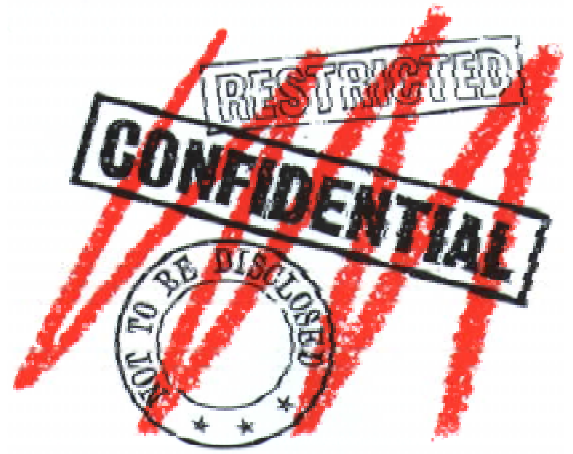


# The Campaign for Freedom of Information in Scotland

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**DRAFT**

## **FREEDOM OF INFORMATION (SCOTLAND) BILL**

**Briefing for the  
Scottish Parliament Debate**

**15 March 2001**

**THE SCOTTISH EXECUTIVE'S  
DRAFT FREEDOM OF INFORMATION BILL**

**BRIEFING FOR THE  
SCOTTISH PARLIAMENT DEBATE 15/3/01**

**Summary**

We welcome the draft Freedom of Information (Scotland) Bill<sup>1</sup> and consider that in significant respects it goes beyond the recent UK Freedom of Information Act. However, the Scottish Executive proposals do not always improve over the UK law – and in a few areas fall behind it. This paper highlights the main differences.

We are particularly pleased that the draft bill would require authorities wishing to withhold information to show that disclosure would ‘prejudice substantially’ the interest in question. This is a more demanding test than the simple ‘prejudice’ of the UK Act. A number of exemptions are significantly narrower than the equivalent UK provisions. The draft bill also requires authorities to meet stricter time limits in responding to requests. The obligations on Scottish authorities to publish information on their own initiative are slightly better than the UK requirements. These provisions should help make Scottish authorities more open than their UK counterparts.

On the other hand, we are concerned at the ‘class exemptions’ which assume that any disclosure in certain areas would, by definition, be harmful. In some of these areas, no disclosure will be possible. In others, information may be released if there is an

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<sup>1</sup> ‘Freedom of Information. Consultation on Draft Legislation’, Scottish Executive, March 2001, SE 2001/65.

overriding public interest in disclosure. This is the wrong starting point: access should not depend on the case *for* disclosure being proved. Where the Scottish Information Commissioner orders disclosure of such information on public interest grounds, the First Minister will have a right of veto. This veto is less extensive than the UK veto, but we think it is wrong in principle and capable of abuse.

We are concerned about four class exemptions in particular. The first covers all information relating to policy formulation by the Scottish Executive, including factual information. The second applies to information obtained during investigations which could lead to proceedings, for example, for safety offences. The third is the broad exemption for confidentiality which would allow regulated companies or lobbyists to avoid scrutiny merely by agreeing with authorities that their information should be kept secret. The last is a provision which allows restrictions on disclosure in existing (or future) legislation to take priority over the FOI bill's right of access.

The proposed charging arrangements may also become an obstacle to access. Although simple requests will be answered free of charge, Scottish authorities will be able to insist on much higher fees for dealing with moderate requests than their UK counterparts. A Scottish authority could charge up to £400 for information which would be available for £50 south of the border.

Although the bill's tight time limits are generally helpful, we note that *applicants* could lose all rights of appeal if they fail to challenge a refusal within 20 working days – which appears unduly harsh.

We welcome the fact that the Scottish Information Commissioner will in several respects have greater powers than the UK Commissioner. He or she is appointed by the Parliament, not ministers. There is no appeal tribunal, which will reduce the potential for delays found in some jurisdictions. However, the Commissioner cannot even investigate complaints relating to a procurator fiscal or the Lord Advocate – making their compliance with the legislation purely voluntary.

