively replicates the existing duties imposed on sheriffs principal under sections 2(3) and 2A(4) of the Public Records (Scotland) Act 1937, which are repealed by section 14(a) of the Act as a consequence.

***Section 11 – No right of action for failures to comply***

37. This section excludes any right of action in civil proceedings where an authority is in breach of Part 1 of the Act. The Keeper can issue action notices in respect of failures to comply with the Act and can publicise any failure to comply with an action notice under section 7.

***Section 12 – Annual report***

38. This section requires the Keeper to prepare an annual report and submit it to Scottish Ministers after the end of each financial year. “Financial year” is defined in schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010 as a year ending with 31 March.
39. Subsections (2) to (4) specify the information which the report must contain. Subsection (2)(a) and (c) allows the Scottish Ministers to set the form and submission date of the report.
40. Once the Scottish Ministers have laid the report before the Parliament under subsection (5) the Keeper must publish it (subsection (6)).

***Section 13 – Interpretation of Part 1***

41. This section defines the key terms used in Part 1 of the Act.

***Section 14 - Repeals***

42. This section repeals certain existing duties which require sheriffs principal to care for and preserve the records of sheriff courts and justice of the peace courts and which require local authorities, the Scottish Environment Protection Agency, National Park authorities and Scottish Water to make arrangements for the preservation and management of their records. The repeals are consequential on the introduction of the duty to prepare and comply with an approved records management plan under section 1 of the Act.

***Part 2 – Transmission of Court Records***

43. [Part 2](#) of the Act consists of section 15 which amends sections 1, 2 and 2A of the [Public Records \(Scotland\) Act 1937 \(c.43\)](#) (“the 1937 Act”). These sections deal with the management of court records and the arrangements for transferring these records to the Keeper.

***Section 15 – Transmission of court records***

44. Subsection (2) inserts a new subsection (3) into section 1 of the 1937 Act. Section 1 of that Act deals with the records of the High Court of Justiciary and the Court of Session. The records of these courts can be transmitted to the Keeper in accordance with Act of Adjournal or Act of Sederunt. The amendment places a new obligation on the High Court of Justiciary and the Court of Session to consult with the Keeper before making an Act of Adjournal or Act of Sederunt in relation to the transmission and retransmission of court records.
45. Subsection (3) amends section 2 of the 1937 Act, which deals with sheriff court records. Subsection (4) amends section 2A of the 1937 Act which deals with Justice of the Peace (JP) court records. Sections 2 and 2A operate in the same way and the effect of the amendments is the same in each case.
46. Subsections (3) and (4) remove the requirement for an order to be made before sheriff court or JP court records can be transmitted to the Keeper and remove the limit which prevents the transmission of sheriff court records under 25 years old and JP court

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records under 10 years old. These provisions are replaced with a power for the sheriff principal to transmit records where the Keeper agrees to the transmission.

### **Part 3 – General**

#### ***Section 16 – Commencement***

47. This section makes provision for commencement. Subsection (1) enables the Scottish Ministers to commence Parts 1 and 2 on a date or dates appointed by order. Part 3 of the Act (sections 16 and 17) comes into force on the day after Royal Assent.

#### ***Section 17 – Short title***

48. This section provides for the short title of the Act.

#### ***Schedule***

49. The schedule lists the authorities which must comply with the records management duties under Part 1 of the Act. The list of authorities can be amended by order under section 2.

### **PARLIAMENTARY HISTORY**

50. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, the references to the Official Report of those proceedings, the dates on which Committee Reports and other papers relating to the Bill were published, and references to those Reports and other papers.

<i>Proceedings and Reports</i>	<i>References</i>
<b>Introduction</b>	
Bill as introduced, 7 October 2010	<a href="#">SP Bill 56</a>
SPICe Briefing (SB 10-86) on the Bill, as introduced, published 29 November 2010	<a href="#">Sb 10/86</a>
<b>Stage 1</b>	
<b><i>(a) Education Lifelong Learning and Culture Committee</i></b>	
26 <sup>th</sup> meeting, 27 October 2010	Item in private
33 <sup>rd</sup> meeting, 8 December 2010	<a href="#">Column 4442</a>
1 <sup>st</sup> meeting, 12 January 2011	<a href="#">Column 4503</a>
2 <sup>nd</sup> meeting, 19 January 2011	<a href="#">Column 4541</a>
3 <sup>rd</sup> meeting, 26 January 2011	Item in private
4 <sup>th</sup> meeting, 2 February 2011	Item in private
<b><i>(b) Subordinate Legislation Committee</i></b>	

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<b><i>Proceedings and Reports</i></b>	<b><i>References</i></b>
35 <sup>th</sup> meeting, 14 December 2010	Column 1220
1 <sup>st</sup> meeting, 18 January 2011	Item in private
<b><i>(c) Finance Committee</i></b>	
22 <sup>nd</sup> meeting, 26 October 2010	Column 2600
<b>Stage 1 report (Education Lifelong Learning and Culture Committee) published on 3 February 2011 (1<sup>st</sup> Report)</b>	SP Paper 580
<b>Subordinate Legislation Committee, 2<sup>nd</sup> Report, 19 January 2011</b>	SP Paper 562
<b><i>(d) Consideration by Parliament</i></b>	
Stage 1 Debate, 10 February 2011	Meeting of the Parliament 10 February 2011
<b>Stage 2</b>	
<b><i>Education Lifelong Learning and Culture Committee</i></b>	
7 <sup>th</sup> meeting, 2 March 2011	Column 4747
Bill as amended at Stage 2, 3 March 2011	SP Bill 56A
<b>After Stage 2</b>	
<b><i>Subordinate Legislation Committee</i></b>	
8 <sup>th</sup> meeting, 15 March 2011	Item in private
<b>Stage 3</b>	
<b><i>Consideration by Parliament</i></b>	
Stage 3 Debate, 16 March 2011	Meeting of the Parliament 16 March 2011
<b>Royal Assent</b>	
<b>20 April 2011</b>	Public Records (Scotland) Act 2011