



**SUMMARY OF RESPONSES TO THE
CONSULTATION PAPER "AN OPEN
SCOTLAND: FREEDOM OF
INFORMATION, A CONSULTATION"**

CONTENTS

- ❖ INTRODUCTION Page 2
- ❖ SUMMARY OF RESPONSES Pages 3-18
- ❖ NEXT STEPS Page 19
- ❖ ANNEX A : RESPONDENTS TO *AN OPEN SCOTLAND*

INTRODUCTION

1.1 On 23 June 1999 the Deputy First Minister Jim Wallace made a statement in the Scottish Parliament about how the Scottish Executive intended to take forward the Partnership commitment to the early introduction of an effective Freedom of Information regime. The commitment to consult in Autumn 1999 on proposals for a statutory Freedom of Information regime was included in the Executive's *Programme for Government*.

1.2 On 25 November 1999 the Scottish Executive published a consultation paper *An Open Scotland: Freedom of Information, a Consultation*. The document was widely distributed throughout civic Scotland. The closing date for responses was 15 March 2000. Several responses came in after this date and are being given equal consideration as part of the consultation exercise.

1.3 A total of 119 responses to the consultation were received; two of the respondents indicated that their responses were made in confidence. Responses came from a wide variety of people and organisations including individual members of the public, local authorities, trade unions, non-departmental public bodies, health bodies and environmental organisations. Twenty-eight responses were made, at least initially, by email. A table of respondents (which excludes the two made in confidence) can be found at *Annex A*.

1.4 During the consultation period, members of the Freedom of Information Unit of the Executive met and discussed the proposals with representatives from organisations such as the Consumers' Association, the Campaign for Freedom of Information, Friends of the Earth Scotland, the Royal Society for the Protection of Birds and the Scottish Criminal Cases Review Commission. Officials from the Scottish Executive FOI Unit and the Crown Office also provided evidence on the proposals to the Justice and Home Affairs Committee of the Scottish Parliament.

The Scottish Executive
Freedom of Information Unit

May 2000

SUMMARY OF RESPONSES

In general, respondents welcomed the broad thrust of the proposals contained in *An Open Scotland*. Freedom of information raises a number of complex issues, particularly for public authorities who will have to implement the legislation. The responses cover many of these issues. Many of the responses also cover issues which arise from the other end of the spectrum i.e. from those who will wish to use the rights to be afforded to them by the legislation.

The analysis of the responses follows the same structure as the chapters in the consultation document itself and in most cases suggestions and comments taken from the responses are preceded by the proposals made in the document. The summary reflects the views of respondents but should not be regarded as being definitive of those views or of reflecting the views of the Scottish Executive. An index of headings, with corresponding chapter numbers, is below.

A RIGHT OF ACCESS (CHAPTER 2)	Page 4
COSTS AND CHARGING (CHAPTER 3)	Page 7
TESTS FOR DISCLOSURE (CHAPTER 4)	Page 8
PERSONAL INFORMATION (CHAPTER 5)	Page 12
REVIEWS AND APPEALS (CHAPTER 6)	Page 13
PUBLIC RECORDS (CHAPTER 7)	Page 15
CHANGING THE CULTURE (CHAPTER 8)	Page 16
MISCELLANEOUS	Page 17

A RIGHT OF ACCESS (CHAPTER 2)

Proposals: *A statutory right of access to official information; all Scottish public authorities and service providers (such as schools and the police) to be covered; applies to both information and documents; anyone can apply; simple system for applying for information; public authorities to respond within 20 working days of receipt of request; a statutory duty on public authorities to publish certain information.*

a statutory right of access to official information; all Scottish public authorities and service providers (such as schools and the police) to be covered

2.1 No respondents suggested any alternative to a statutory right of access. UNISON Scotland, the Scottish Consumer Council, the Campaign for Freedom of Information and the Consumers' Association were of the opinion that the legislation should have a clause clearly setting out the purpose of the legislation. COSLA and a number of local authorities made the point that there are already statutory access rights to information which is held by local authorities, such as the provisions of the Local Government (Scotland) Act 1973 and the Local Government (Access to Information) Act 1985, and asked for clarification as to how these access rights will interact with the statutory FOI regime. The Greater Glasgow Primary Care NHS Trust also asked for clarification on the impact of the proposals on the Access to Health Records Act 1990. In their responses the Scottish Criminal Cases Review Commission and the Scottish Legal Aid Board drew attention to statutory duties of confidentiality which are imposed upon these organisations and were concerned to ensure that the proposed statutory access rights would not conflict with these duties. In their response the Justice and Home Affairs Committee of the Scottish Parliament said that one issue which particularly concerned them is how the Lord Advocate in his role as Crown Prosecutor will be affected by the FOI regime. The Committee believes that some mechanism will be needed to ensure that victims of crime have access to information about the criteria used by the Lord Advocate in making prosecution decisions.