Finally, a bizarre provision taken from the UK legislation means that the Scottish Commissioner would commit an offence by disclosing information to which members of the public would have a right of access.

## **Scope**

The structure and provisions of the bill are generally based on those of the UK Act, and in many areas the drafting is identical. The right of access will be retrospective and a wide range of Scottish authorities will be covered. However, the fact that many authorities have to be listed individually in Schedule 1 means that omissions from the list may be difficult to detect.

## **Purpose clause**

Like the UK Act, the draft bill contains no purpose clause, though the consultation paper states that the possibility of including one is still being considered.<sup>2</sup> We favour such a provision, which we think will help to bring about the needed change in the culture of Scottish authorities and in interpreting the bill's public interest test.<sup>3</sup>

## **Publication schemes**

Scottish authorities will be required to produce 'publication schemes' describing the classes of information which they publish or intend to publish on their own initiative.<sup>4</sup> These requirements go slightly beyond the equivalent UK provisions<sup>5</sup>, incorporating some additional requirements from the Scottish open government code.<sup>6</sup>

However, one important category of information, which has to be disclosed under the code, is not included in the bill. These are the internal rules and guidance followed by authorities in their dealings with the public.<sup>7</sup> Most overseas FOI laws require the disclosure of such materials, and we hope the bill will be revised to provide for this.

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<sup>2</sup> Consultation on Draft Legislation, paragraph 89

<sup>3</sup> Draft bill, section 2(1)(b)

<sup>4</sup> Draft bill, sections 22-23

<sup>5</sup> FOIA 2000, sections 19-20

<sup>6</sup> The further provisions require Scottish authorities to take account of the public interest in providing information about (a) standards of service and (b) the facts and analyses underlying important decisions, when drawing up their publication schemes. These reflect explicit commitments to disclose such information under the Code of Practice on Access to Scottish Executive Information ("the Scottish open government code").

<sup>7</sup> Paragraph 3(ii) of Part I of the code commits Scottish public bodies within the jurisdiction of the Scottish Parliamentary Commissioner to "publish, or otherwise make available, explanatory material on the Scottish Executive's and other public bodies' dealings with the public (including

## Exemptions

The draft bill contains a variety of different exemptions:

- ‘Harm test’ exemptions require authorities to show that releasing the information in question would ‘prejudice substantially’ the interest concerned. Even in such cases disclosure may still be required if there is an overriding public interest in openness. None of these exemptions is subject to a veto.
- ‘Class exemptions’ allow all information within a class to be withheld regardless of whether the particular disclosure would cause any harm. There are two types of class exemptions.

*‘Qualified’ class exemptions* are subject to the bill’s public interest test.<sup>8</sup> The Commissioner could order the release of information where the public interest in its disclosure outweighed the public interest in withholding it.<sup>9</sup> However, in most of these cases, the Commissioner’s orders could be vetoed by the First Minister.

*‘Absolute’ class exemptions* are not subject to the public interest test and provide no right of access whatsoever.<sup>10</sup>

The different types of exemption are illustrated in the table at the end of this paper.

### (1) Absolute class exemptions

The absolute class exemptions are the most restrictive and effectively exclude information from the scope of the bill altogether. The most significant of these apply to:

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such rules, procedures, internal guidance to officials, and similar administrative manuals as will assist better understanding of these bodies action in dealing with the public) except where publication could prejudice any matter which should properly be kept confidential under Part II of the Code [the exemptions]”.

<sup>8</sup> The term ‘qualified’ is used in this paper, but does not appear in the draft bill. The bill does, however, use the term ‘absolute’ to describe the remaining class exemptions.

<sup>9</sup> Draft bill, section 2(1)(b)

<sup>10</sup> Draft bill, section 2(2)

*(a) information whose disclosure is prohibited by other laws.<sup>11</sup>*

In 1993 there were some 250 statutory restrictions on disclosure in UK legislation,<sup>12</sup> and the number is likely to have grown significantly since then. Some of these protect personal information about individuals, but many apply to all information obtained by officials from businesses, regardless of whether genuine commercial secrets are involved. Much of the information obtained by local authority environmental health and trading standards inspectors is subject to such restrictions.

