

# FREEDOM OF INFORMATION

## Consultation on Draft Legislation

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## **Foreword by the Deputy First Minister and Minister for Justice**

In An Open Scotland, the Scottish Executive set out its proposals for a statutory freedom of information regime for Scotland. That consultation document was the first step towards meeting the commitment in Partnership for Scotland and the Executive's Programme for Government to introduce an effective freedom of information regime, and I was pleased that our proposals received a broad welcome. The issues raised in the responses have been considered carefully in developing and refining our proposals, and in preparing a draft Bill.

We are now at the next stage in bringing forward a distinctive and effective Scottish statutory freedom of information regime. Our intention is that a Bill will be introduced to the Parliament later this year. This document includes a draft Bill as the basis for further consultation and pre-legislative scrutiny. At the heart of our proposals is a new legal right of access to information held by a wide range of Scottish public bodies, underpinned by a powerful, independent Scottish Information Commissioner. There is of course a need to balance such a right of access with provisions protecting sensitive information, but I believe the draft Bill strikes an appropriate balance in favour of openness.

I look forward to receiving comments on the draft Bill.

A handwritten signature in black ink that reads "Jim Wallace". The signature is written in a cursive style and is positioned above a horizontal line.

**Jim Wallace** QC MSP

## **INTRODUCTION**

1. This document invites views on the Scottish Executive's draft Freedom of Information Bill, which is being published for consultation prior to a Bill being introduced to the Parliament.

2. The Scottish Executive is committed to the introduction of an effective statutory freedom of information regime, and this consultation on a draft Bill follows the publication in November 1999 of *An Open Scotland*, the Executive's consultation document on freedom of information. The proposals set out in *An Open Scotland* included the following:

- A statutory right of access to information held by a wide range of Scottish public authorities
- A harm test of 'substantial prejudice' to be applied before withholding information
- A requirement to consider the public interest in disclosure
- An independent Scottish Information Commissioner, with strong powers to promote and enforce the legislation

The Executive's draft Bill includes all of these features. Annex A provides a comparison between the main proposals contained in *An Open Scotland* (as summarised in Chapter 9) and what is in the draft Bill.

3. *An Open Scotland* was distributed widely and a total of 119 responses to the consultation were received, for which the Executive is grateful. A summary of these responses was published by the Executive on 25 May 2000. There was a broad welcome for the Executive's proposals, although a number of issues and many points of detail were raised. In refining and developing its policy on freedom of information, the Executive has considered all the responses to the consultation. Freedom of Information is not a simple area of public policy, involving as it does the need to

balance the citizen's right of access to information held by public bodies and the proper protection of information which it is not in the public interest to disclose. The Executive considers that the draft Bill strikes the right balance.

#### **NEXT STEPS**

4. The Executive would welcome comments on the draft legislation. They should be sent by 25 May 2001 to:

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5. This document is also available on the Scottish Executive website at <http://www.scotland.gov.uk>

6. All comments on the draft legislation will be considered carefully and will assist the Scottish Executive in preparing the Bill for introduction to the Scottish Parliament.

7. Copies of responses received will, as is normal practice, be made available to others, on request, unless respondents indicate that all or part of their response is confidential. In the latter case, the confidentiality of the response will be strictly respected.

## **COMMENTARY ON DRAFT BILL**

### **Summary**

8. The Scottish Executive's Freedom of Information Bill would, if enacted, create a statutory right of access to information held by Scottish public authorities. The institutional scope would cover a wide range of such authorities, including the Parliament, the Executive and its agencies, local authorities, the National Health Service in Scotland, educational institutions, the police and a number of other public authorities and offices. The Bill would, as is common in statutory freedom of information regimes, set out a number of exemptions from the duty to disclose information and, in so doing, strike a balance between providing a right of access to information and protection of information which should properly remain confidential.

9. The Bill's provisions establish arrangements for enforcement and appeal. Regulation would be by an independent Scottish Information Commissioner, who would be appointed by Her Majesty on the nomination of the Scottish Parliament. The Scottish Information Commissioner would have wide powers (including powers to order the disclosure of information) and would be responsible for promoting and enforcing the legislation. The statutory right of access, and the Commissioner's regulatory powers, would extend to information contained in historical public records, such as those held by the National Archives of Scotland.

10. Every public authority covered by the Bill would be required to specify categories of information which the authority intends to publish. Public authorities would be required to adopt and maintain schemes for the publication of information, and to review these schemes periodically. Such publication schemes would require the approval of the Commissioner.

11. The following sections of this consultation document provide a commentary on the main provisions of the draft Bill.

## **Part 1 of the Bill - Access to Information Held by Scottish Public Authorities**

12. As proposed in *An Open Scotland*, the Bill would provide a general right of access to information held in recorded form by Scottish public authorities. This right would cover all information, whether held in documents or in some other manner, and public authorities would be required to supply the information in the form requested by the applicant where it was reasonably practicable to do so. The right of access would be open to individuals, companies or any other body, whether from within or outside Scotland. A public authority would be required to provide, or refuse, the requested information promptly and in any event within 20 working days of the date the request was received (or the date of the receipt of additional information necessary to assist in identifying and locating the requested information). The legislation would be fully retrospective, with the access rights covering information of any age held by Scottish public authorities.

### **Handling of requests**

13. Requests for information would require to be made in writing (electronic means would be acceptable), to include the name and address of the applicant together with a description of the information requested. Public authorities would be entitled to ask for further information from the applicant to help to identify and locate the information. If an applicant's description of the requested information was not sufficiently clear to enable the public authority to identify and locate it, or if the applicant had requested the information in a form which might incur significant charges or be difficult for the public authority to supply, there would be a **duty** on the public authority to assist the applicant in clarifying his or her request.

14. The draft Bill sets out the means by which an applicant could ask for the information to be provided, and public authorities would, where it was reasonably practicable to do so, be required to comply with the applicant's stated preference. Where the public authority considered that it could not provide the information by the preferred means it would need to advise the applicant of its reasons. A public authority could charge for information (see the later section on fees) but, where it intended to do so, would need to issue a fees notice to the applicant. Where the

public authority issued a fees notice it would still be obliged to comply with the request within 20 working days, but the time that elapsed between issuing a fees notice and receiving the fee would be disregarded.

### **Refusal of Requests**

15. The obligation on a public authority to comply with a request would not arise in the following circumstances:

- if the request was vexatious;
- if there were a repeated request from the same applicant (unless there had been a reasonable period of time between the requests);
- if any further information required by the public authority (provided it was a reasonable requirement) to enable it to locate the information requested had not been received;
- if the applicant had not paid a fee as requested; or
- if the public authority estimated that the cost of complying with the request would exceed the amount prescribed in regulations.

16. If a public authority were to claim that the information requested was exempt from disclosure as a consequence of the provisions of Part 2 of the Bill (see paragraphs 30 - 61), then it would, within 20 working days of receipt of the application, have to issue a notice in writing (called a refusal notice) to the applicant. The refusal notice would disclose that the information is held (except in certain circumstances), specify the exemption in question and state why it applied. Where the public authority was required to consider the public interest in disclosure, the notice would also state the authority's reason for deciding that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

17. If the public authority did not hold the information requested then it would have to inform the applicant in writing (and within 20 working days of receipt of the application) of that fact (section 17). A public authority could issue a refusal notice stating that information is exempt (by virtue of any of the exemptions detailed in sections 27, 28, 30, 31, 33, 34, 38(1) or 40) without revealing whether the information exists or is held by it.

### **Internal Reviews**

18. Section 19 of the draft Bill provides to all applicants the right to require a public authority to review its actions and decisions in relation to their request. These internal review procedures will provide an opportunity for the public authority to consider any new arguments put forward by the applicant (though there is no obligation on an applicant to submit such arguments). It will also give the authority an opportunity to monitor the quality of its initial decisions and to identify and correct problems or inconsistencies in its decision making processes. As the internal review procedures set out in the draft Bill will apply to the full range of authorities, large and small, to be covered by the legislation, the draft Bill sets out only the key principles with which all internal review procedures must comply. Detailed matters will be set out in a Code of Practice (see paragraph 79). The key principles will be that:

- A request for an internal review should be made in writing within 20 working days of the end of the period within which the public authority was required to respond to the initial request for information (see paragraph 17). In instances where the public authority was late in responding to the request for information the applicant would have 20 working days from the date they received the response to submit a request for a review. A public authority may, if it considers it appropriate, accept a request for review made outwith these time periods.
- The public authority must give its decision following such a review within 20 working days of the request for the review;
- A request for review may be withdrawn at any time by the applicant; and

- The public authority need not proceed to a decision if it considers the request for review vexatious (after providing a written notice to the applicant to this effect).

### **Records transferred to the Keeper of the Records of Scotland**

19. Section 21 of the draft Bill sets out special provisions relating to records transferred to the Keeper of the Records of Scotland which have not been designated as being open for public access. The intention is to allow the authorities who have transferred records to the Keeper (rather than the Keeper) to make the decision on whether a requested record is subject to an exemption and, if it is, whether there is a public interest in its disclosure.

### **Duty to Publish Information**

20. In *An Open Scotland* the Executive said that it was important that there should be a duty on public authorities to publish, as a matter of course, information which would assist better understanding of the public authority's actions. The draft Bill (section 22) therefore requires public authorities to specify categories of information which the authority intends to publish. Public authorities would be required to adopt and maintain a publication scheme and to review the scheme periodically. The form which a publication scheme takes will depend upon the nature of the work undertaken by the public authority. The scheme may be of a general nature, or be more specific and identify particular items of information which the public authority will publish within a set time-scale. The following information however **must** be specified in all publication schemes:

- classes of information which the public authority publishes or intends to publish;
- how the information of each class is, or is intended, to be published; and
- whether the published information will be available to the public free of charge or subject to a payment.

In adopting or reviewing its publication scheme, the public authority will also have to take into account the public interest in the publication of reasons for decisions made by it, and in allowing access to information held by it, in particular that which:

- relates to the services provided by the authority, their costs and the standards achieved by the authority in providing them; and
- consists of facts and analyses on which decisions have been made by the authority.

21. There would be a requirement for such schemes to be approved by the Scottish Information Commissioner, and the Commissioner would be able later to revoke any approval. The Scottish Information Commissioner could also draw up model publication schemes appropriate to groups of public authorities, or approve such schemes prepared by others (section 23).

### **Institutional Coverage**

22. The Bill will have wide application across the Scottish public sector. The institutional coverage is defined in section 3 of the draft Bill as being: a public authority listed in Schedule 1; a body designated by order under section 5; or a wholly publicly-owned company defined by section 6. Schedule 1, which is an area of further work, identifies those authorities or groups of authorities which would be covered. The Bill would not cover the Courts or judicial bodies (including tribunals), but information about the administrative functions of these bodies will be available from other public authorities such as the Scottish Court Service. In *An Open Scotland* (paragraph 2.6) the Executive said that it would consider with the Scottish Parliament authorities whether the Parliament and the Parliamentary corporation would be included in the scope of the legislation. As a result of these discussions the Parliament and the Parliamentary corporation are included in Schedule 1.

23. The proposed order-making power in section 5 would enable the Scottish Ministers to specify, as a public authority for the purposes of the Bill, any person who satisfies certain conditions and who appears to the Scottish Ministers to exercise functions of a public nature or is providing under a contract with a public authority any

service whose provision is a function of that authority. There would also be an order-making power, exercisable by the Scottish Ministers, to add to or amend Schedule 1. Such orders would be made where a new public authority was created or an existing body wound up. Section 7 would enable the Scottish Ministers to make an order limiting the information relating to a Scottish public authority which would be caught by the provisions of the Bill.

## **Fees**

24. There will be a cost to public authorities in meeting their obligations under a statutory freedom of information regime. While it is not the intention that fees for supplying information under the Act should provide for full cost recovery, it is proposed nevertheless that a charging scheme be put in place. Three proposals for a charging regime were set out in *An Open Scotland* (paragraphs 3.10 – 3.16). The responses to *An Open Scotland* confirmed the Executive's view that balancing the competing interests of the applicant and the public authority, and accommodating small and large requests fairly, will not be easy.

25. The Executive's intention is that regulations, to be made under the provisions in the Act, will set out a fees structure based on the second proposal in *An Open Scotland* (paragraph 3.13). No charge could be levied for information costing less than £100 to provide, but public authorities would have discretion to charge the full marginal costs of providing information costing between £100 and a maximum level set out in regulations. Public authorities would not be obliged to disclose information which would cost more than a maximum level (likely to be in the order of £500 to £550) to provide, but would be given discretion to do so, and to charge accordingly. When supplying information generally, public authorities would also have discretion whether to charge the full amount of any fees provided for in the regulations.

26. The applicant would be informed by way of a fees notice of the fee to be paid. The fee would be due to be paid within 3 months of the date of the notice and the public authority would not be required to provide the information until the fee was paid. The regulations would provide that the public authority could levy charges for the costs of locating and disclosing the information, as well as for incidental costs

(disbursements) such as copying, postage etc. The public authority would not be able to charge for the costs involved in considering any application or, subsequently, conducting an internal review of its decision. An applicant would be able to require the public authority to review its proposed fees and, if still dissatisfied, to appeal to the Scottish Information Commissioner.

## **Costs**

27. In *An Open Scotland* the total cost to Scottish public authorities arising from freedom of information was estimated to be between £9 million and £12.5 million per annum. This range was based on estimates made by the United Kingdom Government in relation to the costs to public funds of the UK freedom of information legislation. The Executive has since looked at the experience of other countries with statutory freedom of information regimes, in particular the Republic of Ireland, and, whilst there is a degree of similarity between these various regimes, has found that each is sufficiently distinctive to make detailed comparison less than straightforward.

28. In Ireland, 11,531 requests were received during the first full year (1999) of the operation of its Freedom of Information Act. However, that Act generated a large number of requests for personal information – which here would fall under the Data Protection Act 1998 – and the scope of the Act includes a number of bodies for which their equivalents here would come under the UK freedom of information legislation. Nonetheless, based on the experience in Ireland, we estimate that between 7,500 and 10,000 requests might be received annually under the Scottish freedom of information legislation. If the average cost of dealing with these applications was assumed to be between £100 and £300 (including the costs of considering a request in addition to supplying the information) the estimated gross cost to the public purse would be in the region of £2.5 million to £4.8 million. This would include those costs relating to the Scottish Information Commissioner, internal reviews, training, duty to publish information etc.