2.2 Although the consultation document stated at paragraph 2.4 that "all Scottish public authorities" were intended to be covered by these statutory access rights, a number of respondents sought clarification on the exact scope of the legislation. In accordance with the legislative competence of the Scottish Parliament on "access to information", Cross-Border Public Authorities will not be subject to the Scottish FOI regime; this was commented upon by some respondents. UNISON Scotland and a number of others thought that the Scottish arms of these public authorities should be covered by the Scottish FOI regime. A number of respondents argued strongly that the Scottish Parliament should be included in the scope of the Scottish legislation. The National Union of Journalists expressed strong reservations about the proposed scope of the Scottish regime, particularly the exclusion of information held by UK government departments operating in Scotland and information received from government departments and held in confidence by Scottish public authorities. The Campaign for Freedom of Information thought that the legislation should be extended to cover "all bodies over whom ministers or authorities exercise significant control". In their response the Royal Town Planning Institute in Scotland advised of the political consequences for introducing delays in the planning process by giving members of the public greater rights to access information under the planning system. The Justice and Home Affairs Committee of the Scottish Parliament expressed concern about the impact in practice of having different rights of access to

information in relation to devolved and reserved matters. The Committee thought that it will be important to avoid any suggestion that information is being categorised as reserved simply in order to make access to it more difficult to obtain.

2.3 Friends of the Earth Scotland asked that the proposals be tightened up so that environmental information would be included on a par with other information and the Scottish FOI Act could implement the Aarhus Convention¹. Friends of the Earth Scotland wish to see the introduction of an Emissions Inventory for Scotland. Similar comments were received from other respondents. SEPA is of the strong opinion that the FOI legislation must clarify how it will interrelate with the Environmental Information Regulations and the Data Protection Act 1998. Moray Council and the CBI Scotland were of the opinion that the FOI legislation should not be retrospective. COSLA, while supporting in principle retrospective access rights, suggested that in view of the severe financial constraints facing local government, consideration should be given to initially providing access rights only to information not more than six years old. Scottish Natural Heritage and the Joint Nature Conservation Committee thought that it would be helpful if the Scottish legislation took the same stance on retrospection as the Environmental Information Regulations. The Scottish Human Rights Centre argued that there should be a detailed ECHR compatibility statement provided with the Scottish FOI legislation. On this point the Justice and Home Affairs Committee of the Scottish Parliament thought that there is a particular need to consider how the provision made by a Freedom of Information Act fits with the terms of the Convention itself, if the provision is not to be set aside in practice by the Courts in favour of direct appeal to Convention rights.

applies to both information and documents; anyone can apply; simple system for applying for information

2.4 The National Archives for Scotland commented that there might be problems with the proposal that applicants will be able to choose the format in which they receive information. In their view the emphasis should be on access to information rather than on the format, and that the holder of the information should have the final say over the format. The National Trust for Scotland made the point that there should be a clear definition of "information" in the legislation in order to avoid any confusion. UNISON Scotland, the Scottish Consumers Council and Edinburgh Telematics Partnership all put the case for there being some sort of publicly available database or index of information held by public authorities.

public authorities to respond within 20 working days of receipt of request

2.5 A number of local authorities in their responses expressed concern about the target of 20 working days for meeting FOI requests, particularly for information over six years old or for complicated cases. Renfrewshire Council and other respondents suggested that the time scale should be 40 days, so that it would be consistent with the time for dealing with subject access requests under the Data Protection Act 1998. COSLA sought clarification as to whether it is proposed to

¹ The United Nations Economic Commission for Europe (UNECE) Convention on access to information, public participation in decision making and access to justice in environmental matters.

bring this 40-day period into line with the 20-day FOI timescale. On the other hand, Highland Council thought that the timescale of 20 working days would in most cases be reasonable.

a statutory duty on public authorities to publish certain information

2.6 Glasgow City Council stated in their response that they are required at present to make a range of information publicly available and they welcomed the proposed statutory duty on all public authorities to publish certain information. Friends of the Earth Scotland and Mr David Leslie also welcomed the proposed statutory duty. A number of local authorities however were concerned at the potential conflict between the proposed statutory duty and existing statutory duties (such as section 88 of the Local Government (Scotland) Act 1973) which require them to publish certain information about their services and decisions. Falkirk Council were also concerned that the role of the Information Commissioner in reviewing such schemes was unclear. The Scottish Environment Protection Agency was concerned to ensure that the statutory duty would leave discretion to the Agency on the scope and timing of the publication of material. The Royal Society for the Protection of Birds Scotland would like to see a public register of publication schemes.