The UK Home Office is carrying out a review of these restrictions, with a view to narrowing or repealing those considered excessive. A similar power of repeal exists in the draft bill,<sup>13</sup> and presumably a parallel Scottish Executive review will follow.

We believe that the exemption itself is misplaced, and allows both existing and future restrictions to undermine the FOI right of access. Unless a statutory restriction protects personal data, the bill's right of access should take priority.<sup>14</sup>

*(b) court records<sup>15</sup>*

This exemption is not directed at information whose disclosure might prejudice legal proceedings (separate exemptions apply in such cases<sup>16</sup>) but extends to all published or unpublished documents produced by a court, tribunal or statutory inquiry held by a Scottish public authority, including judgements and transcripts.

*(c) confidential information<sup>17</sup>*

Information whose disclosure would constitute a breach of confidence at common law is subject to another absolute class exemption. This is slightly less restrictive than the above exemptions, since the common law of confidentiality itself permits a disclosure to an

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<sup>11</sup> Draft bill, section 25(a)

<sup>12</sup> 'Open Government' white paper, Cm 2290, 1993, Annex B.

<sup>13</sup> Draft bill, section 62(1)

<sup>14</sup> This is the approach under the Data Protection Act 1998, which provides that an individual's right to see his or her own personal data under that legislation applies "notwithstanding any enactment or rule of law prohibiting or restricting the disclosure, or authorising the withholding of information". [DPA, section 27(5)]

<sup>15</sup> Draft bill, section 36

<sup>16</sup> Draft bill, sections 34(1)(c) and (h)

<sup>17</sup> Draft bill, section 35(2)

appropriate person (though not necessarily to the general public) where there is an overriding public interest. However, the common law public interest test is likely to be more restrictive than the test set out in section 2 of the bill.

The ease with which a legally binding obligation of confidentiality arises makes this a serious obstacle to disclosure. All that is required is for the authority, and the person supplying information to it, to agree that it will be kept confidential. Provided the information is not trivial, or already in the public domain, it will then be subject to an obligation of confidentiality and exempt from access under the bill. This would allow lobbyists to operate in secrecy by agreeing with authorities that their information was to be kept confidential.

## **(2) Qualified class exemptions**

Information subject to these exemptions can only be disclosed where there is an overriding public interest in openness. The consultation paper claims that in these areas “disclosure would normally result in substantial prejudice to the interest concerned”.<sup>18</sup> We do not accept that this is the case.

### *Policy formulation, etc*<sup>19</sup>

Section 28 contains four separate exemptions, for information relating to (a) the formulation of government policy (b) ministerial communications (c) Law Officers’ advice and (d) ministers’ private offices. Such information is available only where an overriding public interest is established, and then subject to a possible veto.

The policy formulation exemption, in particular, is weaker than the corresponding provision in the open government code. The code permits such information to be withheld only if disclosure would “harm the frankness and candour of internal discussion”<sup>20</sup> and even then requires disclosure if there is an overriding public interest.<sup>21</sup>

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<sup>18</sup> Consultation on Draft Legislation, paragraph 35.

<sup>19</sup> Draft bill, section 28(1)

<sup>20</sup> Code of Practice on Access to Scottish Executive Information, Exemption 2

<sup>21</sup> Code of Practice on Access to Scottish Executive Information, Part II, Reasons for confidentiality.

