

The Campaign for Freedom of Information in Scotland

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FREEDOM OF INFORMATION (SCOTLAND) BILL

STAGE 3

BRIEFING ON AMENDMENTS

23 April 2002

Section 1(4)	Amendment 60	Donald Gorrie	Destruction of Records
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Section 1(4) allows an authority to amend or delete information from a record before disclosing it, if that change would have been made regardless of the request.

This would allow an authority to destroy a record, even after receiving a request for it, if it had previously planned to do so – and even if it would be perfectly simple to preserve the document and release it. The failure to prevent this is wholly at odds with the spirit of this legislation.

We support amendment 60, which would prevent the authority from destroying a requested record, unless that was impracticable.

Schedule 1	Amendments 78-80	Michael Matheson, Donald Gorrie	Fire authorities, contracted out prisons, social inclusion partnerships
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We support amendments 78-80 which would bring fire authorities, contracted out prisons and social inclusion partnerships within the Bill’s scope.

We do not support amendment 48, proposed by Jim Wallace, which would remove housing associations from the Bill.

After section 5	Amendment 63	Michael Matheson	Privatised or transferred functions
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Ministers have the power to remove authorities from the Bill's scope by order.¹ This power may be used to keep the list of authorities in the Schedule up to date (eg by deleting those which no longer exist) but it could also be used to remove an existing authority from the scope of the Bill altogether or to allow the privatised functions of an authority to be removed from the Bill's scope.

Ministers have the power to designate new bodies as authorities subject to the Bill² but are not required to do so in any particular case.

We support amendment 63, which would require Ministers to ensure that if any function of a body subject to the Bill is transferred to a body which is *not* subject to it, an order is made bringing the new body within the Bill, but only in relation to the transferred function.

The only exception would be where Ministers are not competent to make such an order, in which case they must explain their reasons in a statement to the Parliament.

Section 6	Amendments 1 & 2	Michael Matheson	Companies controlled by public authorities
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The Bill applies to “publicly owned companies”³, but defines such companies as those which are *wholly-owned* by Ministers or by a Scottish public authority.⁴

Companies which are *controlled* by a public authority but not wholly owned by it, are not covered by this definition.

- A company in which an authority holds 99% of the shares would be outside the Bill's scope. This might even tempt authorities to evade the legislation by selling a single share in an otherwise wholly-owned company.
- A company jointly owned by two or more public authorities – with no element of private ownership at all – would also be outside the Bill.

¹ Section 4(1)(b)

² Under section 4(1)(a) or section 5(1)

³ Section 3(1)(b)

⁴ Section 6

We support amendments 1 and 2, which would bring such companies within the scope of the Bill.

Section 18	Amendment 21	Jim Wallace	Refusal to confirm or deny
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Section 18 allows a Scottish authority to refuse to reveal whether information exists, merely because the information is exempt – and regardless of whether it would be harmful to confirm that the information does exist.

This is weaker than the corresponding provision in the UK Freedom of Information Act 2000, which only allows an authority to refuse to confirm whether it holds information if to do so would prejudice the interest concerned and/or be contrary to the public interest.

Amendment 21 moves in the right direction, by permitting authorities to refuse to confirm the existence of exempt information only where to do so would be contrary to the public interest.

Section 27	Amendment 24	Jim Wallace	New exemption for research data
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Section 27 allows information which is due to be published to be withheld for up to 12 weeks from the date of the request. Amendment 24 would extend this period indefinitely for information obtained from a programme of research, subject to tests of substantial prejudice and public interest.

We understand that this is prompted by concerns from universities that the exemption as it stands would allow requesters to obtain their research data, unless it could be shown that some other exemption might apply (eg prejudice to commercial interests, information subject to an obligation of confidentiality, or prejudice to the effective conduct of public affairs).

However, we are concerned at the breadth of the proposed exemption, and at its introduction at such a late stage in the Bill's proceedings. The range of interests protected by the exemption are very substantial and poorly defined and certainly appear to go beyond the conventional academic interest in maintaining a researcher's or institution's rights to be the first to publish their own findings.