COSTS AND CHARGING (CHAPTER 3)

Proposals: *Costs of regime not to be met in full by applicants; charging regime to be fair to genuine applicant and straightforward and simple to operate; three options for charging scheme.*

costs of regime not to be met in full by applicants

3.1 A few responses suggested that commercial companies requesting information ought to be liable for higher charges than individuals. It was noted that there might be some difficulty in determining which applicants are genuine. Most respondents agreed that applicants should not meet costs in full, though a number commented that the proposals would place an additional financial burden on public authorities as a consequence. UNISON Scotland suggested that central government should meet the cost of any such burden.

charging regime to be fair to genuine applicant and straightforward and simple to operate; three options for charging scheme.

3.2 Of the three charging options put forward in *An Open Scotland*, the preferred option was the one which would involve applicants not paying for information until a threshold of £100 for effort involved in meeting the request is reached, with discretionary powers for public authorities to charge full marginal costs thereafter. This is set out in paragraph 3.13 of the consultation document. Several respondents suggested that, whilst this seemed the most attractive option, some amendment should be made to it. The other options were less popular. Professor Thomas Riley suggested setting a minimum fee for access, perhaps £5, and then charging per page for photocopying, with a consideration of providing the first one hundred pages free of charge. West Lothian Council, East Renfrewshire Council and Aberdeenshire Council Housing and Social Work Service commented that further thought needs to be given to charging. Midlothian Council and Falkirk Council suggested alternative charging schemes.

3.3 Two respondents thought that there had been failure in the charging proposals to take into account differing abilities to pay. The Disabled Persons Housing Service suggested that "charges should only be applied where there is a cost to the supplier at the point of access demand" and they encouraged a move towards electronic information storage on the basis that it would be cheaper and would help accessibility to that information for people with disabilities. Professor Colin Reid commented that charges could only be justified for providing information and not for telling an applicant that the request for information was being refused.

TESTS FOR DISCLOSURE (CHAPTER 4)

Proposals: *Careful balance required between right of access and protection of sensitive information; the public interest in disclosure must be considered; a demanding harm test of 'substantial prejudice'; compatibility with UK FOI Act in relation to investigation and prosecution of crime; investigation and prosecution of crime not to be prejudiced by FOI; policy advice and related information covered by a combination of class-based and content-based exemptions; factual background information to major policy announcements to be disclosed; exemptions drawn largely from the Code of Practice on Access to Scottish Executive Information.*

careful balance required between right of access and protection of sensitive information

4.1 On the general issue of class-based and content-based exemptions, a number of issues were raised. Several respondents disagreed with the concept of class-based exemptions. The Campaign for Freedom of Information were disappointed at the large number of class exemptions proposed. In their view these exemptions include much information that could be disclosed without harm and they should be amended to incorporate tests of harm. The National Union of Journalists suggested "if harm cannot be demonstrated to the Scottish Information Commissioner, then either the harm test is wrong, the Commissioner is wrong, or there is no harm", concluding by asking "therefore why have any class-based exemptions at all?" The Scottish Consumer Council stated "there is no place for class-based exemptions in a truly open freedom of information regime". Amnesty International suggested that "since there is a substantial prejudice test anyway, which is capable of protecting information which really is sensitive, the class based exemptions are not really necessary". They went on to say that a class-based approach to exemptions is unnecessary and "does not fit with the commitment to openness". The Consumers' Association thought that there was "a determined effort in the proposals to limit the use of class-based exemptions". One respondent suggested that a working group could set the precise definitions of exemptions.

4.2 Several respondents commented on the confidentiality exemptions. Friends of the Earth Scotland, Mr Almuth Ernsting and the Scottish Funding Councils for Further & Higher Education suggested that these exemptions need to be more clearly defined. Some bodies, for example the Parole Board for Scotland and the Scottish Criminal Cases Review Commission, commented that most of their business is confidential, and several local authorities noted that there are some specific confidentiality requirements under which they currently operate. The Law Society of Scotland expressed a concern with the possibility of the term "in confidence" being used retrospectively. Other comments were made about the confidentiality of research, and of intellectual property and confidential information held by contractors.

the public interest in disclosure must be considered

4.3 A number of responses noted that guidance would be required about what might constitute "the public interest". The National Trust for Scotland suggested that accredited independent assessors could examine the issue rather than allow it to be defined by public authorities. South Lanarkshire Council argued that when information falls within either a class- or content-based exemption there should not then be a requirement on the public authority to consider whether there

would be a public interest in disclosing the information. The Campaign for Freedom of Information thought that a statutory definition of the public interest may be possible but may ultimately prove restrictive. In their view the general principles which underline the FOI legislation should appear in a purpose clause "where they would set the context for interpreting the statutory public interest test".