29. It is not a straightforward matter to make such an estimate, and it may be that the total costs are higher during the early years of the statutory regime when public authorities will be becoming familiar with the new legislation. There would, of course,

be some off-setting income arising from charges made for the supply of information, but it is impossible to make a robust estimate for this element. We do not however expect this income to be significant (as locating and providing information should not prove to be a significant part of the overall cost of dealing with each request). It is also worth noting that many Scottish public authorities already handle requests for information, whether or not under a formal regime, and will have existing structures in place able to support the provision of information under the freedom of information legislation.

## **Part 2 of the Bill - Exempt Information**

### **General**

30. *An Open Scotland* made clear that the public's right to have access to information needs to be carefully balanced against the right to privacy and confidentiality and the need to ensure that sensitive information is afforded appropriate protection, so as not to undermine the effective operation of public services. Balance is at the heart of all freedom of information regimes, where certain categories of information are exempt from the general right of access to information. The following paragraphs set out the approach in the draft Bill to exemptions, and to the tests for disclosure which apply to these.

31. *An Open Scotland* drew on the non-statutory *Code of Practice on Access to Scottish Executive Information* for the majority of the proposed 15 exemption categories, but emphasised that this was a starting point and that further work was needed. The draft Bill has a total of 17 exemption categories, though a number of these might best be described as 'technical' exemptions since they relate to information accessible under other legislation (such as personal information available under the Data Protection Act 1998), to information already, or shortly to be, in the public domain, or to information covered by existing statutory bars on disclosure or which would attract a claim of confidentiality of communications in legal proceedings. The exemptions in the draft Bill have been developed from those in *An Open Scotland*, and it has been necessary to extend these in a few areas to cater for categories of information not covered by the *Code of Practice* (such as Court records), to take

account of the very much wider coverage of the legislation, and to deal with aspects of the Scottish legal system (such as Fatal Accident Inquiries). Moreover, some of the exemption categories in *An Open Scotland* have been set out as separate exemptions to allow the provisions of the Bill to operate more flexibly.

### **The “harm test”**

32. *An Open Scotland* set out the Executive’s approach to the **harm test** and said that information should be disclosed unless disclosure would, or would be likely to, prejudice substantially the matter set out in the exemption in question. The draft Bill retains the harm test of ‘**substantial prejudice**’.

### **The “public interest test”**

33. In statutory freedom of information regimes it is common to include a requirement that the **public interest** in disclosure be considered. (The Executive’s approach to this was discussed in *An Open Scotland* at paragraphs 4.6 – 4.7). The Bill would, in most cases, require public authorities to consider the public interest before deciding whether or not to disclose information which may be covered by an **exemption** (section 2(1)(b)). Information could be withheld from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The public authority would be required to state in a notice to the applicant its reasons for refusing on this basis to disclose information.

### **“Content” Exemptions**

34. Information covered by a **content-based exemption** would be required to be disclosed unless the public authority considered that disclosure would cause **substantial prejudice** to the protected interest, in other words unless the harm test was satisfied. The way in which the harm test is to be applied can be seen in the wording of the relevant exemptions. For all of the proposed content-based exemptions in the Bill, the public authority would be required to consider whether the

**public interest** in maintaining the exemption outweighed the public interest in disclosing the information.

### **“Class” Exemptions**

35. *An Open Scotland* (paragraph 4.2) said that certain categories of information would be covered by **class-based exemptions**, where the general presumption would be that the information would not ordinarily be released. Information would be covered by a class-based exemption if disclosure would normally result in substantial prejudice to the interest in question; in other words the ‘harm test’ would be deemed to have been satisfied. For the majority of the proposed class exemptions in the Bill, the public authority would however be required to consider whether the **public interest** in refusing to disclose the information covered by the exemption outweighed the public interest in disclosing the information.

### **Absolute Exemptions**

36. There is a small number of class exemptions to which the public interest test would not be applied and these are called **absolute exemptions**. These are where disclosure in the public interest would be neither appropriate nor sensible. Examples are information prohibited by another law from being disclosed, and information otherwise accessible to the public. Section 2(2) of the draft Bill sets out the provisions which are to be regarded as conferring absolute exemption.

### **Description of exemptions**

37. The following paragraphs provide a brief description of each of the exemptions contained in the draft Bill. Annex B lists the exemptions and indicates for each if it is content- or class-based, if it is an absolute exemption, and when, in terms of the historical records provisions, each exemption would cease to need to be considered.

### **Information otherwise accessible (section 24)**

38. This exemption is for information which is reasonably obtainable (other than by requesting it under the Act), even if payment is required for accessing it, or it is made available in accordance with a public authority's publication scheme. This is a class-based and an absolute exemption. The effect of this exemption is to remove from the ambit of the freedom of information legislation information which is otherwise accessible to the applicant.

### **Prohibitions on disclosure (section 25)**

39. This exemption covers information the disclosure of which is prohibited by statute, or is incompatible with any Community obligation, or would constitute, or be punishable as, a contempt of court. A public authority refusing to disclose information under the terms of this exemption would be expected to state what enactment, or regulation (etc.) prevented disclosure. This is a class-based and an absolute exemption.

### **Information intended for future publication (section 26)**

40. This exempts information which is due, and planned at the time of the request, to be published by a public authority or any other person within 12 weeks of the request, provided that it is reasonable in the circumstances that the information should not be disclosed until the planned publication date. This is a class-based exemption. The proposed time limit of 12 weeks is included in this exemption to ensure that a public authority could not delay indefinitely the provision of requested information on the grounds that it was to be published at some undefined point in the future.

### **Relations within the United Kingdom (section 27)**

41. This exemption is for information the disclosure of which would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom (defined as the UK Government and the devolved administrations). This is a content-based exemption.

### **Formulation of Scottish Administration policy etc. (section 28)**

42. This exemption covers information held by the Scottish Administration which relates to the formulation of Scottish Administration policy, Ministerial communications, the provision or the request for provision of advice from Law Officers, or the operation of any Ministerial Private Office. The Scottish Administration must have regard to the public interest in the disclosure of factual information behind the taking of a decision. Also, once a policy decision has been taken, any statistical information used as background to that decision is not exempt in relation to the formulation or development of government policy or Ministerial communications. This is a class-based exemption.

### **Prejudice to effective conduct of public affairs (section 29)**

43. This exemption covers information the disclosure of which would, or would be likely to, prejudice substantially the maintenance of the convention of collective responsibility of the Scottish Ministers; inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation; or otherwise prejudice substantially the effective conduct of public affairs. This is a content-based exemption.

### **National Security and defence (section 30)**

44. This exemption relates to information the disclosure of which would prejudice substantially the public interest in safeguarding national security. It also relates to information the disclosure of which would prejudice substantially the defence of the British Islands or the capability of the armed forces. This is a content-based exemption.

### **International Relations (section 31)**

45. This exemption covers information the disclosure of which would prejudice substantially relations between the United Kingdom and other States, international organisations or international courts, or the interests of the United Kingdom abroad. This part of the exemption is content-based. The exemption also covers information

obtained in confidence from other States, international organisations or courts. This second part is class-based. The purpose of the exemption is to protect information whose disclosure would substantially prejudice the effectiveness of the conduct of international relations e.g. by impairing the confidentiality or candour of communications between the United Kingdom and other States or international bodies.

### **Commercial interests and the economy (section 32)**

46. Commercially sensitive information needs to be protected from disclosure where disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (which would include a body of persons, e.g. a company, and any Scottish public authority). There are two types of commercial information, namely information which has an intrinsic commercial value dependant upon the maintenance of its confidentiality, and information which might not have such a value but whose disclosure might unreasonably disadvantage the person to whom it relates in the conduct of their lawful business. This section exempts, as a class, information which would constitute a trade secret.

47. This section also covers information the disclosure of which would, or would be likely to, prejudice substantially the economic interests of the whole or part of the United Kingdom; or the financial interests of an administration (defined as the UK Government and the devolved administrations). The exemption would protect information whose disclosure would prejudice substantially the ability of the Government to manage the economy. This part of the exemption is content-based.

### **Investigations by Scottish public authorities and proceedings arising out of such investigations (section 33)**

48. This exemption covers a range of information associated with investigations carried out by Scottish public authorities. Specifically, it exempts information which, at any time, has been used for the purposes of an investigation or prosecution of an offence; or which was obtained from a confidential source for the purposes of criminal investigation or law enforcement; or which is obtained for the purposes of civil

proceedings arising out of relevant investigations. The exemption also covers information held by a public authority for the purposes of an inquiry held under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, although this part of the exemption ceases to apply after the conclusion of the proceedings. In addition, information obtained by a public authority for the purpose of an investigation to ascertain the cause of a death (which would include death reports submitted by the police or a fiscal and post mortem reports) are covered by the exemption. This is a class-based exemption.

#### **Law enforcement (section 34)**

49. Law enforcement matters are covered by a content-based exemption where disclosure would, or would be likely to, prejudice substantially such matters as: crime prevention or detection; the apprehension and prosecution of offenders; the administration of justice; the assessment or collection of tax; the operation of immigration controls; and the security of prisons. The exemption also covers information the disclosure of which would prejudice substantially civil proceedings in connection with matters such as: ascertaining whether persons have failed to comply with the law or are responsible for improper conduct; ascertaining the cause of an accident; or securing the health, safety and welfare of persons at work.

#### **Confidentiality (section 35)**

50. This exemption is in two parts. The first part deals with information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings (essentially the equivalent in Scotland of information for which 'legal professional privilege' may be claimed in England), and is a class-based exemption. The second part exempts information obtained by a Scottish public authority from another person if its disclosure by the authority would constitute an actionable breach of confidence. This second part is an absolute exemption.

### **Court records etc. (section 36)**

51. An exemption is provided for information which is contained in any document - lodged with, or placed in the custody of, a court for the purposes of proceedings; served on or by a Scottish public authority for the purposes of proceedings; or created by a court or its staff for the purposes of such proceedings; or which is contained in a document lodged with a person conducting an inquiry or an arbitration. This is a class-based and an absolute exemption.

### **Personal information (section 37)**

52. This exemption is in three parts and includes personal information falling under the Data Protection Act 1998, personal information contained in census records, and health records.

53. In *An Open Scotland* the Executive proposed that all personal information would be excluded from the Bill **except** personal information held manually and not accessible under the **Data Protection Act 1998**. It was stated that the intention was to provide the citizen with exactly the same rights of access to personal information as those proposed for the rest of the United Kingdom. That is still the intention. In order to achieve this it will be necessary to extend to information held by Scottish public authorities the effect of certain amendments to the Data Protection Act 1998 made by the Freedom of Information Act 2000. The present intention is that this would be done after the enactment of the Scottish Freedom of Information Bill.

54. The Executive's objectives regarding access to personal information will be:

- To include in the Bill a class-based (and absolute) exemption for any information which constitutes personal data relating to the person making the subject access request (as access to such information will be available under the Data Protection Act 1998); and

- To ensure that rights of subject access and provisions on data accuracy in the Data Protection Act 1998 are extended to **all** personal information held by Scottish public authorities, subject to certain exemptions and modifications.

55. There would be a right of access under the Bill to third-party personal information, i.e. information not relating to the person making the request. The information would however be exempt if its disclosure would contravene the Data Protection Act 1998 or if the person to whom it related would not have a right to know about it or a right of access to it under that Act.

56. At present all **census records** in Scotland held by General Registers of Scotland are “protected” under the terms of section 8(2) to (7) of the Census Act 1920 (as amended by section 1 of the Census (Confidentiality) Act 1991). Census records transferred from the Registrar General to the Keeper of the Records of Scotland are closed, by administrative means, for a period of 100 years. As the Bill would provide a general right of access to all information held by Scottish public authorities, including census records held by the Keeper of the Records of Scotland, it is necessary to exempt personal census information from that access right (section 37(1)(c)). This would underwrite the assurances of confidentiality that are given to those completing census returns. The exemption for personal census information is an absolute exemption, which ceases to apply after 100 years.

57. The third part of the exemption (section 37(1)(d)) exempts “**a health record**” (as defined in section 1(1) of the Access to Health Records Act 1990). Access rights to health records are available under the Data Protection Act 1998 (which provides for access by an individual to their own health records) and the Access to Health Records Act 1990 (which, in specified circumstances, provides access to the health records of deceased persons). This is an absolute exemption which ceases to apply 100 years after the death of the person to whom the records relate.

### **Health, safety and the environment (section 38)**

58. Section 38(1) exempts information which would, or would be likely to, endanger the physical or mental health or safety of an individual. This part of the exemption is content-based.

59. Section 38(2) exempts information if that information is required to be made available under regulations made under Section 61 of the Bill. This part is class-based. Paragraphs 81 – 82 below describe the proposed relationship between the Bill and the access regime for environmental information to be provided by the regulations.

### **Audit functions (section 39)**

60. The Bill would exempt information which would, or would be likely to, prejudice substantially the exercise of audit functions by any Scottish public authority or such functions relating to the examination of the economy, efficiency and effectiveness with which Scottish public authorities use their resources. This is a content-based exemption.

### **Communications with Her Majesty, etc. and honours (section 40)**

61. The Bill would exempt information which relates to communications with Her Majesty, other members of the Royal Family or the Royal Household; or relates to any honour. In respect of information relating to honours, the exemption will ensure that recommendations, opinions and assessments of individuals for the award of an honour can be made with frankness and candour (a necessary element of the effective operation of the honours system). This is a class-based exemption.

## **Parts 3 and 4 of the Bill - The Scottish Information Commissioner and Enforcement**

### **Appointment of the Commissioner**

62. The Bill would establish a Scottish Information Commissioner as an **independent** office holder (and not subject to the direction or control of the Scottish

Executive or of the Scottish Parliament) to **promote** and **enforce** the Scottish freedom of information legislation. The appointment arrangements for the Commissioner will be based on those established under the Scotland Act 1998 for the Auditor General for Scotland, where **the appointment is made by Her Majesty on the nomination of the Parliament**. We propose that the Commissioner's salary, allowances and other terms of conditions would be determined by the Scottish Parliamentary Corporate Body.