The Parliamentary Ombudsman has made clear that this exemption does not apply to factual information.<sup>22</sup>

Even for straightforward factual information relating to decisions, the draft bill's approach is complex and restrictive:

- Factual information relating to policy formulation is exempt<sup>23</sup> The only exception is for statistics relating to a decision *which has been taken*<sup>24</sup>. If a decision has *not* been taken, even relevant statistics could be withheld.
- Factual information would be disclosable where there was an overriding public interest in its release.<sup>25</sup> The Executive would explicitly have to have regard to the public interest in the disclosure of such information.<sup>26</sup> However, ministers and officials could also consider the public interest in *non-disclosure*, and may decide that the balance favours secrecy. Although the Commissioner could overrule them, the Commissioner's decision could be vetoed.
- The Executive's publication scheme would have to contain some provision relating to the disclosure of facts and analyses *after* important decisions had been taken. This provision is based on the current open government code, which contains a more explicit requirement to publish such material.<sup>27</sup> The bill's vaguer provision would allow Scottish authorities to adopt a watered down commitment (for example, to publish the facts but only after a considerable time, say a year, after the decision had been made).

We think the Act should follow the approach of the Irish and Australian FOI Acts. Factual information is explicitly excluded from the scope of the corresponding Australian exemption.<sup>28</sup> Ireland's FOI Act excludes not only factual and statistical information, but

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<sup>22</sup> Parliamentary Ombudsman Case A.8/00, HC 494, May 2000,

<sup>23</sup> Draft bill, section 28(1)

<sup>24</sup> Draft bill, section 28(2)

<sup>25</sup> Draft bill, section 2(1)

<sup>26</sup> Draft bill, section 28(3)

<sup>27</sup> In drawing up their publication schemes, authorities are merely required to "have regard to the public interest in allowing...public access to ...facts or analyses, on the basis of which decisions of importance to the public have been made". Draft bill, section 22(3)(a)(ii)

<sup>28</sup> Freedom of Information Act 1982 [Australia], sections 36(5) and 36(6)(a)

their analysis.<sup>29</sup> Both laws also exclude scientific and technical advice from the scope of this exemption.

### *Investigations and proceedings*<sup>30</sup>

Information relating to investigations into potential offences, are exempt, regardless of whether disclosure could prejudice the investigation or any trial.<sup>31</sup> (Where such a risk does exist, entirely separate exemptions would come into play.<sup>32</sup>) Information collected by an enforcing authority during *routine inspections* would also be exempt, even though no offence may have been detected or a decision not to prosecute had been taken.<sup>33</sup> This would allow information about potential safety problems to be withheld by bodies such as environmental health or trading standards officers.

### *Information supplied in confidence by another government or international body*<sup>34</sup>

This exemption protects information supplied in confidence, or in circumstances where confidentiality might have been expected, by another government or an international organisation – including the EU. Such information could be disclosed only on public interest grounds. (Information supplied in confidence by the UK government is not covered by this exemption, but is excluded from access altogether.<sup>35</sup>)

## **(3) Harm test exemptions**

Other exemptions allow information to be withheld only if disclosure would ‘prejudice substantially’ a specified interest. This test applies to many of the more sensitive exemptions including national security,<sup>36</sup> defence,<sup>37</sup> international relations,<sup>38</sup> law enforcement,<sup>39</sup> the frank exchange of views for the purpose of deliberation,<sup>40</sup> relations

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<sup>29</sup> Freedom of Information Act 1997 [Ireland] section 19(3)(a)

<sup>30</sup> Draft bill, section 33

<sup>31</sup> Draft bill, section 33(1)(a)

<sup>32</sup> Draft bill, sections 34(1)(a),(b)(c) and (g),

<sup>33</sup> Draft bill, section 33(1)(b)

<sup>34</sup> Draft bill, section 31(1)(b)

<sup>35</sup> Draft bill, section 3(2)(a)(ii)

<sup>36</sup> Draft bill, section 30(1)(a)

<sup>37</sup> Draft bill, section 30(1)(b)

<sup>38</sup> Draft bill, section 31(1)(a)

<sup>39</sup> Draft bill, section 34(1)

<sup>40</sup> Draft bill, section 29(b)(ii)

between UK administrations,<sup>41</sup> commercial interests,<sup>42</sup> the economy<sup>43</sup> and audit functions.<sup>44</sup> We think a similar test should apply throughout the bill.