4.4 Professor Thomas Riley commented that the harm tests should be balanced with a liberal interpretation of "the public interest" which would be aligned to the individual making the request and the context in which the request is made.

4.5 Charter88 suggested a "benefit test" whereby there would be a legal obligation to disclose specific types of information when considering the public interest.

4.6 The Scottish Police Federation believe that the harm and public interest tests should be weighed separately, balanced, and a decision should be made on the basis of whether the harm would outweigh the public interest or vice versa.

a demanding harm test of 'substantial prejudice'

4.7 The majority of respondents who commented on the proposed harm test were in favour of the use of the term "substantial prejudice". The Consumers' Association, for instance, believed that such a harm test "will make it much more difficult for public authorities to unreasonably withhold information relating to commercial interests". The Campaign for Freedom of Information welcomed the proposal that there should be a substantial harm test and agreed that it would be a demanding test. In their view the definition that the test will require that "the prejudice caused by disclosure would be real, actual and of significant substance" should appear on the face of the legislation. Orkney Islands Council, on the other hand, thought that it would be more difficult to define than simple "prejudice".

4.8 The Scottish Police Federation mentioned that in law enforcement matters it is not always feasible to state that harm is probable rather than possible. They believe that the nature of the harm feared must be taken into account.

4.9 The Scottish Human Rights Commission commented that "only the information which satisfies the harm test should be withheld and not the whole document".

compatibility with UK FOI Act in relation to investigation and prosecution of crime; investigation and prosecution of crime not to be prejudiced by FOI

4.10 The Scottish Police Federation commented "we believe that the exemptions that we propose should be class-based exemptions, with a presumption against disclosure". The Federation went on to list ten categories of information which they consider should be subject to a class-based exemption and stated that there would be a general presumption that such information would not be disclosed.

4.11 The Scottish Media Lawyers' Society thought that the "law enforcement and legal proceedings" exemption would "potentially cover a very great deal of civil proceedings, and even proceedings which are no longer active".

4.12 Few others made detailed comment on this part of the proposals, although one respondent suggested that legal proceedings should not be a general exemption but should be considered case by case.

policy advice and related information covered by a combination of class-based and content-based exemptions

4.13 COSLA commented if it is legitimate for central government to have an exemption for decision making and policy advice it is proper for local government to expect the same degree of exemption afforded to Scottish Executive Ministers in their policy development processes. RSPB suggested that the "policy development" exemption should be switched from being class-based to content-based. Mr Angus Langlands and Friends of the Earth Scotland suggested that a tight definition of policy advice would be required. Several respondents argued that the exemption relating to "internal discussion" should apply to local government, health boards, NHS trusts and others as well as to central government. The Campaign for Freedom of Information commented in detail upon the group of class exemptions which appeared under the heading of "internal discussion and advice". The Campaign welcomed the proposal that factual information is excluded from the class exemption but did not accept that other information relating to policy discussions needed the protection of a class exemption.

4.14 South Lanarkshire Council commented that "no justification is given [in *An Open Scotland*] for excluding all communications between Ministers but only confidential information between public authorities". Highland Council argued that there should be access to the decision-making processes as well as to written information and records.

4.15 The School Library Association in Scotland thought that the exemption for "immigration and nationality" could seriously inhibit schools in their attempt to support pupils since, in the Association's experience, "schools are often the first point of reference for families whose children are English-speaking but whose parents have limited command of the language".

4.16 The exemption for "the operation of any Ministerial office" drew criticism from the Scottish Association of Health Councils who commented that "while we can accept the work conducted may be exempt the operational aspects should not be".

4.17 A number of respondents suggested that the exemptions for "incomplete analysis" and "research, statistics and analysis" should be withdrawn. In the proposed exemption dealing with "voluminous and vexatious enquiries", the majority who commented agreed with a need to identify vexatious requests if they had been made maliciously. The National Trust for Scotland and Friends of the Earth Scotland argued that access to information should not be denied on the grounds that enquiries were "voluminous".

4.18 The Scottish Media Lawyers' Society commented on the "privacy" exemption, saying that "the notion that personal information about a deceased individual may invade privacy extends further than, say, the protection which the law of defamation considers it appropriate to provide".

4.19 A few respondents asked for the exemptions to be extended in the legislation. The Joint Nature Conservation Committee, for example, suggested that an exemption should be included for environmental information the disclosure of which "would, or would be likely to, damage the natural heritage or prejudice conservation of the environment".

4.20 A small number of respondents commented on the currency of information, suggesting that an exemption quoted in refusing a request may not necessarily still apply after a period of time or change of circumstances; consideration should be given to the inclusion of a "sunset" clause. This would state a time limit or circumstances after which an exemption could no longer apply.