### **General functions of the Commissioner**

63. To promote the observance by Scottish public authorities of the Act and the Codes of Practice issued by the Scottish Ministers, the Commissioner would have a general duty to promote good practice by those authorities. If the Commissioner took the view that the practice of a Scottish public authority did not conform with a Code of Practice (for example, in relation to its procedures for dealing with requests for information) then he could recommend (by issuing a practice recommendation to the authority) the steps that should be taken to comply with the Code in question. The Commissioner will also make available to the public such information on the operation of the Act as he determines is expedient.

### **Reports**

64. The Commissioner would lay before the Scottish Parliament an annual report setting out how he or she has exercised the powers and functions of that office. The Act would also empower the Commissioner to lay reports on any other matters as he or she considered fit.

### **Appeals to the Commissioner**

65. The draft Bill (section 46) provides that any appeal must be made to the Commissioner in writing within six months of the date of the public authority's internal review decision (although this time-scale could be extended at the discretion of the Commissioner). There would be only 3 exceptional situations where appeals to the Commissioner would be excluded. These are as follows: where the original request was to the Commissioner and a decision following internal review had already been

made by the Commissioner; where the original request had been made to a Procurator Fiscal; and where the request had been made to the Lord Advocate and related to information held by him in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland.

66. The Commissioner would not need to consider an appeal in the following circumstances: if the appellant has not gone through the internal review procedures or has made a late request, if the application were considered by the Commissioner to be frivolous or vexatious; or if it had been withdrawn. If the Commissioner did consider that the request was frivolous or vexatious, then he or she would notify the applicant to this effect within one month of receipt of the appeal. Once the Commissioner considered that an appeal was valid, he or she would give the public authority notice and invite its comments. The draft Bill contains a provision (section 48(4)) allowing the Commissioner to endeavour to effect a settlement between the applicant and public authority so as to obviate the need for a substantive appeal decision to be issued. The Commissioner would be required (wherever possible) to make a substantive decision on an appeal by way of a Decision Notice to the appellant and the public authority within four months of receipt of the appeal. Where the Commissioner found in favour of the appellant, the Decision Notice would specify (a) the provisions with which the public authority had failed to comply, (b) the steps to be taken by the public authority and (c) the time-scale for taking the action required. Decision Notices would also contain details of the rights of appeal against the Commissioner's decision.

67. The draft Bill provides for the Commissioner to obtain from a public authority such information as he requires to allow him to process an appeal (section 49). The Commissioner would serve an Information Notice specifying the information required, and the form in which it was to be provided. It would also specify the time within which the information should be supplied by the public authority. The Commissioner would also be able to serve on a public authority an Information Notice to assist him or her in determining whether the authority was conforming with the Codes of Practice or any other provisions of the Act.

68. If the Commissioner considered that a public authority had failed to comply with a provision of Part I of the Act (including not following the internal review

procedures set out in that Part), he or she could serve an Enforcement Notice on the public authority. Such a Notice would require the public authority, within a specified time period, to take action to comply with the provisions of Part 1.

69. If a public authority failed to comply with an Information Notice, Enforcement Notice or Decision Notice, the Commissioner could certify such failure to the Court of Session. The Court could inquire into the matter and, after hearing witnesses or any statement made on behalf of the public authority, could deal with the authority as if it had committed a contempt of court. The draft Bill also provides powers of entry and inspection exercisable by the Scottish Information Commissioner or any member of the Commissioner's staff (Schedule 3). These powers would be available under a warrant issued by a Sheriff who was satisfied that the Commissioner had reasonable grounds for suspecting that a public authority:

- was not complying with the requirements in Part I of the Act or with a Decision, Information or Enforcement Notice; or
- was committing or had committed an offence by altering records so to prevent disclosure.

70. The Scottish Information Commissioner is included within the scope of the Bill (see Schedule 1). He or she would therefore be subject to the provisions relating to the general rights of access to information as set out in Part I of the Bill, including the requirement to review any decision (Section 19). It would however not be sensible for the Commissioner to have to consider any application for decision made under Part 4 of the Bill in instances where he or she would already have reviewed the original decision. Section 47(a) of the draft Bill therefore excludes applications for Section 48 decisions being made to the Commissioner where the original request for review was made to him or her.

### **Lord Advocate**

71. In paragraphs 6.8 - 6.9 of *An Open Scotland* the Executive said that it would be inappropriate for any decision taken by the Lord Advocate, in his capacity as head

of the systems of criminal prosecution and investigation of deaths in Scotland, to be subject to review by the Scottish Information Commissioner. One option put forward in *An Open Scotland* was to exclude from the functions of the Commissioner the power to review a decision taken by the Lord Advocate. Section 47(c) of the draft Bill excludes any application made to the Commissioner to review a decision by the Lord Advocate to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecutions and investigation of deaths in Scotland.

### **Ministerial Certificates**

72. In *An Open Scotland* (paragraph 6.6) the Executive proposed that for certain categories of information the final decision on the release of information could be the subject of a collective consideration of the Scottish Ministers. Such a provision is necessary to preserve a proper balance between the right of access to official information and the need for government to protect information of exceptional sensitivity. The Bill would therefore provide that after consulting the other Ministers of the Executive a certificate could be signed by the First Minister overriding a Decision Notice or an Enforcement Notice given to the Scottish Administration by the Scottish Information Commissioner (Section 51). In paragraph 6.7 of *An Open Scotland* the Executive said that the power to issue a Ministerial certificate should apply to information covered by a limited number of the class-based exemptions. The relevant exemptions in the draft Bill are at sections 28, 31(1)(b), 33, 35, and 40(b).

73. The Bill will require that a Ministerial certificate must be issued within 40 working days of the giving of the Scottish Information Commissioner's Decision Notice or Enforcement Notice, and that a copy must be laid before the Scottish Parliament. The appellant would be provided with reasons for the decision taken by the First Minister to issue a certificate in relation to a Decision Notice.

### **Further Appeals**

74. *An Open Scotland* (paragraph 6.16) said that the Executive would consider the case for providing a right of appeal to an Information Tribunal against a decision by the Scottish Information Commissioner. In the light of the responses to the

consultation paper, and in particular the widely held view that to include an Information Tribunal would add an unnecessary layer of bureaucracy and possibly undermine the Commissioner's powers, the Executive is inclined not to go down this route. Consequently, the draft Bill does not provide a further right of appeal to a tribunal, but, as is the case with other administrative decisions, it will be open to the applicant and the public authority to appeal to the courts on a point of law (Section 55).

### **Part 5 of the Bill - Historical Records**

75. The right of access under freedom of information will have implications for the public records system. The statutory right of access, the exemptions and other relevant provisions of the Bill, and the Scottish Information Commissioner's regulatory powers, will apply generally to information of any age held by Scottish public authorities (and will cover records held by the National Archives of Scotland).

76. The draft Bill (section 56) defines records that are over 30 years old as 'historical records'. Extending the right of access to records over 30 years old is not intended to undermine any existing procedures for placing the records of a public authority on open access before 30 years have elapsed. For records already on open access the right of access under freedom of information will not need to be exercised, whereas for records on restricted access any request for information under freedom of information will need to be considered under the terms of the Bill (including the exemptions). The right of access under the legislation would apply to information held from its creation and in perpetuity (or until a record was destroyed in accordance with established public records policy). Essentially the Bill would provide statutory underpinning to certain aspects of the public records system. If records to which certain exemptions applied were not made available on open access before a statutory specified point (e.g. 30 years) then they would have to be made open at that stage.

77. When considering requests under freedom of information for information held in an "historical record", Scottish public authorities would be required to consider the exemptions unless any had been disapplied. The draft Bill (section 57) specifies the points at which certain exemptions would cease to apply e.g. 30, 60 or 100 years, and

in so doing would establish a statutory basis (for the first time in Scotland) for certain 'rules' presently operated on an administrative basis. An example is the '30 year rule'. Where the draft Bill does not specify the point when an exemption is disapplied the exemption would remain to be considered in perpetuity. This does not mean that records will remain closed in perpetuity, rather that it is considered appropriate for consideration always to be given to exemptions for certain matters, such as personal information, when considering whether requested information should be disclosed.

78. Under section 58 of the draft Bill the Scottish Ministers may by Order vary the periods set out in sections 56 and 57. Such periods may not be amended to be longer than those originally specified in these sections.

### **Part 6 of the Bill - Codes of Practice**

79. There are two Codes of Practice which the draft Bill requires the Scottish Ministers to issue, both of which would be laid before the Scottish Parliament. Firstly, Section 59 of the Bill would provide for the Scottish Ministers, after consultation with the Scottish Information Commissioner, to issue a Code of Practice which would provide guidance on how public authorities should discharge their duties in complying with the Bill. The Code would cover matters such as the provision of advice and assistance to applicants, transferring requests to another public authority, consultations with third parties (people other than the applicant who may be affected by the release of information), the procedures for dealing with complaints against refusal to disclose information, and the inclusion in contracts entered into by public authorities of terms relating to the disclosure of information.

80. Secondly, Section 60 provides for the issue by the Scottish Ministers, after consultation with the Commissioner and the Keeper of the Records of Scotland, of a Code of Practice which would provide Scottish public authorities with guidance on the keeping, management and destruction of their records. This Code may also include guidance on the transfer of records to the Keeper of the Records of Scotland and may be tailored so as to meet the requirements of different public authorities.

## **Part 7 of the Bill - Miscellaneous and Supplemental**

### **Environmental Information**

81. As indicated in paragraph 59 above, there would be a class-based exemption for environmental information which would be obtainable under the access rights to be afforded under regulations made by the Scottish Ministers. The regulations made under section 61 will implement the Aarhus Convention - a United Nations Economic Commission for Europe (UNECE) measure which was signed on behalf of the United Kingdom (and almost all other European countries) on 25 June 1998. The Convention deals with access to information, public participation and decision-making, and access to justice on environmental matters. Having signed the Convention, the United Kingdom Government wishes to ratify the Convention as soon as possible. As the Convention goes further than the existing Environmental Information Regulations (EIRs) in some areas, and these are not sufficient to enable the United Kingdom to ratify the Convention, new regulations must be made. These regulations will implement only those provisions of the Aarhus Convention that relate to access to environmental information. This will allow the creation of a free-standing access regime for environmental information, replacing the current EIRs which will be revoked. Such regulations would provide for a new access regime, as well as the Independent Supervisory Authority (ISA) - a requirement of the Aarhus Convention - who would be the Scottish Information Commissioner.

82. Access to environmental information held by Scottish public authorities will be available first under the regulations rather than under the Scottish Freedom of Information Act. However, the freedom of information regime would continue to have effect, by placing a duty on public authorities to consider the release of information, which might be exempt under the EIRs, where it is in the public interest so to do.

### **Power to amend or repeal statutory bars**

83. As described at paragraph 39 above, there will be an exemption for information whose disclosure is prohibited by or under an enactment. Under section

62 of the Bill the Scottish Ministers would be able by Order to repeal or amend such an enactment, so far as it relates to a Scottish public authority, if they decided that it was unduly or unnecessarily prohibitive with regard to the disclosure of information.

## **Commencement**

84. The draft Bill specifies that all provisions of the legislation (apart from sections 68, 71 and 72 which would come into force on Royal Assent) will come into force within 5 years of Royal Assent. Those provisions which do not come into effect on Royal Assent must be brought into force by Order or they will automatically come into force at the end of the 5 year period. Until such time as all provisions are in force, annual reports will require to be made to the Scottish Parliament by the Scottish Ministers on the progress towards full commencement.

## **FURTHER WORK**

### **Information sharing between the Scottish Information Commissioner and Scottish Ombudsmen**

85. We intend adding to the Bill, before it is introduced to the Parliament, provisions to allow the Scottish Parliamentary Commissioner for Administration, the Health Service Commissioner for Scotland, the Commissioner for Local Administration in Scotland (the Scottish ombudsmen) and the Scottish Information Commissioner to pass information on data protection matters to the UK Information Commissioner. We will also add to the Bill provisions allowing the Scottish Information Commissioner to disclose relevant information, obtained under the Scottish freedom of information legislation, to the Scottish ombudsmen. We expect that the provisions will be similar to the comparable provisions in the Freedom of Information Act 2000.

86. The powers to disclose information to an ombudsman will be limited to circumstances where it appears to the Scottish Information Commissioner that the information relates to a matter which could be the subject of an investigation by an ombudsman. The information may in turn be disclosed only for the purposes of any investigation by that ombudsman.

87. Consideration is being given to the arrangements needed to authorise the exchange of information between the UK Information Commissioner and the Scottish Information Commissioner.

### **Scottish Information Commissioner and Ombudsmen Offices**

88. We will consider whether, in the context of the Executive's consultation on "Modernising the Complaints System", there would be merit in combining the offices of the Scottish Information Commissioner and the Scottish ombudsmen.

### **Purpose Clause**

89. In *An Open Scotland* (paragraph 4.8) the Executive said that it would consider including a "purpose clause" in the draft legislation. The Executive is considering this carefully, but has not yet reached a final decision. In doing so, it will take account of any further comments from consultees, and the fact that the Bill as presently drafted sets out clearly that its purpose is to make provision for the disclosure of information held by Scottish public authorities - and would introduce a legal right to such information.

### **Historical Records**

90. The provisions which govern the handling of requests received by the Keeper of the Records of Scotland for records not open to the public is an area of further work. In particular we will be looking at the interface between the Keeper and the transferring Scottish and UK public authorities.

### **Institutional coverage**

91. The list of Scottish public authorities in Schedule 1 is an area of further work and should not be considered a definitive or final indication of the Bill's institutional coverage.

### Comparison between *An Open Scotland* and the draft Bill

<b>An Open Scotland</b>	<b>Draft Bill</b>
<b><i>A right of access</i></b>	
A statutory right of access to official information (2.1, 2.2)	Yes
All Scottish public authorities and service providers (such as schools and the police) to be covered (2.4)	Yes
Applies to both information and documents (2.8)	Yes
Anyone can apply (2.9)	Yes
Simple system for applying for information (2.11 - 2.13)	Yes
Public authorities to respond within 20 working days of receipt of request (2.14)	Yes
A statutory duty on public authorities to publish certain information (2.15-2.16)	Yes
<b><i>Costs and charging</i></b>	
Costs of regime not to be met in full by applicants (3.6)	Yes
Charging regime to be fair to genuine applicants and straightforward and simple to operate (3.9)	Yes
Three options for charging scheme (3.10 - 3.16)	Scheme based on option 2, favoured by most consultees who responded on this matter
<b><i>Tests for disclosure</i></b>	
Careful balance required between right of access and protection of sensitive information (4.1)	Yes
The public interest in disclosure must be considered (4.6-4.8)	Yes (except for information covered by an absolute exemption – e.g. a statutory prohibition on disclosure)
A demanding harm test of ‘substantial prejudice’ (4.11-4.12)	Yes
Compatibility with UK FOI Act in relation to investigation and prosecution of crime (4.13-14)	Yes
Investigation and prosecution of crime not to be prejudiced by FOI (4.15 - 16)	Yes
Policy advice and related information covered by a combination of class-based and content-based exemptions (4.17-4.18 )	Yes
Factual background information to major policy announcements to be disclosed (4.19)	Yes
Exemptions drawn largely from the <i>Code of Practice on Access to Scottish Executive Information</i> (4.20-4.22 and Annex C)	4.22 of <i>An Open Scotland</i> said that work would continue on the precise definition of the exemptions. The exemptions draw on those in the <i>Code</i> , but some are conflated, some are subdivided, and other exemptions have been added to cater for matters or bodies not covered by the <i>Code</i> .

