

# PROTECTION OF FREEDOMS ACT 2012

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## EXPLANATORY NOTES

### THE ACT

#### *Commentary on Sections*

#### **Part 6: Freedom of information and data protection**

#### *Section 104: Extension of certain provisions to Northern Ireland bodies*

409. *Subsection (1)* repeals section 80A of the FOIA and paragraph 6 of Schedule 7 to the Constitutional Reform and Governance Act 2010 which excluded Northern Ireland bodies from provisions in the FOIA relating to the disclosure of historical records and communications with the Royal Family.
410. As a result Northern Ireland bodies will be subject to the amendments made to sections 2(3) and 37(1)(a) of the FOIA about information relating to communications with the Royal Family and Household. The Constitutional Reform and Governance Act 2010 substituted five categories of communication for those previously set out in section 37(1)(a). These are communications:
- with the Sovereign (new paragraph (a));
  - with the heir to the Throne or the second in line to the Throne (new paragraph (aa));
  - with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne. This provides an exemption for information which relates to communications with such a person from the date they accede to the Throne or become heir or second in line to the Throne. The exemption also applies to all relevant information created before that date. Should that person cease to be the Sovereign, heir to or second in line to the Throne otherwise than by death and remain a member of the Royal Family then paragraph (ac) will apply to information relating to communications with that person created on or after the date of that change (new paragraph (ab));
  - with members of the Royal Family who do not themselves fall within paragraphs (a) to (ab) other than when those communications are made or received on behalf of the persons referred to in paragraphs (a) to (ab) (new paragraph (ac)); and
  - with the Royal Household other than where those communications are made or received on behalf of the persons referred to in paragraphs (a) to (ac) (new paragraph (ad)).
411. The amendment to section 2(3) of the FOIA by which the exemptions in the new paragraphs (a) to (ab) are absolute, and those in the new paragraphs (ac) and (ad) are qualified (as they are subject to a public interest test), applies to Northern Ireland bodies.
412. The amendments made by the Constitutional Reform and Governance Act 2010 to sections 62(1) and 63 of the FOIA relating to historical records will also apply to Northern Ireland bodies. The amended section 62(1) provides for a change in the

*These notes refer to the Protection of Freedoms Act  
2012 (c.9) which received Royal Assent on 1 May 2012*

meaning of “historical record” so that a record becomes an “historical record” at 20 years rather than 30 years as previously.

413. The amended section 63 of the FOIA limits the exemptions from disclosure which can be applied to “historical records” so the maximum period for which information can be withheld is reduced from 30 years to 20 years for:
- sections 30(1) (investigations and proceedings conducted by public authorities), 32 (court records), 33 (audit functions), 35 (formulation of government policy) and 42 (legal professional privilege); and
  - section 36 (prejudice to the effective conduct of public affairs), except for subsection (2)(a)(ii) (information which would or would be likely to prejudice the work of the Executive Committee of the Northern Ireland Assembly) and section 36(2)(c), in so far as disclosure would prejudice the effective conduct of public affairs in Northern Ireland where the lifespan of the exception remains at 30 years.
414. The amended section 63 also specifies the time limit applying to subsections 37(1)(a) to (ad) (communications with Her Majesty, etc). The time limit is 20 years after the creation of the record in which the information is contained, or five years after the death of the relevant member of the Royal Family, whichever is longer. In the case of communications with the Royal Household falling within new paragraph (ad), the relevant member of the Royal Family for these purposes is the Sovereign reigning when the record in question was created.
415. The maximum duration remains 30 years for sections 28 (relations within the UK) and 43 (commercial interests) of the FOIA.
416. *Subsection (2)* ensures that the power in section 46(2) to (5) of the Constitutional Reform and Governance Act 2010 may apply to Northern Ireland bodies. Subsections 46(2) to (5) of the Constitutional Reform and Governance Act 2010 allow transitional provisions to be made in connection with the amendments to the FOIA that reduce from 30 to 20 years the period within which certain exemptions from disclosure apply; give the Secretary of State power, by order, to make transitional arrangements relating to those amendments; enable provision to be made in any such order about the time when the exemptions cease to apply; and enable different provision to be made for records of different descriptions. A statutory instrument containing such an order is subject to the negative resolution procedure.