4.21 Several responses noted that guidance would be required on some of the concepts in the proposals, for example "substantial", "vexatious", "likely to" and "soon".

PERSONAL INFORMATION (CHAPTER 5)

Proposals: *Most personal information to be accessed under the provisions of the Data Protection Act 1998; personal information which falls outside the provisions of the Data Protection Act 1998 to be subject to FOI rights of access.*

personal information which falls outside the provisions of the Data Protection Act 1998 to be subject to FOI rights of access.

5.1 In her response to the consultation document the Data Protection Commissioner drew attention to the complexity of establishing the boundary between manually processed information to which the Data Protection Act 1998 will apply and the manually processed information falling under the scope of the Scottish FOI regime. She outlined three key concerns relating to access to personal information held by Scottish public authorities, namely:

- Data subjects and applicants should be clear about their rights of access to different categories of information
- Scottish public authorities should be clear about their responsibilities under both regimes
- The respective roles of the Scottish Information Commissioner and the Data Protection Commissioner should be clearly delineated.

5.2 Other respondents expressed concern about the possibility of overlap or conflict between the Data Protection and Freedom of Information regimes. Argyll and Bute Council thought that it is not necessarily the case that requests for information will fall neatly under each regime. There may be difficulties in complying with both sets of information, particularly in relation to making decisions to provide information where different exemptions apply and also against different charges and time limits. A couple of respondents thought that there should be dual access under the FOI and Data Protection regimes to personal information. North Lanarkshire Council commented that there would be merit in having codified information bringing all rights of access to information within the terms of one Act. The Scottish Police Federation argued that the Scotland Act 1998 should be amended to remove the reservation of data protection, which would create the advantage of a single unified system operating in Scotland. Argyll and Bute Council also commented that it was unfortunate that Data Protection is a reserved matter. In their response the Educational Institute of Scotland raised specific concerns about the impact of the Data Protection Act 1998 on schools and other educational establishments.

5.3 The Scottish Funding Councils for Further and Higher Education and the Common Services Agency raised what they saw as a problem in the inadvertent release of sensitive personal information under FOI access arrangements. Professor Colin Reid commented that the consultation document did not say what remedy would be available to individuals whose personal information was wrongly disclosed under the FOI regime. The Commission for Racial Equality stated that there is a cross cutting issue between FOI and Data Protection legislation regarding racist incidents, and that protocols should be established to enable statutory agencies to share information pertinent to the perpetrators of such incidents.

REVIEWS AND APPEALS (CHAPTER 6)

Proposals: *Independent review and appeals mechanism; independent Scottish Information Commissioner; Commissioner to have powers to order the disclosure of information, adjust charges, resolve disputes by mediation and have a right of access to documents; for certain categories of information, the final say on disclosure to rest on a collective decision of the Scottish Ministers; independence of Lord Advocate, as head of systems of criminal prosecution and investigation of deaths in Scotland, preserved; two stage appeals system; Commissioner's decision final, subject only to judicial review; consider case for providing right of appeal to an Information Tribunal.*

independent Scottish Information Commissioner

6.1 There was a broad welcome from respondents for the proposals to establish an independent Scottish Information Commissioner. The Consumers' Association commented that "there is a clear need for an independent authority to balance competing interests and enforce disclosure". The Scottish Police Federation however raised concerns about the Commissioner being given the role of promoting freedom of information as this would in their view conflict with the quasi-judicial role also envisaged for the Commissioner. In their response the Greater Glasgow Primary Care Health Trust said there should be a provision to allow a public authority to have a right of appeal (or seek a ruling from) the Commissioner where it is considered that a request would require a public authority to use an unreasonable amount of resources. Another respondent argued that the Commissioner should have powers to levy fines for public authorities that had failed to meet their obligations under the FOI regime. The Scottish Committee of the Council on Tribunals believes that the Committee should have supervision over the non-executive functions of the Scottish Information Commissioner (similar to that provided in the UK FOI Bill in relation to the UK Information Commissioner). In the Committee's view this would enhance the credibility of the appeals system and be especially relevant if an Information Tribunal is not introduced. The manner of the appointment of the Scottish Information Commissioner was considered important by a number of respondents. The Scottish Children's Reporter Administration, whilst seeing no alternative to the appointment of a Scottish Information Commissioner, urged that efforts be made to limit the ensuing bureaucracy and cost of introducing and maintaining such a framework.

the final say on disclosure to rest on a collective decision of the Scottish Ministers