<b>Personal information</b>	
Most personal information to be accessed under the provisions of the Data Protection Act 1998 (5.9)	Yes
Personal information which falls outside the provisions of the Data Protection Act 1998 to be subject to FOI rights of access (5.10)	Yes

<b>Reviews and appeals</b>	
Independent review and appeals mechanism (6.2)	Yes
Independent Scottish Information Commissioner (6.3 - 6.4)	Yes. Commissioner to be appointed by Her Majesty on the nomination of the Scottish Parliament.
Commissioner to have powers to order the disclosure of information, adjust charges, resolve disputes by mediation and have a right of access to documents (6.5)	Yes
For certain categories of information, the final say on disclosure to rest with a collective decision of the Scottish Ministers (6.6 - 6.7)	Yes
Independence of Lord Advocate, as head of systems of criminal prosecution and investigation of deaths in Scotland, preserved (6.8 - 6.9)	Yes
Two stage appeals system (6.10 - 6.12)	Yes
Commissioner's decision final; subject only to judicial review (6.13)	Yes; appeal, on a point of law, to the Court of Session.
Consider case for providing right of appeal to an Information Tribunal (6.14)	In accordance with the views of most consultees who responded on this point an Information Tribunal is not included.

<b>Public records</b>	
No proposals for changes to current public records system (7.1)	Policy developed and taken forward. Bill applies right of access to records of any age, including historical public records.
Retain existing administratively-based 30 year rule (7.5)	Certain exemptions cease to apply at 30 years.
Scottish public authorities to be encouraged to operate efficient records management practices (7.6 - 7.8)	Yes. Code of Practice on records management, to be overseen by Scottish Information Commissioner.
Possibility of national archives legislation to receive separate consideration (7.9, 7.10)	Under separate consideration

<b>Changing the culture</b>	
Commitment to culture of greater openness in public sector (8.1)	Yes - Interdepartmental Working Group established; first meeting held 2 February 2001
Build on existing openness regimes (8.3)	Yes
Programme of work to address training needs and other issues (8.6 - 8.10)	Yes
Scottish Information Commissioner key to fostering greater openness (8.11 - 8.12)	Yes. Commissioner to promote (as well as enforce) freedom of information regime.

## Summary of Exemptions

Section in draft Bill	Exemption	Absolute <sup>1</sup>	Class or Content <sup>2</sup>	Ministerial Certificates <sup>3</sup>	Duration of exemption <sup>4</sup>
24	Information Otherwise accessible	Yes	Class	No	Perpetuity, except for historical records held by Keeper of Records of Scotland
25	Prohibitions on disclosure	Yes	Class	No	Perpetuity
26	Information Intended for future publication	No	Class	No	Perpetuity, except for historical record held by Keeper of Records of Scotland
27	Relations within the United Kingdom	No	Content	No	30 years
28	Formulation of Scottish Administration policy etc	No	Class	Yes	30 years
29	Prejudice to effective conduct of public affairs	No	Content	No	30 years
30	National security and defence	No	Content	No	Perpetuity
31(1)(a) 31(1)(b)	International Relations	No No	Content Class	No Yes	Perpetuity
32(1)(a) 32(1)(b) 32(2)	Commercial interests and the economy	No No No	Class Content Content	No No No	30 years 30 years Perpetuity
33	Investigations by Scottish public authorities and proceedings arising out of such investigations	No	Class	Yes	Perpetuity, except: 33(2)(a), ceases at conclusion of FAI proceedings; 33(2)(b) 100 years
34	Law enforcement	No	Content	No	100 years
35 (1) 35 (2)	Confidentiality	No Yes	Class Class	Yes Yes	30 years 30 years
36	Court records etc	Yes	Class	No	30 years
37 (1)(a) 37 (1)(b) 37 (1)(c) 37 (1)(d)	Personal data relating to applicant Other personal data Personal census information Health Records	Yes In certain circumstances Yes Yes	Class Class Class Class	No No No No	Perpetuity Perpetuity 100 years 100 years after death
38(1) 38(2)	Health, safety and the environment	No No	Content Class	No No	Perpetuity Perpetuity
39	Audit Functions	No	Content	No	30 years
40	Communications with her Majesty, etc. and honours	No	Class	Yes – section 40(b) only	Section 40(a) – 30 years Section 40(b) – 60 years

<sup>1</sup> See paragraph 36

<sup>2</sup> See paragraphs 34, 35

<sup>3</sup> See paragraphs 72, 73

<sup>4</sup> See paragraphs 75 - 78

# Freedom of Information (Scotland) Bill

## CONSULTATION DRAFT

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## ACCOMPANYING DOCUMENTS

Explanatory Notes, together with other accompanying documents, are printed separately as SP Bill <X>-EN. A Policy Memorandum is printed separately as SP Bill <X>-PM.

# Freedom of Information (Scotland) Bill

## CONSULTATION DRAFT

An Act of the Scottish Parliament to make provision for the disclosure of information held by Scottish public authorities or by persons providing services for them; and for connected purposes.

### PART 1

#### ACCESS TO INFORMATION HELD BY SCOTTISH PUBLIC AUTHORITIES

5

#### *Right to information*

#### **1 General entitlement**

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant”.
- (3) If the authority—
- (a) requires further information in order to identify and locate the information requested; and
  - (b) has told the applicant so (specifying what the requirement for further information is),
- then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.
- (4) The information to be given by the authority is that held by it at the time the request is received, except that any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- (5) This section is subject to sections 2, 9, 12 and 14.

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#### **2 Effect of exemptions**

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that—
- (a) the provision does not confer absolute exemption; and
  - (b) in all the circumstances of the case, the public interest in maintaining the exemption is outweighed by that in disclosure.

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- (2) For the purposes of paragraph (a) of subsection (1), the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption—
- (a) section 24;
  - (b) section 25;
  - 5 (c) section 35(2);
  - (d) section 36; and
  - (e) in section 37(1)—
    - (i) paragraphs (a), (c) and (d); and
    - 10 (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

### 3 Scottish public authorities

- (1) In this Act, “Scottish public authority” means—
- (a) any body which, any other person who, or the holder of any office which—
    - (i) is listed in schedule 1; or
    - 15 (ii) is designated by order under section 5(1); or
  - (b) a publicly-owned company, as defined by section 6.
- (2) For the purposes of this Act, information is held by an authority if it is held—
- (a) by the authority otherwise than—
    - (i) on behalf of another person; or
    - 20 (ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom; or
  - (b) by a person other than the authority, on behalf of the authority.
- (3) Subsection (1)(a)(i) is subject to any qualification set out in schedule 1.

### 4 Amendment of schedule 1

- (1) The Scottish Ministers may by order amend schedule 1 by—
- (a) adding to that schedule a reference to—
    - (i) any body which; or
    - (ii) the holder of any office which,

is not for the time being listed there and is either a part of the Scottish Administration or a Scottish public authority with mixed functions or no reserved functions; or
  - (b) removing from that schedule an entry for the time being listed there.
- (2) The reference, in paragraph (a) of subsection (1), to an authority with mixed functions or no reserved functions is to be construed in accordance with paragraphs 1(4) and 2 of Part III of Schedule 5 to the Scotland Act 1998 (c.46).
- (3) An order under subsection (1) may relate to a specified person or office or to persons or offices falling within a specified description.

**5 Further power to designate Scottish public authorities**

- (1) The Scottish Ministers may by order designate as a Scottish public authority for the purposes of this Act any person mentioned in subsection (2) who—
- 5 (a) is neither for the time being listed in schedule 1 nor capable of being added to that schedule by order under section 4(1); and
- (b) is neither a public body nor the holder of any public office.
- (2) The persons are those who either—
- 10 (a) appear to the Scottish Ministers to exercise functions of a public nature; or
- (b) are providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority.
- (3) An order under subsection (1) may designate a specified person or persons falling within a specified description.
- (4) An order under subsection (1) made by virtue of—
- 15 (a) subsection (2)(a) must specify the functions of a public nature which appear to be exercised;
- (b) subsection (2)(b) must specify the service being provided.
- (5) Before making an order under subsection (1), the Scottish Ministers must consult—
- (a) every person to whom the order relates; or
- (b) persons appearing to them to represent such persons.

**6 Publicly-owned companies**

- 20 (1) A company is a “publicly-owned company” for the purposes of section 3(1)(b) if it is wholly owned—
- (a) by the Scottish Ministers; or
- 25 (b) by any other Scottish public authority listed in schedule 1, other than an authority so listed only in relation to information of a specified description.
- (2) For the purposes of subsection (1), a company is wholly owned—
- (a) by the Scottish Ministers if it has no members except—
- 30 (i) the Scottish Ministers or companies wholly owned by the Scottish Ministers; or
- (ii) persons acting on behalf of the Scottish Ministers or of such companies; and
- (b) by any other Scottish public authority if it has no members except—
- (i) that authority or companies wholly owned by that authority; or
- (ii) persons acting on behalf of that authority or of such companies.
- 35 (3) In subsections (1) and (2), “company” includes any body corporate.

**7 Public authorities to which Act has limited application**

- (1) An order under section 4(1)(a) may, in adding an entry to schedule 1, list the authority only in relation to information of a specified description; and where an authority is so listed nothing in this Act applies to any other information held by the authority.
- (2) The Scottish Ministers may by order amend that schedule—
- (a) by limiting the entry relating to an authority to information of a specified description; or
  - (b) by removing or amending any such limitation for the time being contained in an entry so relating.
- (3) Nothing in this Act applies to information held by a person designated as a Scottish public authority by order under subsection (1) of section 5 if the order is made by virtue of—
- (a) subsection (2)(a) of that section and the information does not relate to the functions; or
  - (b) subsection (2)(b) of that section and the information does not relate to the service, specified in the order.
- (4) Nothing in this Act applies in relation to information—
- (a) held by a publicly-owned company; and
  - (b) of a description specified in relation to that company in an order made for the purposes of this subsection by the Scottish Ministers.

**8 Requesting information**

- (1) Any reference in this Act to “requesting” information is a reference to making a request which—
- (a) is in writing;
  - (b) states the name of the applicant and an address for correspondence; and
  - (c) describes the information requested.
- (2) For the purposes of paragraph (a) of subsection (1) (and without prejudice to the generality of that paragraph), a request is to be treated as made in writing where the text of the request is—
- (a) transmitted by electronic means;
  - (b) received in legible form; and
  - (c) capable of being used for subsequent reference.

**9 Fees**

- (1) A Scottish public authority receiving a request which requires it to comply with section 1(1) may, within the time allowed by section 10 for so complying, give the applicant a notice in writing (in this Act referred to as a “fees notice”) stating that a fee of an amount specified in the notice is to be charged by the authority for so complying.

- (2) If a fees notice is given to the applicant, the authority is not obliged to give the requested information unless the fee is duly paid; and for the purposes of this subsection and section 10(2) due payment is payment within the period of three months beginning with the day on which the notice is given.
- 5 (3) Subject to subsection (5), a fee charged under subsection (1) is to be determined by the authority in accordance with regulations made by the Scottish Ministers.
- (4) Without prejudice to the generality of subsection (3), the regulations may in particular provide that—
- 10 (a) a fee is not to exceed such amount as may be specified in, or determined in accordance with, the regulations;
- (b) a fee is to be calculated in such manner as may be so specified; and
- (c) no fee is payable in a case so specified.
- (5) Subsection (3) does not apply where provision is made, by or under any enactment, as to the fee that may be charged by the authority for the disclosure of the information.

## 15 **10 Time for compliance**

- (1) Subject to subsection (2), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after—
- 20 (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.
- (2) Where the authority gives a fees notice to the applicant and the fee is duly paid, the working days in the period—
- 25 (a) beginning with the day on which that notice is given; and
- (b) ending with the day on which the fee is received by the authority,
- are to be disregarded in calculating, for the purposes of subsection (1), the twentieth working day mentioned in that subsection.
- (3) The Scottish Ministers may by regulations provide that subsections (1) and (2) are to have effect as if references to the twentieth working day were references to such other working day, not later than the sixtieth, after receipt by the authority of the request as is specified in (or determined in accordance with) the regulations.
- 30 (4) Regulations under subsection (3) may—
- (a) prescribe different days in relation to different cases; and
- (b) confer a discretion on the Scottish Information Commissioner.

## 35 **11 Means of providing information**

- (1) Where, in requesting information from a Scottish public authority, the applicant expresses a preference for receiving it by any one or more of the means mentioned in subsection (2), the authority must, so far as is reasonably practicable, give effect to that preference.
- 40 (2) The means are—

- (a) the provision to the applicant, in permanent form or in another form acceptable to the applicant, of a copy of the information;
- (b) such provision to the applicant of a digest or summary of the information; and
- (c) the provision to the applicant of a reasonable opportunity to inspect a record containing the information.

(3) In determining, for the purposes of subsection (2), what is reasonably practicable, the authority may have regard to all the circumstances, including cost; and where it determines that it is not reasonably practicable to give effect to the preference it must notify the applicant of the reasons for that determination.

(4) Subject to subsection (2), information given in compliance with section 1(1) may be given by any means which are reasonable in the circumstances.

## 12 Excessive cost of compliance

(1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations; and different amounts may be so prescribed in relation to different cases.