Where substantial prejudice is shown, disclosure may still be required if there is an overriding public interest in doing so. The combination of these two tests (substantial prejudice and public interest) makes these exemptions demanding. The fact that there is no ministerial veto in these areas, is a further advantage over the UK regime.

Some of the harm test exemptions improve on the UK Act in other ways:

- The UK Act contains a catch-all exemption for information whose disclosure would ‘prejudice the effective conduct of public affairs’<sup>45</sup>. This test is established in the *subjective* opinion of a minister or official, making it particularly difficult to challenge. The equivalent in the draft bill makes this an *objective test* (by omitting the reference to anyone’s ‘opinion’) and adopts the higher ‘prejudice substantially’ test.<sup>46</sup>
- The UK Act exempts information which is to be published at some unspecified future date, if it is reasonable to withhold it until then.<sup>47</sup> The Scottish bill limits this exemption to information which is to be published in the next 12 weeks.<sup>48</sup>
- Under the UK Act, a ministerial certificate can be issued to prevent disclosure on national security grounds.<sup>49</sup> No such certificate is available under the Scottish bill.<sup>50</sup>
- The power of Scottish authorities to refuse to confirm that they hold exempt information would be more limited than that of UK authorities.<sup>51</sup>

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<sup>41</sup> Draft bill, section 27

<sup>42</sup> Draft bill, section 32(1)(b)

<sup>43</sup> Draft bill, section 32(2)

<sup>44</sup> Draft bill, section 39

<sup>45</sup> FOIA 2000, section 36(2)(c)

<sup>46</sup> Draft bill, section 29(c)

<sup>47</sup> FOIA 2000, 22(1)

<sup>48</sup> Draft bill, section 26(a)

<sup>49</sup> FOIA 2000, section 24(3). However, the certificate can be overturned by the UK Information Tribunal, on judicial review grounds [section 60(3)].

<sup>50</sup> Draft bill, section 30(1)(a)

<sup>51</sup> Under both regimes, authorities will be able to refuse to confirm whether or not they hold

## **The public interest test**

The public interest test itself appears slightly less favourable to applicants than the test in the UK Act.

The draft bill requires disclosure where the public interest *in disclosure* outweighs the public interest in maintaining the exemption.<sup>52</sup> This means that in the unlikely event that the public interest both for and against disclosure is absolutely equal, the information would *not* be disclosed. The equivalent UK provision requires information to be disclosed in these circumstances.<sup>53</sup> We hope the Scottish bill will follow this precedent.

## **The veto**

The First Minister will be able to exercise a veto in relation to five exemptions<sup>54</sup> - making it considerably narrower than the UK veto.<sup>55</sup> Some of these are nevertheless broad in their own right. The five exemptions are:

- *section 28*, formulation of government policy, ministerial communications, Law Officers' advice, ministerial private offices
- *section 31(1)(b)* information in confidence from other governments or international organisations

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exempt information in certain circumstances. The UK Act envisages that the 'duty to confirm' can be set aside for virtually every exemption, under particular circumstances. The draft Scottish bill permits this for a limited group of exemptions only, including those relating to relations between administrations [section 27], policy formulation [section 28], national security and defence [section 30], international relations [section 31], investigations and proceedings [section 33], law enforcement [section 34], health and safety [section 38(1)] or communications with Her Majesty and honours [section 40]. However, Scottish authorities will *not* be able to refuse to confirm that they hold information which is exempt on grounds of prohibitions on disclosure [section 25], intended for future publication [section 26] prejudice to the effective conduct of public affairs [section 29], commercial interests and the economy [section 32], confidentiality [section 35], court records [section 36], personal information [section 37], environmental information [section 38(2)] or audit functions [section 39].

<sup>52</sup> Draft bill, section 2(1)(a)

<sup>53</sup> FOIA 2000, section 2(2)(b)

<sup>54</sup> Draft bill, section 51(1)(b)

<sup>55</sup> The UK veto can be used in relation to any decision by the Commissioner to order central government to release information on public interest grounds, under *any* of the exemptions subject to the public interest test.