6.2 The Scottish Committee of the Council on Tribunals found it surprising that the inclusion of a reserve power by Ministers could be promoted without any form of review procedure. One of the key concerns of Friends of the Earth Scotland is that there should be a very tight definition of the circumstances in which Scottish Ministers will be able to over-rule the Information Commissioner. The Campaign for Freedom of Information stated that they "regard the proposed veto as wrong in principle and potentially open to misuse". They therefore consider that the veto should be removed altogether but that if it remains it should be removed from as many exemptions as possible and limited to cases where complying with the Commissioner's ruling would cause serious harm. The Society of Scottish Media Lawyers commented that the Australian experience is that the constraints of the FOI legislation and political embarrassment do not reduce the use of this device. The Scottish Newspapers Publishers Association and the Scottish Daily Newspaper Society expressed deep

concerns about this proposal commenting that the public will not be readily persuaded that a body acting as a judge and jury in matters of self interest could be wholly objective in its decision making. A number of other respondents, including the Scottish Human Rights Centre, Charter88 and the National Union of Journalists, also raised strong concerns about the proposal for Ministerial certificates. On the other hand, East Ayrshire Council, North Lanarkshire Council and the Society of Local Authority Lawyers and Administrators in Scotland argued that all public authorities should be entitled to ask for a Ministerial exemption certificate.

independence of Lord Advocate

6.3 The Scottish Media Lawyers' Society commented on the proposals at paragraphs 6.8 and 6.9 of the consultation document on the role of the Lord Advocate, stating "he is free to decline to prosecute on the basis of his assessment of the public interest. It does not seem to follow that he is entitled to refuse to give information on the same basis. The greater the discretion afforded to him in his professional role, the more need is there for him to answer questions about the exercise of that discretion and its logical and evidential bases". Other respondents also questioned the proposal that decisions of the Lord Advocate would not be subject to review by the Scottish Information Commissioner.

two stage appeals system/right of appeal to an Information Tribunal

6.4 The two-stage appeal system was welcomed. Renfrewshire Council asked for consideration to be given to the establishment of a third party appeal system. British Telecom and CBI Scotland also supported a third party appeal system, and argued that third parties should have a statutory right to be notified of a disclosure and to prevent a damaging disclosure together with compensation. Argyll and Bute Council put forward the suggestion that internal appeals by local authorities might involve elected members. East Ayrshire Council thought that where third party rights may have been breached (for example in relation to Data Protection issues) consideration will have to be given as to what, if any, rights these third parties are to have in terms of the appeals procedure.

6.5 Of twenty-four respondents who commented on whether there should be a right of appeal of a decision by the Commissioner to an Information Tribunal, fourteen were not in favour. The remainder argued the case for the establishment of such a body. In his response Professor Thomas Riley outlined two reasons why he was not in favour of an Information Tribunal. Firstly in his view, and in the experience of other jurisdictions, the Tribunal would mostly be used by public authorities and would delay the appeal process. Secondly the existence of a Tribunal would undermine the authority and stature of the Information Commissioner and create a bureaucratic obstacle to open government. The Campaign for Freedom of Information suggested that the establishment of a tribunal "would create further delay, which will invariably be to [the] requester's detriment". On the other hand, the Scottish Committee of the Council on Tribunals "recommends that there should be a further right of appeal to an Information Tribunal. Without that mechanism the consideration of an appeal has been a wholly internal procedure within the Information Commissioner's organisation".

PUBLIC RECORDS (CHAPTER 7)

Proposals: *No proposals for changes to current public records system; retain existing 30 year rule; Scottish public authorities to be encouraged to operate efficient records management practices; possibility of national archives legislation to receive separate consideration.*

no proposals for changes to current public records system; retain existing 30 year rule; possibility of national archives legislation to receive separate consideration.

7.1 The National Archives of Scotland stated that in order to maintain the 30-year rule in Scotland it would be necessary to place it on a statutory basis. They commented that "this is one of the many overlaps between FOI and archive legislation and there need to be strong links and cross references between the two". It was noted that a presumption of openness may negate the need for a 30-year rule. COSLA commented that they were in support of the 30-year rule for government records being reduced to 10 years.

Scottish public authorities to be encouraged to operate efficient records management practices

7.2 A number of respondents commented that there was a need to ensure that records were properly managed. The National Archives of Scotland said that in their view proper records management by public authorities would be central to the operation of any FOI regime, in order that records and information could be easily retrieved. In the same vein, the Scottish Records Advisory Council suggested that "inefficiency in records management... will prove a major obstacle unless public bodies are placed under a clear obligation to maintain, organise and preserve their records". They also noted that there would be difficulty in meeting aspirations about record keeping given the "poor state of many public archives and record keeping arrangements in Scotland". East Renfrewshire Council suggested that many public authorities "may not be sufficiently advanced at this point to provide the basis for compliance".