(2) The regulations may provide that, in such circumstances as they may specify, where two or more requests for information are made to the authority—

- (a) by one person; or
- (b) by different persons who appear to it to be acting in concert or in pursuance of a campaign,

then if the authority estimates that the total cost of complying with both (or all) of the requests exceeds the amount prescribed, in relation to complying with either (or any) of those requests, under subsection (1), section 1(1) does not oblige the authority to comply with either (or any) of those requests.

(3) The regulations may make provision as to—

- (a) the costs to be estimated; and
- (b) the manner in which those costs are to be estimated.

## 13 Fees for disclosure in certain circumstances

(1) A Scottish public authority may charge for the communication of any information—

- (a) which by virtue of section 12(1) or (2) it is not obliged to communicate; and
- (b) which it is not otherwise required by law to communicate,

such fee as may be determined by it in accordance with regulations.

(2) Without prejudice to the generality of subsection (1), the regulations may in particular provide that a fee—

- (a) is not to exceed such amount as may be specified in, or determined in accordance with, the regulations; and
- (b) is to be calculated in such manner as may be so specified.

(3) Subsection (1) does not apply where provision is made, by or under any enactment, as to the fee that may be charged by the authority for the disclosure of the information.

**14 Vexatious or repeated requests**

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.
- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

**15 Duty to provide advice and assistance**

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 59 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

*Responses to request***16 Refusal of request**

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a “refusal notice”) which—
- (a) discloses that it holds the information;
  - (b) states that it so claims;
  - (c) specifies the exemption in question; and
  - (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority’s claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority’s reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
- (3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.
- (4) A Scottish public authority which, in relation to a request for information, claims that section 12(1) applies must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice which states that it so claims.
- (5) A Scottish public authority which, in relation to such a request, claims that section 14 applies must, within that time, give the applicant a notice which states that it so claims; except that the notice need not be given if—
- (a) the authority has, in relation to a previous identical or substantially similar such request, given the applicant a notice under this subsection; and

(b) it would in all the circumstances be unreasonable to expect it to serve a further such notice in relation to the current request.

(6) A notice under subsection (1), (4) or (5) must—

(a) contain particulars of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and

(b) contain particulars about the rights of application to the authority and the Commissioner conferred by sections 19(1) and 46(1).

## 17 Notice that information is not held

(1) Where a Scottish public authority receives a request which would require it either—

(a) to comply with section 1(1); or

(b) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates, but the authority does not hold that information, it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

(2) Subsection (1) does not apply if, by virtue of section 18, the authority instead gives the applicant a refusal notice.

## 18 Further provision as respects responses to request

(1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 27, 28, 30, 31, 33, 34, 38(1) or 40 but the authority does not wish to reveal whether the information exists or is so held, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.

(2) Paragraph (a) of section 16(1) does not apply as respects a refusal notice given by virtue of this section.

### *Review of refusal, etc.*

## 19 Requirement for review of refusal, etc.

(1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.

(2) A requirement under subsection (1) is referred to in this Act as a “requirement for review”.

(3) A requirement for review must—

(a) be in writing;

(b) state the name of the applicant and an address for correspondence; and

(c) specify—

(i) the request for information to which the requirement for review relates; and

(ii) the matter which gives rise to the applicant’s dissatisfaction mentioned in subsection (1).

- (4) For the purposes of paragraph (a) of subsection (3) (and without prejudice to the generality of that paragraph), a requirement for review is treated as made in writing where the text of the requirement is as mentioned in paragraphs (a) to (c) of section 8(2).
- (5) Subject to subsection (6), a requirement for review must be made by not later than the twentieth working day after—
- 5 (a) the expiry of the time allowed by or by virtue of section 10 for complying with the request; or
- (b) in a case where the authority has complied with a request for information or has given the applicant a refusal notice (or has purported to do so) outwith that time, the receipt by the applicant of the information provided or the refusal notice, as the case may be.
- 10 (6) A Scottish public authority may comply with a requirement for review made after the expiry of the time allowed by subsection (5) for making such a requirement if it considers it appropriate to do so.
- 15 (7) In subsection (1) of this section, the reference to “actions” and “decisions” includes inaction and failure to reach a decision.

## **20 Review by Scottish public authority**

- (1) A Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (5)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.
- 20 (2) A requirement for review may be withdrawn by the applicant who made it, by notice in writing to the authority, at any time before the authority makes its decision on the requirement.
- (3) The authority may, as respects the request for information to which the requirement relates—
- 25 (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
- (b) substitute for any such decision a different decision; or
- 30 (c) reach a decision, where the complaint is that no decision had been reached.
- (4) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (3) and a statement of its reasons for so doing.
- (5) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if—
- 35 (a) the requirement is vexatious; or
- (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.
- (6) Where the authority considers that paragraph (a) or (b) of subsection (5) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.
- 40 (7) A notice under subsection (4) or (6) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 46(1) and 55.

*Records transferred to the Keeper of the Records of Scotland***21 Special provisions relating to records transferred to Keeper**

- (1) This section applies to information which—
- (a) is contained in a record transferred to the Keeper of the Records of Scotland by—
    - (i) a Scottish public authority; or
    - (ii) a public authority within the meaning of the Freedom of Information Act 2000 (c.36); and
  - (b) has not been designated by the authority as open information for the purposes of this section.
- (2) The Keeper must, as soon as practicable after receiving a request for information to which this section applies, send a copy of that request to the authority which transferred the information and it is for that authority, instead of the Keeper, to come to a decision as to whether the information is exempt information by virtue of any provision of Part 2 and to determine any question then arising by virtue of paragraph (a) or (b) of section 2(1) as respects the information.
- (3) After receiving the copy, that authority must, within such time as will make it practicable for the Keeper to comply with section 10 as respects the request, inform the Keeper of the decision mentioned in subsection (2) and of any determination required by virtue of that decision.
- (4) Where that authority is not a Scottish public authority, it is to be treated as such an authority for the purposes of any requirement in Part 3 or 4 to furnish information about compliance with this Part.

*Publication schemes***22 Publication schemes**

- (1) A Scottish public authority must—
- (a) adopt and maintain a scheme (in this Act referred to as a “publication scheme”) which relates to the publication of information by the authority and is approved by the Commissioner;
  - (b) publish information in accordance with that scheme; and
  - (c) from time to time review that scheme.
- (2) A publication scheme must specify—
- (a) classes of information which the authority publishes or intends to publish;
  - (b) the manner in which information of each class is, or is intended to be, published; and
  - (c) whether the published information is, or is intended to be, available to the public free of charge or on payment.
- (3) In adopting or reviewing its publication scheme the authority must have regard to the public interest in—
- (a) allowing public access to information held by it and in particular to information which—

- (i) relates to the provision of services by it, the cost to it of providing them or the standards attained by services so provided; or
- (ii) consists of facts, or analyses, on the basis of which decisions of importance to the public have been made by it;

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(b) the publication of reasons for decisions made by it.

(4) The authority must publish its publication scheme but may do so in such manner as it thinks fit.

(5) The Commissioner may—

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(a) when approving a publication scheme, provide that the approval expires at the end of a specified period; and

(b) at any time give notice to an authority revoking, as from the end of the period of six months beginning at that time, approval of its publication scheme.

(6) The Commissioner, when—

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(a) refusing to approve a proposed publication scheme; or

(b) revoking approval of a publication scheme,

must state the reason for doing so.

### 23 Model publication schemes

(1) The Commissioner may, in relation to Scottish public authorities falling within particular classes—

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(a) prepare and approve model publication schemes; or

(b) approve such schemes prepared by other persons.

(2) If an authority which falls within the class to which an approved model publication scheme relates adopts that scheme without modification, no further approval of the Commissioner is required so long as that model scheme remains approved; but the approval of the Commissioner is required in relation to any modification of the scheme by an authority.

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(3) The Commissioner may—

(a) when approving a model publication scheme, provide that the approval expires at the end of a specified period; and

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(b) at any time publish, in such manner as the Commissioner thinks fit, a notice revoking, as from the end of the period of six months beginning at that time, approval of such a scheme.

(4) The Commissioner, when—

(a) refusing to approve—

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(i) under subsection (1)(b), a proposed model scheme; or

(ii) any such modification as is mentioned in subsection (2),

must state the reason for doing so; or

(b) revoking approval of a model publication scheme, must include in the notice under subsection (3)(b) a statement of the reason for doing so.

**PART 2**

## EXEMPT INFORMATION

**24 Information otherwise accessible**

- 5 (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- (2) For the purposes of subsection (1), information—
- 10 (a) may be reasonably obtainable even if payment is required for access to it;
- (b) is to be taken to be reasonably obtainable if the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to members of the public on request, whether free of charge or on payment.
- 15 (3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

**25 Prohibitions on disclosure**

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)—

- 20 (a) is prohibited by or under an enactment;
- (b) is incompatible with a Community obligation; or
- (c) would constitute, or be punishable as, a contempt of court.

**26 Information intended for future publication**

Information is exempt information if—

- 25 (a) it is held with a view to its being published by—
- (i) a Scottish public authority; or
- (ii) any other person,
- at a date not later than twelve weeks after that on which the request for the information is made;
- 30 (b) when that request is made the information is already being held with that view; and
- (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).

**27 Relations within the United Kingdom**

- 35 (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.
- (2) In subsection (1), "administration in the United Kingdom" means—

- (a) the government of the United Kingdom;
- (b) the Scottish Administration;
- (c) the Executive Committee of the Northern Ireland Assembly; or
- (d) the National Assembly for Wales.

## 28 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to—
- (a) the formulation or development of government policy;
  - (b) Ministerial communications;
  - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice; or
  - (d) the operation of any Ministerial private office.
- (2) Once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of—
- (a) paragraph (a) of subsection (1), as relating to the formulation or development of the policy in question; or
  - (b) paragraph (b) of that subsection, as relating to Ministerial communications.
- (3) In determining any question under section 2(1)(b) as respects information which is exempt information by virtue of subsection (1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
- (4) In this section—
- “government policy” means the policy of the Scottish Administration;
  - “the Law Officers” means the Lord Advocate, the Solicitor General for Scotland, the Advocate General for Scotland, the Attorney General, the Solicitor General and the Attorney General for Northern Ireland;
  - “Ministerial communications” means any communications between the Scottish Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet); and
  - “Ministerial private office” means any part of the Scottish Administration which provides personal administrative support to a Minister of the Scottish Executive.

## 29 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act—

- (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;
- (b) would, or would be likely to, inhibit substantially—
  - (i) the free and frank provision of advice; or
  - (ii) the free and frank exchange of views for the purposes of deliberation; or

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

### 30 National security and defence

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially—

- (a) the public interest in safeguarding national security;  
 (b) the defence of the British Islands or of any colony; or  
 (c) the capability, effectiveness or security of any relevant forces.

- (2) In subsection (1)(c), “relevant forces” means—

- (a) the armed forces of the Crown; and  
 (b) any forces co-operating with those forces,  
 or any part of the armed forces of the Crown or of any such co-operating forces.

### 31 International relations

- (1) Information is exempt information if—

- (a) its disclosure under this Act would, or would be likely to, prejudice substantially—

- (i) relations between the United Kingdom and any other State;  
 (ii) relations between the United Kingdom and any international organisation or international court;  
 (iii) the interests of the United Kingdom abroad; or  
 (iv) the promotion or protection by the United Kingdom of its interests abroad;  
 or

- (b) it is confidential information obtained from—

- (i) a State other than the United Kingdom; or  
 (ii) an international organisation or international court.

- (2) For the purposes of subsection (1), information obtained from a State, organisation or court is confidential at any time while—

- (a) the terms on which that information was obtained require it to be held in confidence; or

- (b) the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

- (3) In subsection (1)—

“international court” means an international court which—

- (a) is not an international organisation; and

- (b) is established—

- (i) by a resolution of an international organisation of which the United Kingdom is a member; or

(ii) by an international agreement to which the United Kingdom is a party;

“international organisation” means—

- 5 (a) an international organisation whose members include any two or more States; or
- (b) an organ of such an international organisation;

“State” includes—

- (a) the government of any State; and
- (b) any organ of such a government,

10 and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.

### 32 Commercial interests and the economy

- (1) Information is exempt information if—
- 15 (a) it constitutes a trade secret; or
- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially—
- 20 (a) the economic interests of the whole or part of the United Kingdom; or
- (b) the financial interests of an administration in the United Kingdom.
- (3) In subsection (2), “administration in the United Kingdom” has the same meaning as in section 27(2).

### 33 Investigations by Scottish public authorities and proceedings arising out of such investigations

- 25 (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of—
- (a) an investigation which the authority has a duty to conduct to ascertain whether a person—
- 30 (i) should be prosecuted for an offence; or
- (ii) prosecuted for an offence is guilty of it;
- (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or
- 35 (c) criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.
- (2) Information is exempt information if—

- (a) held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14) but not for the time being concluded; or
- (b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out to ascertain the cause of death of a person.

(3) Information is exempt information if—

- (a) obtained from a confidential source by a Scottish public authority; or
- (b) having been obtained from such a source, is recorded by a Scottish public authority,

for the purposes of investigations (other than such investigations as are mentioned in subsection (1)) conducted by it, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment, for any purpose specified in section 34(2).

(4) Information is exempt information if obtained or recorded by a Scottish public authority for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of such investigations as are mentioned in subsection (1) or (3).

### 34 Law enforcement

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially—

- (a) the prevention or detection of crime;
- (b) the apprehension or prosecution of offenders;
- (c) the administration of justice;
- (d) the assessment or collection of any tax or duty (or of any imposition of a similar nature);
- (e) the operation of the immigration controls;
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained;
- (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
- (h) any civil proceedings—
  - (i) brought; and
  - (ii) arising out of an investigation conducted, for any such purpose, by or on behalf of any such authority, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment.

(2) The purposes are—

- (a) to ascertain whether a person has failed to comply with the law;
- (b) to ascertain whether a person is responsible for conduct which is improper;
- (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
- (d) to ascertain a person's fitness or competence in relation to—

- (i) the management of bodies corporate; or
- (ii) any profession or other activity which the person is, or seeks to become, authorised to carry on;
- (e) to ascertain the cause of an accident;
- 5 (f) to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration;
- (g) to protect the property of a charity from loss or mismanagement;
- (h) to recover the property of a charity;
- (i) to secure the health, safety and welfare of persons at work; and
- 10 (j) to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work.