- *section 33* investigations and proceedings
- *section 35* confidentiality, and
- *section 40(b)*, honours

These are all class exemptions, which allow information to be withheld without specific evidence that its disclosure would cause harm. Disclosure is only possible on public interest grounds – and even then subject to a possible veto. This arrangement swings the balance significantly against disclosure.

In ‘An Open Scotland’ the Executive indicated that the veto could only be exercised on the “collective decision of the Scottish ministers”.<sup>56</sup> In fact, the collective veto has been replaced by a veto exercised by the First Minister *alone* “after consulting the other Ministers”,<sup>57</sup> a less demanding hurdle.

We believe there should be no veto at all, and Ministers should *appeal* against decisions with which they disagree, not set them aside.

If a veto is retained, it should be made far more difficult to exercise. As the bill stands, the First Minister could veto a decision merely because he thinks it is marginally wrong – even though the consequences of releasing the information may be minimal. We believe the First Minister should have to satisfy an additional and more demanding statutory test. ‘An Open Scotland’ proposed that the veto should only be available in relation to information “of exceptional sensitivity or seriousness”.<sup>58</sup> This phrase should be given statutory weight. This would open to door to judicial review of any veto issued without evidence of exceptional seriousness. However, we would prefer to see the veto removed altogether.

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<sup>56</sup> An Open Scotland, paragraph 6.6

<sup>57</sup> Draft bill, section 51(2)

<sup>58</sup> An Open Scotland, paragraph 6.6

## **The veto and confidential information**

We are surprised to see that the veto can be used in relation to information whose disclosure would constitute an actionable breach of confidence.<sup>59</sup> The UK veto is *not* available in relation to this information, for good reason. This exemption is *not* subject to the section 2 public interest test.

In reviewing this exemption, the Commissioner would apply the same test as the courts (including the *common law* public interest defence to action for breach of confidence). If the Commissioner misinterprets the common law, and attempts to order disclosure of information which is subject to an obligation of confidentiality, the person to whom that obligation is owed can obtain a remedy from the courts.<sup>60</sup> The First Minister has no proper part to play in this process; and should not be entitled to veto a disclosure which is correct in law.

## **Charges for information**

The consultation paper proposes that applicants could be charged to cover the costs of locating and retrieving information. Where these costs are less than £100, no charge at all would be made. Above this limit, the marginal costs of locating and retrieving the information could be charged (plus copying and postage charges). This means that for a request which cost £500, the applicant could be required to pay £400 (plus any copying and postage costs).<sup>61</sup>

However, under the UK Act, ministers have said that regulations will permit authorities to charge no more than 10% of the marginal costs of locating information.<sup>62</sup> Where these costs are £500, the charge to the applicant would be only £50. *A similar request to a Scottish public authority would therefore cost 8 times more. Charges in Scotland are likely to become a serious obstacle where requested information is not easily located.*

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<sup>59</sup> Draft bill, section 35(2)

<sup>60</sup> Section 55 of the draft bill permits any decision of the Commissioner to be challenged in court on a point of law.

<sup>61</sup> Consultation on Draft Legislation, paragraphs 25-26

<sup>62</sup> This approach was set out in the Home Office's 'Freedom of Information. Consultation on Draft Legislation'. May 1999, Cm 4355, paragraph 58 and subsequently confirmed by Home Office minister Mike O'Brien during the bill's committee stage in the House of Commons. Standing Committee B, 18 January 2000, morning, col. 85.

Although smaller requests to Scottish authorities will be free, in practice so will smaller requests to UK authorities. The cost of collecting a fee of, say, £5, is likely to be more trouble than it is worth.