7.3 Other issues raised by those who commented on public records included a need for guidance on retention and destruction, and clarification on the legal responsibilities of records managers, including the aspect of employee liability for misused information, or information which infringes the Data Protection Act, or which is inadvertently destroyed. Several respondents agreed that a code of practice on records management would be of benefit. Suggested additions to the legislation included empowerment of the Commissioner to approve disposal schedules and a clause, coming into force before other provisions, making it impossible to destroy records without a schedule.

CHANGING THE CULTURE (CHAPTER 8)

Proposals: *Commitment to culture of greater openness in public sector; build on existing openness regimes; programme of work to address training needs and other issues; Scottish Information Commissioner key to fostering greater openness.*

commitment to culture of greater openness in public sector

8.1 Those public authorities that commented on the proposals in this chapter of *An Open Scotland* expressed their support for the creation of a culture of greater openness in the public sector in Scotland. COSLA in particular welcomed the commitment to the production of detailed guidance, training and inter agency co-operation via a working group of Scottish Executive officials and representatives of Scottish public authorities. They hoped that local government would be represented on such a group through COSLA. The Disabled Persons Housing Service were disappointed that the chapter on "Changing the culture" did not propose the need for the introduction of an alternative information format production. The Justice and Home Affairs Committee of the Scottish Parliament believe that the commitment to fostering greater openness is vital and that it must be adequately resourced if the intentions behind the proposed legislation are to be realised. The Committee however had some concerns that this is an area where most difficulties will arise and would welcome clearer commitments as to how the existing "culture of secrecy" could be turned round into a "culture of openness".

programme of work to address training needs and other issues

8.2 Glasgow City Council believes that the commitment set out in *An Open Scotland* to provide detailed guidance, training and an inter-agency working group is paramount to ensuring a consistent approach across all public authorities. The Committee of Scottish Higher Education Principals welcomed the recognition of the need for co-ordinated advice and guidance and the proposed training and awareness programme. Edinburgh Telematics Partnership thought that a staged implementation appears to be a positive way forward and that best practice in the use of information communications technology for information access and retrieval should be investigated and adhered to where appropriate.

Scottish Information Commissioner key to fostering greater openness

8.3 Most respondents who commented on this aspect of the proposals agreed that the Scottish Information Commissioner would need to play an important part in fostering greater openness throughout the public sector. Mr David Leslie commented that it would not be necessary for the Scottish Executive to provide a dedicated centre of expertise given an early appointment of a Scottish Information Commissioner with expert supporting staff. Professor Thomas Riley thought it important that the FOI legislation should contain a mandatory duty on the Information Commissioner to undertake an educational programme to inform the Scottish public of their new rights.

MISCELLANEOUS

The following points made by respondents do not fit neatly into one of the main sections above.

9.1 Renfrewshire Council suggested that the volume of requests would need to be kept under review. They commented that "if the response is similar to that elicited as a result of publication by the UK Government of similar proposals... much greater interest than has hitherto been shown in material held by public bodies can be expected, particularly for commercial exploitation".

9.2 They also thought that consideration should be given to copyright and other intellectual property rights issues.

9.3 The Scottish Parliamentary Commissioner for Administration commented that he would wish to see a provision made enabling an exchange of information between the Scottish Information Commissioner and the other public sector ombudsmen. He suggested that this could be done by either adding the Scottish Information Commissioner to an existing provision in the Scotland Act 1998 (Transitory and Transitional Provisions) (Complaints of Maladministration) Order 1999, SI 1999/1351 or alternatively by making a new provision in the freedom of information legislation.

9.4 Friends of the Earth Scotland suggested that the system should be extended to cover "emanations of the state". They also thought that there should be a strategy to ensure that members of the public understand their rights under the UK and Scottish FOI regimes. The Campaign for Freedom of Information suggested that there should be a statutory duty to assist applicants.

9.5 Ms Gabrielle McKenzie thought that the Executive should be aiming to produce freedom of information legislation which is as good as, if not better than, the system currently operating in the United States. Mr David Muxworthy also commented that information in some UK government documents which is restricted in the UK under the 30-year rule can be obtained from the United States after two years.

9.6 Several respondents commented that each public authority should designate a dedicated freedom of information officer.

9.7 The Educational Institute of Scotland suggested that there should be an independent review of the operation of the FOI regime and that such a review should be carried out within five years of its inception.

9.8 A few respondents argued that the system should be introduced on a single date rather than over a period of time.

9.9 The Civil Engineering Contractors Association (Scotland) asked for full transparency in the tendering arrangements when public authorities act as the client in construction contracts.

9.10 Holyrood Strategy asked for the public and diary engagements of Scottish Ministers to be published each week listing in advance the schedule of forthcoming meetings.

NEXT STEPS

10.1 The responses to *An Open Scotland* will be fully analysed and considered by the Scottish Executive during its preparation of a draft Bill on Freedom of Information. The draft Bill will be subject to full consultation before it is introduced to the Scottish Parliament.