### 35 Confidentiality

- 15 (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) Information is exempt information if—
  - (a) it was obtained by the Scottish public authority from another person (including another such authority); and
  - 20 (b) its disclosure by the Scottish public authority to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

### 36 Court records, etc.

- (1) Information is exempt information if—
  - 25 (a) it is contained in a document—
    - (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter;
    - (ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or
    - 30 (iii) created by a court or a member of its administrative staff for the purposes of such proceedings; or
  - (b) it is contained in a document—
    - (i) lodged with, or otherwise placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration; or
    - (ii) created by such a person for such purposes,
- 35 and a Scottish public authority holds the information solely because it is contained in such a document.
- (2) In this section—
  - (a) “court” includes a tribunal or body exercising the judicial power of the State; and
  - 40 (b) “inquiry” means an inquiry or hearing held under a provision contained in, or made under, an enactment.

- (3) This section does not apply to information held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14).

### 37 Personal information

- 5 (1) Information is exempt information if it constitutes—
- (a) personal data of which the applicant is the data subject;
  - (b) personal data and either the condition mentioned in subsection (2) (the “first condition”) or that mentioned in subsection (3) (the “second condition”) is satisfied;
  - 10 (c) personal census information; or
  - (d) a health record.
- (2) The first condition is—
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
  - 15 (i) any of the data protection principles; or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
  - 20 (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.
- (3) The second condition is that, by virtue of any provision of Part IV of that Act, the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).
- 25 (4) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to that Act are to be disregarded.
- (5) In this section—
- 30 “the data protection principles” means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;
  - “data subject” and “personal data” have the meanings respectively assigned to those terms by section 1(1) of that Act;
  - 35 “health record” has the meaning assigned to that term by section 1(1) of the Access to Health Records Act 1990 (c.23); and
  - “personal census information” has the same meaning as in section 8 of the Census Act 1920 (c.41).

### 40 38 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

- (2) Information is exempt information if a Scottish public authority—
- (a) is obliged by regulations under section 61 to make it available to the public in accordance with the regulations; or
  - (b) would be so obliged but for any exemption contained in the regulations.
- 5 (3) Subsection (2)(a) is without prejudice to the generality of section 24(1).

### 39 Audit functions

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially the exercise of a Scottish public authority's functions in relation to—

- 10 (a) the audit of the accounts of other Scottish public authorities; or
- (b) the examination of the economy, efficiency and effectiveness with which such authorities use their resources in discharging their functions.

### 40 Communications with Her Majesty, etc. and honours

Information is exempt information if it relates to—

- 15 (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household; or
- (b) the exercise by Her Majesty of Her prerogative of honour.

## PART 3

### THE SCOTTISH INFORMATION COMMISSIONER

#### 20 41 The Scottish Information Commissioner

- (1) For the purposes of this Act there is to be an officer known as the Scottish Information Commissioner (in this Act referred to as the "Commissioner") who is to be an individual appointed by Her Majesty on the nomination of the Parliament.
- (2) The Commissioner is entitled to—
- 25 (a) a salary of such amount; and
- (b) such allowances,
- as the Parliamentary corporation may determine.
- (3) Subject to subsection (4), the Commissioner is to hold office for such period not exceeding five years as the Parliamentary corporation, at the time of appointment, may determine.
- 30 (4) The Commissioner—
- (a) may be relieved of office by Her Majesty at that officer's request;
  - (b) vacates office on 31st December in the year of service in which that officer attains the age of 65;

(c) may be removed from office by Her Majesty in pursuance of a resolution of the Parliament, which, if passed on a division, must be voted for by the number of members equivalent to not less than two thirds of the total number of seats for members of the Parliament; and

5 (d) in other respects, holds office on such terms and conditions as the Parliamentary corporation may determine.

(5) Subject to subsection (4), a person whose term of office as Commissioner expires is eligible for re-appointment; but re-appointment for a third term is competent only if, by reason of special circumstances, such re-appointment is desirable in the public interest.

10 (6) The validity of any actings of the Commissioner is not affected by a defect in the nomination by the Parliament for that officer's appointment.

(7) The Commissioner, in the exercise of that officer's functions (except the function of preparing accounts), is not subject to the direction or control of the Parliamentary corporation, of any member of the Scottish Executive or of the Parliament.

15 (8) Where the office of Commissioner is vacant, the Parliamentary corporation may appoint a person (who may or may not be a member of the Commissioner's staff) to discharge the functions of that office until a new Commissioner is appointed.

(9) A person appointed under subsection (8)—

(a) may be relieved of that appointment at that person's request;

20 (b) may be removed from office by the Parliamentary corporation by notice in writing given by it;

(c) in other respects, holds office on such terms and conditions as the Parliamentary corporation may determine; and

25 (d) while holding that appointment, is to be treated for all purposes, except those of subsections (1) to (6) and those of paragraph 2 of schedule 2, as the Commissioner.

(10) Any function of the Commissioner may be exercised on behalf of that officer by any person (whether or not a member of that officer's staff) authorised by the Commissioner to do so (and to the extent so authorised).

30 (11) The Parliamentary corporation is to pay—

(a) the salary and allowances of the Commissioner;

(b) any expenses incurred by that officer in the exercise of functions under this Act; and

35 (c) any sums payable by virtue of subsection (9)(a) to (c) to, or in respect of, a person who—

(i) is appointed under subsection (8); or

(ii) has ceased to hold office by virtue of having been so appointed.

(12) Schedule 2 to this Act has effect with respect to the Commissioner.

## 42 General functions of Commissioner

40 (1) The Commissioner, with a view in particular to promoting the observance by Scottish public authorities of the provisions of—

(a) this Act; and

(b) the codes of practice issued under sections 59 and 60,  
is to promote the following of good practice by those authorities.

(2) The Commissioner—

(a) must determine what information it is expedient to give the public concerning the following matters—

(i) the operation of this Act;

(ii) good practice;

(iii) other matters within the scope of that officer's functions,

and must secure the dissemination of that information in an appropriate form and manner; and

(b) may give advice to any person as to any of those matters.

(3) The Commissioner may, with the consent of a Scottish public authority, assess whether the authority is following good practice.

(4) The Commissioner may determine and charge sums for services provided under this section.

(5) Any sum received by the Commissioner by virtue of subsection (4) is to be retained by that officer and applied to meet expenditure incurred in respect of the services so provided.

(6) The Commissioner must from time to time consult the Keeper of the Records of Scotland about the promotion under subsection (1) of the observance by Scottish public authorities of the provisions of the code of practice issued under section 60.

(7) In this section “good practice”, in relation to a Scottish public authority, means such practice in the discharge of its functions under this Act as appears to the Commissioner to be desirable, and includes (but is not limited to) compliance with the requirements of this Act and the provisions of the codes of practice issued under sections 59 and 60.

### **43 Recommendations as to good practice**

(1) If it appears to the Commissioner that the practice of a Scottish public authority in relation to the exercise of its functions under this Act does not conform with the code of practice issued under section 59 or 60, the Commissioner may give the authority a recommendation (in this Act referred to as a “practice recommendation”).

(2) A practice recommendation must—

(a) be in writing and specify the code and the provisions of that code with which, in the Commissioner's opinion, the authority's practice does not conform; and

(b) specify the steps which that officer considers the authority ought to take in order to conform.

(3) The Commissioner must consult the Keeper of the Records of Scotland before giving a practice recommendation to a Scottish public authority (other than the Keeper) in relation to conformity with the code of practice issued under section 60.

### **44 Confidentiality of information obtained by or furnished to Commissioner**

(1) A person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner must not disclose any information which—

- (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of this Act;
- (b) relates to an identified or identifiable individual or business; and
- (c) is not at the time of the disclosure, and has not previously been, available to the public from another source,

unless the disclosure is made with lawful authority.

- (2) For the purposes of subsection (1), disclosure is made with lawful authority only if, and to the extent that—

- (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business, as the case may be;
- (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under a provision of this Act;
- (c) the disclosure is made for the purpose of, and is necessary for, the discharge of—
  - (i) a function under this Act; or
  - (ii) a Community obligation;
- (d) the disclosure is made for the purpose of proceedings, whether criminal or civil and whether arising under, or by virtue of, this Act or otherwise; or
- (e) having regard to the rights and freedoms or legitimate interests of a person, the disclosure is necessary in the public interest.

- (3) A person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence.

- (4) A person guilty of an offence under subsection (3) is liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum; or
- (b) on conviction on indictment, to a fine.

#### **45 Laying of reports**

- (1) The Commissioner must lay annually before the Parliament a general report on the exercise of the functions conferred on that officer under this Act.
- (2) The report mentioned in subsection (1) (without prejudice to the generality of that subsection) must record the number of occasions, during the period covered by the report, on which the Commissioner failed to reach a decision on an application under section 46(1) (being an application on which a decision fell to be made) within the period of four months specified in section 48(3)(b).
- (3) The Commissioner may from time to time lay before the Parliament such other reports with respect to the functions conferred on that officer under this Act as that officer thinks fit.

### **PART 4**

#### ENFORCEMENT

#### **46 Application for decision by Commissioner**

- (1) A person who is dissatisfied with—

- (a) a notice given under section 20(4) or (6); or
- (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice,

5 may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must—

- (a) be in writing;
- (b) state the name of the applicant and an address for correspondence; and
- 10 (c) specify—
  - (i) the request for information to which the requirement for review relates;
  - (ii) the matter which was specified under sub-paragraph (ii) of section 19(3)(c); and
  - 15 (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

- (3) For the purposes of paragraph (a) of subsection (2) (and without prejudice to the generality of that paragraph), an application under that subsection is treated as made in writing where the text of the application is as mentioned in paragraphs (a) to (c) of section 8(2).

- 20 (4) Subject to subsection (5), an application to the Commissioner under subsection (1) must be made—

- (a) where the application concerns a matter mentioned in paragraph (a) of subsection (1), before the expiry of six months after the date of receipt by the applicant of the notice complained of; or
- 25 (b) where the application concerns a matter mentioned in paragraph (b) of that subsection, before the expiry of six months after the period allowed in section 20 (1) for complying with a requirement for review has elapsed.

- (5) The Commissioner may consider an application under subsection (1) made after the expiry of the time allowed by subsection (4) for the making of that application if, in the opinion of the Commissioner, it is appropriate to do so.

- 30 (6) This section is subject to section 47.

#### 47 When application excluded

No application may be made to the Commissioner for a decision under section 46(1) as respects a request for review made to—

- 35 (a) the Commissioner;
- (b) a procurator fiscal; or
- (c) the Lord Advocate, to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland.

**48 Commissioner's decision**

- (1) The Commissioner must make a decision in relation to an application made in accordance with section 46(1) which is not excluded by section 47 unless—
- (a) in the opinion of the Commissioner, the application is frivolous or vexatious; or
  - (b) in the opinion of the Commissioner, the application appears to have been withdrawn or abandoned.
- (2) In a case where the Commissioner determines that subsection (1) does not require a decision to be made, that officer must give the applicant and the Scottish public authority in question notice in writing within one month of receipt of the application, or within such other period as is reasonable in the circumstances, specifying—
- (i) that no decision falls to be made in relation to the application; and
  - (ii) the reasons why that is the case.
- (3) In any other case, the Commissioner must—
- (a) give that authority notice in writing of the application and invite its comments; and
  - (b) if no settlement has in the meantime been effected, reach a decision on the application before the expiry of four months after receiving it, or before the expiry of such other period as is reasonable in the circumstances.
- (4) The Commissioner may endeavour to effect a settlement between the applicant and that authority before the expiry of the period allowed by subsection (3) for reaching a decision on the application.
- (5) The Commissioner must give the applicant and that authority, within the time allowed by subsection (3), notice in writing (referred to in this Act as a “decision notice”) of any decision under paragraph (b) of that subsection.
- (6) Where the Commissioner decides that that authority has not dealt with a request for information in accordance with Part 1 of this Act, the notice under subsection (5) must specify—
- (a) the provision of that Part with which the authority has failed to comply and the respect in which it has so failed;
  - (b) the steps which, in the opinion of the Commissioner, the authority must take to comply with the provision; and
  - (c) the time within which those steps must be taken.
- (7) The time specified under subsection (6)(c) must not expire before the end of the period within which an appeal may be brought under section 55 against the decision of the Commissioner and, if such an appeal is brought, no step which is affected by the appeal need be taken before the cause is finally determined.
- (8) A notice under subsection (2) or (5) must contain particulars of the right of appeal conferred by section 55.
- (9) This section is subject to section 51.

**49 Information notices**

- (1) Where the Commissioner—
- (a) has received an application under section 46(1); or

(b) reasonably requires information—

- (i) for the purpose of determining whether a Scottish public authority has complied or is complying with the provisions of this Act; or
- (ii) for the purpose of determining whether the practice of a Scottish public authority conforms with the code of practice issued under section 59 or 60,

that officer may give the authority notice in writing (referred to in this Act as “an information notice”) requiring it, within such time as is specified in the notice, to give the officer, in such form as may be so specified, such information relating to the application, to compliance with this Act or to conformity with the code of practice as is so specified.

(2) An information notice must contain—

- (a) in a case mentioned in paragraph (a) of subsection (1) a statement that the Commissioner has received an application under section 46(1); or
- (b) in a case mentioned in paragraph (b) of that subsection, a statement—
  - (i) of the purpose mentioned in that paragraph for which that officer regards the specified information as relevant;
  - (ii) of the officer’s reasons for so regarding the information; and
  - (iii) of the time within which the information is to be given.

(3) An information notice must contain also particulars of the right of appeal conferred by section 55.

(4) The time specified under subsection (2)(b)(iii) in an information notice must not expire before the end of the period within which an appeal may be brought under section 55 against the notice; and, if such an appeal is brought, the information need not be given pending the determination or withdrawal of the appeal.

(5) A Scottish public authority is not obliged by virtue of this section to give the Commissioner information in respect of—

- (a) a communication between professional legal adviser and client in connection with the giving of legal advice to the client with respect to that client’s obligations under this Act; or
- (b) a communication between professional legal adviser and client, or between such adviser or client and another person, made in connection with or in contemplation of proceedings under or arising out of this Act and for the purpose of such proceedings.

(6) In subsection (5), references to the client of a professional legal adviser include references to a person representing such client.

(7) The Commissioner may cancel an information notice by notice in writing given to the authority.

(8) In this section, “information” includes unrecorded information.