The UK Act contains a series of other restrictions designed to protect authorities from potentially time-consuming requests, all of which also appear in the Executive's proposals. Scottish authorities (a) would not be required to provide information where the costs of locating it exceeded £500 (b) could refuse to provide information to someone who had recently been provided with substantially similar information<sup>63</sup> (c) could refuse 'vexatious' requests<sup>64</sup> (d) could aggregate the costs of different requests made by the same person or other persons who appear to be acting in concert or as part of a campaign<sup>65</sup> (e) could insist on fees being paid in advance of the request being processed<sup>66</sup> and (g) could apparently not be required to waive fees on public interest grounds. These provisions make it harder to see why Scottish authorities should be able to charge at a higher rate than UK bodies.

### **Time limits**

Scottish public authorities will be subject to more tightly defined time-limits for responding to requests.

- The UK Act sets a 20 working day limit for responses, but unhelpfully allows authorities to take an unspecified 'reasonable' period for dealing with requests involving decisions on public interest disclosure.<sup>67</sup> Scottish authorities will be subject a single 20-day response period – a significant improvement.<sup>68</sup>
- Scottish authorities will have 20 working days to review a refusal to disclose.<sup>69</sup> No fixed limit for such reviews is laid down in the UK Act. (Note that applicants cannot

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<sup>63</sup> Draft bill, section 14(2)

<sup>64</sup> Draft bill, section 14(1)

<sup>65</sup> Draft bill, section 12(2)

<sup>66</sup> Draft bill, section 10(2)(b)

<sup>67</sup> FOIA 2000, section 10(3)

<sup>68</sup> Draft bill, section 10(1)

<sup>69</sup> Draft bill, section 20(1)

appeal to the Information Commissioner unless they have first asked the authority to review its original decision.)

- the Scottish Information Commissioner will normally be required to reach decisions within 4 months (though a longer period will be allowed where reasonable).<sup>70</sup> The UK law provides no statutory limit.

However, in other respects Scottish authorities will have more generous time-limits than their UK counterparts:

- We are particularly concerned at the proposal to deprive applicants of their rights of appeal if they fail to ask for an authority to review a refusal within 20 working days of a refusal.<sup>71</sup> Applicants apparently lose their rights if they fail to promptly challenge an authority which has simply ignored their request altogether.<sup>72</sup> Such rigid requirements are misplaced. It is easy to imagine circumstances in which applicants are slow in recognising that a refusal was unjustified, and find that they lose their rights as a result. *Authorities* who exceed their time-limits, on the other hand, appear to face no specific penalties.
- A request sent by post is assumed to be received *three days after it was sent*.<sup>73</sup> Since a first-class letter should arrive the following day, this provision in effect extends the 20 day response period by a further two days.
- The First Minister will have 40 working days to decide on whether to veto a decision of the Commissioner requiring disclosure<sup>74</sup> – the UK veto must be exercised within 20 working days.<sup>75</sup> This could create additional delays, allowing Scottish ministers 2 months before they are required to disclose information to which the veto might apply.

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<sup>70</sup> Draft bill, section 48(3)(b)

<sup>71</sup> Draft bill, section 19(5)(b)

<sup>72</sup> Draft bill, section 19(5)(a)

<sup>73</sup> Draft bill, section 70(2)(a)

<sup>74</sup> Draft bill, section 51(2)

<sup>75</sup> FOIA 2000, section 53(2)

### **The powers of the Commissioner**

The powers of the Commissioner are generally strong. Unlike the UK regime, there is no appeal tribunal. We think this is helpful in preventing the appeals process (which already involves a mandatory internal review by the authority itself) becoming too drawn out. The Scottish Commissioner would therefore be in the same position as the Commissioner under Ireland's 1997 FOI Act who also can be challenged only by appeal to the courts on a point of law.

### **The Lord Advocate and procurators fiscal**

However, the Commissioner has no power to review refusals to disclose information by the Lord Advocate or by a procurator fiscal.<sup>76</sup> In effect these officers will be able to ignore the legislation altogether - though their UK counterparts enjoy no such special protection. The provision is not limited to information about the exercise of prosecutorial discretion. Requests for information about the costs of office redecoration could be ignored with impunity – an inexplicable situation.