10.2 Copies of this paper can be obtained from The Scottish Executive Freedom of Information Unit. The paper is also available on the Scottish Executive website at:

<http://www.scotland.gov.uk/publications/>

The Scottish Executive Freedom of Information Unit can be contacted at:

Freedom of Information Unit
Scottish Executive
Room 045
St Andrew's House
Regent Road
EDINBURGH
EH1 3DG

Telephone 0131-244 4615
or 0131-244 4613
Fax 0131-244 0370
E-mail foi@scotland.gov.uk

10.3 Copies of the full responses (other than those where confidentiality was requested) are available for consultation at:

Scottish Executive Library
Saughton House
Broomhouse Drive
EDINBURGH
EH11 3XD

Telephone 0131-244 4564

RESPONDENTS TO AN OPEN SCOTLAND

Response
Aberdeen City Council
Aberdeenshire Council Housing and Social Work Service
Age Concern Scotland
Amnesty International
Angus Council
Argyll and Bute Council
Argyll and Clyde Local Health Council
Association of Chief Police Officers in Scotland
British Computer Society (Edinburgh Branch)
BT
Business Archives Council of Scotland
Campaign for Freedom of Information
Charter88 Tayside and Fife Group
City of Edinburgh Council
Civil Engineering Contractors Association (Scotland)
Cllr Dr Jenny Dawe
Comhairle Nan Eilean Siar
Commission for Racial Equality
Committee of Scottish Higher Education Principals
Common Services Agency
Confederation of British Industry Scotland
Confederation of Passenger Transport UK
Consumers' Association
Convention of Scottish Local Authorities (COSLA)
Data Protection Commissioner
Disabled Persons Housing Service
Dunadd Community Council
East Ayrshire Council
East Renfrewshire Council
Edinburgh Telematics Partnership
Educational Institute of Scotland
Falkirk Council
Friends of the Earth Scotland
General Assembly of the Church of Scotland
Glasgow City Council
Greater Glasgow Health Board
Greater Glasgow Primary Care NHS Trust
Heritage Lottery Fund

Highland Council
Holyrood Strategy (Scotland) Ltd
John and Pamela Scott
Joint Nature Conservation Committee
Justice and Home Affairs Committee, Scottish Parliament
Lanarkshire Health Board
Law Society of Scotland
Mental Welfare Commission for Scotland
Midlothian Council
Moray Council
Mr Almuth Ernsting
Mr Angus Langlands
Mr B Muir
Mr David Leslie
Mr David Muxworthy
Mr Dougal Carnegie
Mr Ian Mitchell
Mr M Hatch
Mr P Hind
Mrs E Beevers
Ms Alice Lambert
Ms Gabrielle McKenzie
National Archives of Scotland
National Trust for Scotland
National Union of Journalists
North Ayrshire Council
North Lanarkshire Council
North of Scotland Water Authority
Orkney Islands Council
Parole Board for Scotland
Professor Charles Raab
Professor Colin T Reid
Professor Thomas B Riley
Renfrewshire Council
Renfrewshire Justices of the Peace Advisory Committee
Royal Botanic Garden Edinburgh
Royal Commission on Historical Manuscripts
Royal Institution of Chartered Surveyors in Scotland
Royal Society for the Protection of Birds
Royal Town Planning Institute in Scotland
Safeguarding Communities Reducing Offending (SACRO)
Salsburgh Community Council
School Library Association in Scotland
Scottish Association of Health Councils

Scottish Borders Council
Scottish Children's Reporter Association
Scottish Committee of the Council on Tribunals
Scottish Consumer Council
Scottish Council for Research in Education
Scottish Criminal Cases Review Commission
Scottish Daily Newspaper Society
Scottish Engineering
Scottish Environment Protection Agency
Scottish Funding Councils for Further & Higher Education
Scottish Hospital Endowments Research Trust
Scottish Human Rights Centre
Scottish Legal Aid Board
Scottish Library and Information Council and Scottish Library Association
Scottish Media Lawyers' Society
Scottish Natural Heritage
Scottish Newspaper Publishers Association
Scottish Parliamentary Commissioner for Administration
Scottish Police Federation
Scottish Qualifications Authority
Scottish Records Advisory Council
Scottish Records Association
Scottish Screen
Society of Archivists
Society of Local Authority Lawyers & Administrators in Scotland
South Glasgow University Hospitals NHS Trust
South Lanarkshire Council
Stirling Media Research Institute
Tayside Health Board
Tayside University Hospitals NHS Trust
Unison Scotland
Victim Support Scotland
West Dunbartonshire Council
West Lothian Council
Woodland Trust