**50 Enforcement notices**

- 5 (1) If the Commissioner is satisfied that a Scottish public authority has failed to comply with a provision of Part 1 of this Act, the Commissioner may give the authority a notice (referred to in this Act as “an enforcement notice”) requiring the authority to take, within such time as is specified in the notice, such steps as are so specified for so complying.
- (2) An enforcement notice must contain—
- 10 (a) a statement of the provision with which the Commissioner is satisfied that the authority has failed to comply and the respect in which it has not done so; and
- (b) particulars of the right of appeal conferred by section 55.
- (3) The time specified under subsection (1) must not expire before the end of the period within which an appeal may be brought under section 55 against the notice and, if such an appeal is brought, the notice need not be complied with before the cause is finally determined.
- 15 (4) The Commissioner may cancel an enforcement notice by notice in writing given to the authority.
- (5) This section is subject to section 51.

**51 Exception from duty to comply with certain notices**

- 20 (1) This section applies to a decision notice or enforcement notice which—
- (a) is given to the Scottish Administration; and
- (b) relates to a perceived failure, in respect of one or more requests for information, to comply with section 1(1) in respect of information which, by virtue of section 28, 31(1)(b), 33, 35 or 40(b), is exempt information.
- 25 (2) A decision notice or enforcement notice to which this section applies ceases to have effect, in so far as it relates to the perceived failure, if, not later than the fortieth working day following the effective date, the First Minister of the Scottish Executive, after consulting the other Ministers of the Executive, gives the Commissioner a certificate signed by the First Minister stating that the First Minister has on reasonable grounds formed the opinion that there was no such failure.
- 30 (3) The First Minister is, as soon as practicable after such a certificate—
- (a) is given, to lay a copy of it before the Parliament; and
- (b) is given in relation to a decision notice, to inform the person to whose application the notice relates of the reasons for the opinion formed,
- 35 except that the First Minister is not obliged to provide information under paragraph (b) if, or to the extent that, compliance with that paragraph would necessitate the disclosure of exempt information.
- (4) In subsection (2), “the effective date”, in relation to a notice, means—
- (a) the day on which the notice was given to the Scottish Administration; or
- 40 (b) where an appeal under section 55 is brought, the day on which the cause is finally determined.

**52 Failure to comply with notice**

- (1) If a Scottish public authority has failed to comply with—
- (a) so much of a notice given to it by the Commissioner under subsection (5) of section 48 as, by virtue of subsection (6)(b) of that section, requires steps to be taken by the authority;
  - (b) an information notice; or
  - (c) an enforcement notice,
- the Commissioner may certify in writing to the court that the authority has failed to comply with the notice.
- (2) For the purposes of this section, a Scottish public authority which, in purported compliance with an information notice—
- (a) makes a statement which it knows to be false in a material respect; or
  - (b) recklessly makes a statement which is false in a material respect,
- is to be taken to have failed to comply with the notice.
- (3) Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the authority, and after hearing any statement that may be offered in defence, may deal with the authority as if it had committed a contempt of court.
- (4) In this section, “the court” means the Court of Session.

**53 Powers of entry and inspection**

Schedule 3, which makes provision as to powers of entry and inspection, has effect.

**54 No civil right of action against Scottish public authority**

- (1) This Act does not confer a right of action in civil proceedings in respect of failure by a Scottish public authority to comply with a duty imposed by, under or by virtue of this Act.
- (2) Subsection (1) does not affect the powers of the Commissioner under section 52(1).

**55 Appeal against notices under Part 4**

An appeal, on a point of law, to the Court of Session may be made—

- (a) against a decision by the Commissioner under subsection (2) of section 48, by the person who applied for that decision;
- (b) against a decision by the Commissioner under subsection (3)(b) of that section –
  - (i) by that person; or
  - (ii) by the Scottish public authority in respect of which the decision was made; or
- (c) against the decision which resulted in the giving of—
  - (i) an information notice; or
  - (ii) an enforcement notice,to a Scottish public authority, by that authority.

**PART 5**

## HISTORICAL RECORDS

**56 The expression “historical record”**

- 5 (1) For the purposes of this Part, a record becomes a “historical record” at the end of that period of thirty years which commences at the beginning of the calendar year following that in which the record is created.
- (2) Where records created at different dates are for administrative purposes kept together in one file or other assemblage, all the records in that file or assemblage are to be treated for the purposes of this Part as created when the latest of those records is created.

**57 Falling away of exemptions with time**

- 10 (1) Information contained in—
- (a) a historical record cannot be exempt information by virtue of any of sections 27 to 29, 32(1), 35, 36, 39 and 40(a); or
- 15 (b) a historical record held by the Keeper of the Records of Scotland cannot be exempt information by virtue of section 24 or 26.
- (2) Information cannot be exempt information by virtue of—
- (a) section 40(b) after the end of that period of sixty years; or
- (b) section 33(2)(b), 34 or 37(1)(c) after the end of that period of one hundred years,
- 20 which commences at the beginning of the calendar year following that in which the record containing the information is created.
- (3) Information in a deceased person’s health record cannot be exempt information by virtue of section 37(1)(d) after the end of that period of one hundred years which commences on the date of the person’s death.

**58 Power to vary periods mentioned in sections 56 and 57**

- 25 (1) The Scottish Ministers may by order amend subsection (1) of section 56 or paragraph (a) or (b) of subsection (2) of section 57 so as to substitute for the number of years for the time being mentioned in the provision in question such other number of years (not being a number which exceeds that mentioned in the provision as originally enacted) as may
- 30 be specified in the order.
- (2) An order under subsection (1) may contain such transitional provisions and savings as the Scottish Ministers think fit.

**PART 6**

## CODES OF PRACTICE

**59 Code of practice as to functions under this Act**

- 5 (1) The Scottish Ministers are to issue, and may from time to time revise, a code of practice providing guidance to Scottish public authorities as to the practice which it would, in the opinion of the Ministers, be desirable for the authorities to follow in connection with the discharge of the authorities' functions under this Act.
- 10 (2) The code must, in particular, include provision relating to—
- (a) the provision of advice and assistance by the authorities to persons who propose to make, or have made, requests for information;
  - (b) the transfer of requests by one of the authorities to another by which the information requested is or may be held;
  - (c) consultation with persons to whom information requested relates or with persons whose interests are likely to be affected by the disclosure of such information;
  - 15 (d) the inclusion in contracts entered into by the authorities of terms relating to the disclosure of information; and
  - (e) the provision by the authorities of procedures for dealing with complaints about the handling by the authorities of requests for information.
- (3) The code may make different provision for different Scottish public authorities.
- 20 (4) Before issuing or revising the code, the Scottish Ministers are to consult the Commissioner.
- (5) The Scottish Ministers must lay the code, and any revised code made under this section, before the Parliament.

**60 Code of practice as to the keeping, management and destruction of records**

- 25 (1) The Scottish Ministers are to issue, and may from time to time revise, a code of practice providing guidance to Scottish public authorities as to the practice which it would, in the opinion of the Ministers, be desirable for the authorities to follow in connection with the keeping, management and destruction of the authorities' records.
- 30 (2) The code may also include guidance as to the practice—
- (a) to be adopted in relation to the transfer of records to the Keeper of the Records of Scotland; and
  - (b) of reviewing records before they are so transferred.
- (3) In exercising their functions under this section, the Scottish Ministers are to have regard to the public interest in allowing public access to information held by Scottish public authorities.
- 35 (4) The code may make different provision for different Scottish public authorities.
- (5) Before issuing or revising the code the Scottish Ministers are to consult—
- (a) the Commissioner; and
  - (b) the Keeper of the Records of Scotland.
- 40 (6) The Scottish Ministers must lay the code, and any revised code made under this section, before the Parliament.

**PART 7**

## MISCELLANEOUS AND SUPPLEMENTAL

**61 Power to make provision relating to environmental information**

- 5 (1) In this section “the Aarhus Convention” means the Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters signed at Aarhus on 25th June 1998.
- (2) For the purposes of this section, “the information provisions” of the Aarhus Convention are Article 4, together with Articles 3 and 9 so far as relating to that Article.
- 10 (3) The Scottish Ministers may, in relation to information held by or requested from any Scottish public authority, by regulations make such provision as they consider appropriate—
- (a) for the purpose of implementing the information provisions of the Aarhus Convention or any amendment of those provisions made in accordance with Article 14 of the Convention; and
- 15 (b) for the purpose of dealing with matters arising out of, or related to, the implementation of those provisions or of any such amendment.
- (4) Regulations under subsection (3) may in particular—
- (a) enable charges to be made for making information available in accordance with the regulations;
- 20 (b) provide that any obligation imposed by the regulations in relation to the disclosure of information is to have effect notwithstanding any enactment or rule of law;
- (c) make provision for the issue by the Scottish Ministers of a code of practice;
- (d) provide for sections 42 and 43 to apply in relation to such a code with such modifications as may be specified in the regulations;
- 25 (e) provide for all or any of the provisions of Part 4 to apply, with such modifications as may be so specified, in relation to compliance with any requirement of the regulations; and
- (f) contain such transitional or consequential provision (including provision
- 30 modifying any enactment) as the Scottish Ministers consider appropriate.

**62 Power to amend or repeal enactments prohibiting disclosure of information**

- (1) If it appears to the Scottish Ministers that by virtue of section 25(a) a relevant enactment is capable of preventing the disclosure of information under section 1, they may by order repeal or amend that enactment, in so far as it relates to any Scottish public authority, so as to remove or relax the prohibition.
- 35 (2) In subsection (1)—
- “relevant enactment” means an Act of Parliament, or Act of the Scottish Parliament, which receives Royal Assent before the end of the calendar year in which this Act receives Royal Assent or any subordinate legislation made before the date on which this Act receives Royal Assent; and
- 40 “information” includes unrecorded information.

- (3) An order under subsection (1) may do all or any of the following—
- (a) make such modifications of enactments as, in the opinion of the Scottish Ministers, are consequential upon, or incidental to, the repeal or amendment of the relevant enactment;
  - (b) contain such transitional provisions and savings as appear to them to be appropriate;
  - (c) make different provision in relation to different cases.

### **63 Offence of altering etc. records with intent to prevent disclosure**

- (1) Where—

- (a) a request for information is made to a Scottish public authority; and
- (b) the applicant is, under section 1, entitled to be given the information or any part of it,

a person to whom this subsection applies who, with the intention of preventing the disclosure by the authority of the information, or part, to which the entitlement relates, alters, defaces, blocks, erases, destroys or conceals a record held by the authority, is guilty of an offence.

- (2) Subsection (1) applies to the authority and to any person who is employed by, is an officer of, or is subject to the direction of, the authority.
- (3) A person guilty of an offence under subsection (1) is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.

### **64 Saving for existing powers of disclosure**

Nothing in this Act is to be taken to limit the powers of a Scottish public authority to disclose information held by it.

### **65 Protection from actions for defamation**

Where, in compliance with a request for information, information supplied to a Scottish public authority by a third party is communicated by the authority, under section 1, to the applicant, the publication to the applicant of any defamatory matter contained in the information so supplied is privileged unless that publication is shown to have been made with malice.

### **66 Scottish Parliament, Scottish Administration and Scottish Parliamentary Corporate Body**

Section 63 and paragraph 10 of schedule 3 apply to—

- (a) a member of the staff of, or a person acting on behalf of, the Parliament or the Parliamentary corporation; or
- (b) a member of the staff of the Scottish Administration,

as they apply to any other person; but none of those bodies is liable to prosecution under this Act.

**67 Amendment of Public Records (Scotland) Act 1937**

- (1) The Public Records (Scotland) Act 1937 (c.43) shall be amended as follows.
- (2) In section 7 (constitution of Scottish Records Advisory Council), after subsection (3) there shall be inserted—

5 “(3A) The matters on which the aforesaid Council may advise the Scottish Ministers include matters relating to the application of the Freedom of Information (Scotland) Act 2001 (asp 00) to information contained in records which are historical records (within the meaning of Part 5 of that Act) held by the Keeper.”.

- 10 (3) After section 12 there shall be inserted—

**“12A Duty to afford facilities for inspection etc. of certain records**

It shall be the duty of the Keeper to arrange that reasonable facilities are available to the public for—

(a) inspecting; and

15 (b) obtaining copies of,

such records held by the Keeper as fall to be disclosed in accordance with the Freedom of Information (Scotland) Act 2001 (asp 00).”.

**68 Orders and regulations**

- 20 (1) Any power of the Scottish Ministers to make an order or regulations under this Act is exercisable by statutory instrument.

- (2) A statutory instrument—

(a) made in exercise of any of the powers conferred by sections 4(1), 9(3), 12, 13(1) or 61(3) is subject to annulment in pursuance of a resolution of the Parliament;

25 (b) containing an order under section 5(1), 7(2) or (4)(b), 58(1) or 62(1) or regulations under section 10(3), is not made unless a draft of the instrument has been—

(i) laid before; and

(ii) approved by resolution of,

the Parliament.

**69 Interpretation**

30 In this Act, unless the context requires a different interpretation—

“the Commissioner” means the Scottish Information Commissioner;

“body” includes an unincorporated association;

“decision notice” has the meaning given by section 48(5);

35 “enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Parliament;

“enforcement notice” has the meaning given by section 50(1);

“exempt information” means information which is so described in any provision of Part 2;

“fees notice” has the meaning given by section 9(1);

“information” (subject to sections 49(8) and 62(2)) means information recorded in any form;

“information notice” has the meaning given by section 49(1);

5 “Minister of the Crown” has the same meaning as in the Ministers of the Crown Act 1975 (c.26);

“the Parliamentary corporation” means the Scottish Parliamentary Corporate Body;

“publication scheme” has the meaning given by section 22(1)(a);

10 “refusal notice” has the meaning given by section 16(1) (including that section as read with section 18(2));

“requirement for review” has the meaning given by section 19(2);

“Scottish public authority” has the meaning given by section 3(1);

15 “subordinate legislation” has the same meaning as in the Interpretation Act 1978 (c.30) but includes an instrument made under an Act of the Parliament; and

“working day” means any day other than a Saturday, a Sunday, Christmas Day or a day which, under the Banking and Financial Dealings Act 1971 (c.80), is a bank holiday in Scotland.

## 70 Giving of notice etc.

20 (1) In this Act, any reference to—

(a) a notice being given is to be construed as a reference to its being—

(i) delivered; or

(ii) posted; and

25 (b) a request for information, a requirement for review or an application being made, or a certificate being given, is to be construed as a reference to its being—

(i) delivered;

(ii) posted; or

(iii) transmitted by electronic means.