### **Secrecy offence**

Finally, we note that the Scottish Information Commissioner could commit an offence by disclosing information about an identifiable individual or business without their consent, other than in certain circumstances.<sup>77</sup> A disclosure to the general public would be possible only if this was “necessary in the public interest” having regard to the rights and freedoms or legitimate interests of a person.<sup>78</sup> “Necessary” is a strict test, which may preclude disclosure in many cases.

This offence does not require evidence that the Commissioner's disclosure caused harm, for example to a businesses' commercial interests. Information which a member of the public could obtain under the Act (because disclosure would not 'prejudice substantially' the businesses' commercial position,<sup>79</sup> could result in the Commissioner's prosecution if

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<sup>76</sup> Draft bill, section 47(b) and (c)

<sup>77</sup> Draft bill, section 44

<sup>78</sup> Draft bill, section 44(2)(e)

<sup>79</sup> Draft bill, section 32(1)(b)

he or she disclosed it. Similarly the Commissioner would be at risk for mentioning the name of a minister or civil servant without their consent.

This is based on a similar provision in the UK Act.<sup>80</sup> However, the UK situation is different, since a single Commissioner enforces both the Data Protection Act and the FOI Act – and a secrecy provision already existed under the DPA. We questioned this logic, but think it is even more difficult to sustain in the Scottish bill, given that Scotland's Commissioner will have no responsibility for enforcing the DPA.

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<sup>80</sup> FOIA 2000, Schedule 2, paragraph 18, which extends a secrecy offence applying to the former Data Protection Commissioner to the UK Information Commissioner.

## Appendix

### Examples of the bill's exemptions

Type of exemption	Features	Examples	
Absolute class exemptions	<ul style="list-style-type: none"> <li>▪ No test of harm</li> <li>▪ s 2 public interest test does <i>not</i> apply</li> </ul>	<ul style="list-style-type: none"> <li>▪ disclosure prohibited by law</li> <li>▪ disclosure would be an actionable breach of confidence</li> <li>▪ records prepared for or created during court proceedings</li> <li>▪ personal information about another individual</li> </ul>	<p>25</p> <p>35(2)</p> <p>36</p> <p>37</p>
Qualified class exemptions + veto	<ul style="list-style-type: none"> <li>▪ No test of harm</li> <li>▪ s 2 public interest test the sole basis for disclosure</li> <li>▪ Any disclosure subject to possible veto.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Formulation of government policy, ministerial communications, ministers' private offices</li> <li>▪ Information held for purposes of an investigation which could have led to a prosecution</li> <li>▪ Information received in confidence from foreign government or international organisation</li> <li>▪ Advice from lawyer</li> </ul>	<p>28(1)</p> <p>33</p> <p>31(1)(b)</p> <p>35(1)</p>
Qualified class exemptions - no veto	<ul style="list-style-type: none"> <li>▪ No test of harm</li> <li>▪ s 2 public interest test sole basis for disclosure</li> <li>▪ No veto available</li> </ul>	<ul style="list-style-type: none"> <li>▪ Trade secrets</li> <li>▪ Communications with Royal Family</li> </ul>	<p>32(1)(a)</p> <p>40(a)</p>
Harm test exemptions	<ul style="list-style-type: none"> <li>▪ Withhold only if disclosure would 'prejudice substantially' the interest</li> <li>▪ Even then, disclosure possible under s 2 public interest test</li> <li>▪ No veto available</li> </ul>	<ul style="list-style-type: none"> <li>▪ Relations within UK</li> <li>▪ Effective conduct of public affairs</li> <li>▪ Defence</li> <li>▪ International relations</li> <li>▪ Commercial interests</li> <li>▪ Law enforcement</li> <li>▪ Audit functions</li> </ul>	<p>27</p> <p>29(c)</p> <p>30(1)(b)</p> <p>31(1)(a)</p> <p>32(1)(b)</p> <p>34</p> <p>39</p>