(2) For the purposes of any provision of this Act, a thing—

30 (a) posted is presumed not to be received until the third day after the day of posting; and

(b) transmitted by electronic means is presumed to be received on the day of transmission.

(3) For the purposes of any provision of this Act, delivery or posting to—

35 (a) a body corporate, is delivery or posting to the body at its registered or principal office;

(b) a firm, is delivery or posting to its principal office; and

(c) any other person, is delivery or posting to that person’s last known address.

**71 Commencement**

(1) This section and sections 68 and 72 come into force on Royal Assent; and the other provisions of this Act come into force—

(a) at the end of that period of five years which begins with the date of Royal Assent;  
or

(b) on such day before the end of that period as the Scottish Ministers may by order appoint,

and different days may be so appointed for different provisions and for different purposes.

(2) An order under paragraph (b) of subsection (1) may contain such transitional provisions and savings (including provisions capable of having effect after the end of the period referred to in that subsection) as the Scottish Ministers consider appropriate.

(3) During—

(a) that period of twelve months which begins with the date of Royal Assent; and

(b) each subsequent period of twelve months until all the provisions of this Act are fully in force,

the Scottish Ministers shall prepare, and lay before the Parliament, a report of their proposals for bringing fully into force the provisions of this Act.

**72 Short title**

This Act may be cited as the Freedom of Information (Scotland) Act 2001.



**PART 4**

## THE NATIONAL HEALTH SERVICE

- 22 The Common Services Agency for the Scottish Health Service.
- 23 A Health Board, constituted under section 2 of the National Health Service (Scotland)  
5 Act 1978 (c.29).
- 24 A local health council, established under section 7 of that Act.
- 25 A professional advisory committee of the National Health Service in Scotland.
- 26 A National Health Service trust.
- 27 The Scottish Ambulance Service Board.
- 10 28 The Scottish Dental Practice Board.
- 29 The Scottish Hospital Endowments Research Trust.
- 30 The Scottish Hospital Trust.
- 31 Any person providing general medical services, general dental services, general  
15 ophthalmic services or pharmaceutical services under Part II of the National Health  
Service (Scotland) Act 1978, but only in respect of information relating to the provision  
of those services.
- 32 Any person providing personal medical services or personal dental services under  
arrangements made under section 17C of that Act, but only in respect of information  
relating to the provision of those services.

**PART 5**

## EDUCATIONAL INSTITUTIONS

- 33 The board of management of a college of further education (expressions used in this  
paragraph having the same meaning as in section 36(1) of the Further and Higher  
Education (Scotland) Act 1992 (c.37)).
- 25 34 Any institution in receipt of funding from the Scottish Higher Education Funding  
Council.

**PART 6**

## POLICE

- 35 A joint police board constituted by an amalgamation scheme made or approved under  
30 the Police (Scotland) Act 1967 (c.77).
- 36 A chief constable of a police force in Scotland.

**PART 7**

## OTHERS

- 37 The Accounts Commission for Scotland.
- 35 38 The Advisory Committee on Sites of Special Scientific Interest.
- 39 The Ancient Monuments Board for Scotland.
- 40 Audit Scotland.
- 41 The Auditor General for Scotland.

- 42 Caledonian MacBrayne Limited.
- 43 The Clinical Standards Board for Scotland.
- 44 The Commissioner for Local Administration in Scotland.
- 45 Community Learning Scotland.
- 5 46 The Crofters Commission.
- 47 The Deer Commission for Scotland.
- 48 The East of Scotland Water Authority.
- 49 The Fisheries Committee continued in existence by paragraph 5 of Schedule 9 to the Electricity Act 1989 (c.29).
- 10 50 The General Teaching Council for Scotland.
- 51 The Health Appointments Advisory Committee.
- 52 The Health Education Board for Scotland.
- 53 The Health Technology Board for Scotland.
- 54 Highlands and Islands Enterprise.
- 15 55 The Historic Buildings Council for Scotland.
- 56 Learning and Teaching Scotland.
- 57 The Local Government Boundary Commission for Scotland.
- 58 The Mental Welfare Commission for Scotland.
- 59 The Board of Trustees for the National Galleries of Scotland.
- 20 60 The Trustees of the National Library of Scotland.
- 61 The Board of Trustees of the National Museums of Scotland.
- 62 A National Park authority, established by virtue of schedule 1 to the National Parks (Scotland) Act 2000 (asp 10).
- 63 The North of Scotland Water Authority.
- 25 64 The Parole Board for Scotland.
- 65 The Police Advisory Board for Scotland.
- 66 The Post Qualification Education Board for Health Service Pharmacists in Scotland.
- 67 A procurator fiscal.
- 68 The Board of Trustees of the Royal Botanic Garden, Edinburgh.
- 30 69 The Royal Commission on the Ancient and Historical Monuments of Scotland.
- 70 The Scottish Advisory Committee on Alcohol Misuse.
- 71 The Scottish Advisory Committee on the Dental Workforce.
- 72 The Scottish Advisory Committee on Distinction Awards.
- 73 The Scottish Advisory Committee on Drug Misuse.
- 35 74 The Scottish Agricultural Wages Board.
- 75 The Scottish Arts Council.

- 76 The Scottish charities nominee, appointed under section 12 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40).
- 77 The Scottish Children's Reporter Administration.
- 78 The Scottish Commission for the Regulation of Care.
- 5 79 The Scottish Conveyancing and Executry Services Board.
- 80 The Scottish Council for Post Graduate Medical and Dental Education.
- 81 The Scottish Criminal Cases Review Commission.
- 82 Scottish Enterprise.
- 83 The Scottish Environment Protection Agency.
- 10 84 The Scottish Further Education Funding Council.
- 85 The Scottish Health Advisory Service.
- 86 The Scottish Higher Education Funding Council.
- 87 The Scottish Industrial Development Advisory Board.
- 88 The Scottish Information Commissioner.
- 15 89 The Scottish Law Commission.
- 90 The Scottish Legal Aid Board.
- 91 The Scottish Medical Practices Committee.
- 92 The Scottish National Rural Partnership.
- 93 Scottish Natural Heritage.
- 20 94 The Scottish Parliamentary Commissioner for Administration.
- 95 The Scottish Prison Complaints Commission.
- 96 The Scottish Qualifications Authority.
- 97 The Scottish Records Advisory Council.
- 98 Scottish Screen.
- 25 99 The Scottish Social Services Council.
- 100 The Scottish Sports Council.
- 101 The Scottish Standing Committee for the Calculation of Residual Values of Fertilisers and Feedings Stuffs.
- 102 The Scottish Tourist Board.
- 30 103 The Scottish Valuation and Rating Council.
- 104 The Standards Commission for Scotland.
- 105 The Water Industry Commissioner for Scotland.
- 106 The West of Scotland Water Authority.

SCHEDULE 2  
(introduced by section 41(12))

THE SCOTTISH INFORMATION COMMISSIONER

*Status*

- 5        1        The Commissioner and that officer's staff are not to be regarded as servants or agents of the Crown or as having any status, immunity or privilege of the Crown; and the Commissioner's property is not to be regarded as property of, or property held on behalf of, the Crown.

*Pensions, allowances, etc.*

- 10       2 (1)    The Parliamentary corporation may make arrangements for the payment of pensions, allowances or gratuities to, or in respect of, any person who has ceased to hold the office of Commissioner and (without prejudice to that generality) may—
- (a) make contributions or payments towards provision for such pensions, allowances or gratuities; and
- 15           (b) for the purposes of this sub-paragraph, establish and administer one or more pension schemes.
- (3) The references in sub-paragraph (1) to pensions, allowances and gratuities include references to, as the case may be, pensions, allowances or gratuities by way of compensation for loss of office.

20       *Staff*

- 3 (1)    The Commissioner may appoint such staff, on such terms and conditions, as that officer may determine.
- (2)    The Commissioner may make arrangements for the payment of pensions, allowances or gratuities to, or in respect of, any person who has ceased to be a member of such staff and (without prejudice to that generality) may—
- 25           (a) make contributions or payments towards provision for such pensions, allowances or gratuities; and
- (b) for the purposes of this sub-paragraph, establish and administer one or more pension schemes.
- 30           (3)    The references in sub-paragraph (2) to pensions, allowances and gratuities include references to, as the case may be, pensions, allowances or gratuities by way of compensation for loss of employment.
- (4)    A determination under sub-paragraph (1) or arrangements under sub-paragraph (2) require the approval of the Parliamentary corporation.

35       *Accounts*

- 4        (1)    The Commissioner must—
- (a) keep accounts; and
- (b) prepare annual accounts in respect of each financial year,
- in accordance with such directions as the Scottish Ministers may give that officer.
- 40        (2)    The Commissioner must send a copy of the annual accounts to the Auditor General for Scotland for auditing.

- (3) The financial year of the Commissioner is—
- (a) the period beginning with the date on which the Commissioner is appointed and ending with 31st March next following that date; and
  - (b) each successive period of twelve months ending with 31st March.
- 5 (4) If requested by any person, the Commissioner must make available at any reasonable time, without charge, in printed or in electronic form, the audited accounts, so that they may be inspected by that person.

*General powers*

- 5 The Commissioner may do anything which appears necessary or expedient for the purpose of, or in connection with, or which appears conducive to, the exercise of that officer's functions; and without prejudice to that generality, may in particular—
- (a) acquire and dispose of land and other property; and
  - (b) enter into contracts.

SCHEDULE 3  
(introduced by section 53 )

POWERS OF ENTRY AND INSPECTION

*Grant of warrants*

- 1 (1) If a sheriff is satisfied by evidence on oath supplied by the Commissioner that there are reasonable grounds for suspecting—
- 20 (a) that a Scottish public authority has failed or is failing to comply with—
    - (i) any of the requirements of Part 1 of this Act;
    - (ii) so much of a notice given to it by the Commissioner under subsection (5) of section 48 as, by virtue of subsection (6)(b) of that section, requires steps to be taken; or
    - 25 (iii) an information notice or an enforcement notice; or
  - (b) that an offence under section 63(1) has been or is being committed,
- and that evidence of such a failure to comply or of the commission of the offence is to be found on any premises specified as part of that evidence, the sheriff, subject to paragraph 2, may grant to the Commissioner such warrant as is mentioned in sub-paragraph (2).
- 30 (2) The warrant is one which authorises the Commissioner, or any member of the Commissioner's staff, at any time within seven days after the date of the warrant—
- (a) to enter and search the premises;
  - (b) to inspect and seize any documents or other material found there which may constitute the evidence in question; and
  - 35 (c) to inspect, examine, operate and test any equipment found there in which information held by the authority may be recorded.
- 2 (1) A sheriff must not grant the warrant unless satisfied—

(a) that the Commissioner has given seven days' notice in writing to the occupier of the premises demanding access to them; and

(b) that either—

(i) access was demanded at a reasonable hour and was unreasonably refused; or

(ii) although entry to the premises was granted, the occupier unreasonably refused to comply with a request by the Commissioner, or any member of the Commissioner's staff, to permit the Commissioner or any such member of staff to do any of the things referred to in paragraph 1(2); and

(c) that the occupier has, after the refusal, been notified by the Commissioner of the application for the warrant and has had an opportunity of being heard by the sheriff on the question of whether or not it should be granted.

(2) Sub-paragraph (1) does not apply if the sheriff is satisfied that the case is one of urgency or that compliance with the provisions of that sub-paragraph would defeat the object of the entry.

#### *Execution of warrants*

A person executing the warrant may use such reasonable force as may be necessary.

The warrant must be executed at a reasonable hour, unless it appears to the person executing it that there are grounds for suspecting that the evidence in question would not be found if it were so executed.

(1) If the premises in respect of which the warrant is granted are occupied by a Scottish public authority and any officer or employee of the authority is present when the warrant is executed, that officer or employee must be shown the warrant and supplied with a copy of it; and if no such officer or employee is present a copy of the warrant must be left in a prominent place on the premises.

(2) If the premises in respect of which the warrant is granted are occupied by a person other than a Scottish public authority and that person is present when the warrant is executed, the person must be shown the warrant and supplied with a copy of it; and if the person is not present a copy of the warrant must be left in a prominent place on the premises.

(1) A person seizing anything in pursuance of the warrant must give a receipt for it if asked to do so.

(2) Anything so seized may be retained for so long as is necessary in all the circumstances, but the person in occupation of the premises must be given a copy of anything that is seized if that person so requests and the person executing the warrant considers that it can be done without undue delay.

#### *Matters exempt from inspection and seizure*

The powers of inspection and seizure conferred by the warrant are not exercisable in respect of information which is exempt information by virtue of section 30(1)(a).

(1) Subject to the provisions of this paragraph, the powers of inspection and seizure conferred by the warrant are not exercisable in respect of—

(a) a communication between professional legal adviser and client in connection with the giving of legal advice to the client with respect to the client's obligations, liabilities or rights under this Act; or

5 (b) a communication between professional legal adviser and client, or between such adviser or client and another person, made in connection with or in contemplation of proceedings under or arising out of this Act and for the purpose of such proceedings.

(2) Sub-paragraph (1) applies also to—

(a) a copy or other record of such communication as is there mentioned; and

10 (b) a document or article enclosed with or referred to in such communication if made in connection with the giving of any advice or, as the case may be, in connection with or in contemplation of and for the purpose of such proceedings as are there mentioned.

15 (3) This paragraph does not apply to anything in the possession of a person other than the professional legal adviser or client or to anything held with the intention of furthering a criminal purpose.

(4) In this paragraph references to the client of a professional legal adviser include references to a person representing such a client.

9 20 If the person in occupation of premises in respect of which the warrant is granted objects to the inspection or seizure under it of any material on the grounds that the material consists partly of matters in respect of which those powers are not exercisable, that person must, if requested, provide in response to the warrant a copy of so much of the material as is material in relation to which the powers are exercisable.

### *Offences*

25 10 A person who—

(a) intentionally obstructs a person who is executing the warrant; or

(b) fails, without reasonable excuse, to give the person who is executing the warrant such assistance as that person may reasonably require for executing it,

is guilty of an offence.

30 *Vessels, vehicles etc.*

11 In this schedule, “premises” includes vessel, vehicle, aircraft or hovercraft, and references to the occupier of premises include references to the person in charge of a vessel, vehicle, aircraft or hovercraft.