Section 29(1)	Amendment 70	Robert Brown & Robin Harper	Disclosure of factual information
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We have serious reservations about a number of “class exemptions” which could be used to block access to an enormous volume of crucial information. Section 29(1) is one of the most serious of these. It contains an all-embracing exemption for information relating to the “formulation or development of government policy”. Such information can be disclosed only under the section 2 public interest test which requires the public interest in disclosure to be weighed against the public interest in confidentiality.

The only exception to this *is for statistical information* relating to a *decision which has been taken* [s 29(2)]. The limited nature of the exception confirms that even statistics could be withheld under this enormous exemption.

This exemption’s approach may be appropriate for civil service advice, but not for purely factual information such as research findings, cost data or a straightforward factual description of a problem. By adopting a balancing test, officials may be actively encouraged to look for public interest arguments *against* disclosure, eg that the information is unreliable, may give a misleading impression or alarm the public. This is likely to undermine progress towards a more open culture.

FOI laws in Ireland and Australia explicitly prevent factual information from being withheld under the corresponding exemptions. These are intended to protect advice – not facts.

The Ombudsman, who supervises the Scottish Executive’s open government code has consistently made clear that the corresponding code exemption “is intended to protect advice, not factual information”.⁵

We strongly support amendment 70, which goes part of the way towards adopting the Irish and Australian approach. Once a decision has been taken, “purely factual” information would be treated in the same way as statistical information. It could not be withheld under the exemptions for policy formulation or ministerial communications.

⁵ Parliamentary Ombudsman. Case A31/99. This and a series of similar rulings were made by the Parliamentary Ombudsman, Mr Michael Buckley, who is also the Scottish Parliamentary Commissioner for Administration. There have been no formal decisions under the Scottish code, but the code and its exemptions are identical.

Section 36	Amendment 71	Michael Matheson	Confidentiality exemption not to apply between public authorities
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Section 36(2) exempts information whose disclosure would constitute an actionable breach of confidence. Broadly, it applies to unpublished information supplied in confidence to an authority by someone else.

The justification for such an exemption is that it enables public authorities to obtain information from individuals or companies which they need in order to carry out their functions and which would not otherwise be supplied to them.

However, section 36(2) is exceptionally wide in its scope: it applies not just to information from individuals and businesses but to information from *other public authorities*.

Overseas FOI laws including those of Australia, Canada, Ireland and South Africa all exclude information supplied by another public authority from their exemptions for information supplied in confidence.

The amendment would bring the Bill into line with those FOI laws. It would *exclude* information supplied by another authority from the scope of the exemption.

There are already plenty of exemptions to protect communications between different authorities:

- If the information is supplied by one Scottish authority to another, the exemptions for information whose disclosure could substantially prejudice the frankness of advice, the frank exchange of views or the effective conduct of public affairs could apply.⁶
- If the information is supplied to the Executive by a Scottish public authority, the policy formulation exemption⁷ may apply;
- If the information is supplied in confidence by a UK government department it *is outside the scope of the Bill altogether*⁸

⁶ Section 30(b)

⁷ Section 29(1)(a)

⁸ Section 3(2)(a)(ii)

The first two of these exemptions are also subject to the Bill's public interest test, requiring authorities to meet a strict test before they can withhold information. The section 36(2) test, on the other hand, is extremely easily invoked.

Scottish authorities who wish to withhold their *own* information have to meet demanding tests, requiring them to show that disclosure would cause substantial prejudice and be contrary to the public interest. Why should information which the same authorities exchange between themselves be subject to far less demanding tests?

Section 45	Amendment 27	Jim Wallace	Disclosure offences by the Commissioner
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Section 45 provides that the Commissioner may commit an offence by disclosing information which he or she has obtained for the purposes of the Act, unless the disclosure meets a number of conditions. We think the provision is potentially damaging – and the UK Information Commissioner has also objected to a similar (if slightly narrower) provision in the UK FOI Act. However, we welcome this amendment, which partially limits the extent of the offence.

Section 52	Amendment 8	Michael Matheson	Remove the ministerial veto
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In many important areas, large classes of information are exempt and disclosable only under the public interest balancing test in section 2(1)(b). However, any order which the Information Commissioner made requiring disclosure in these areas could be vetoed by Scottish Ministers under section 52.

The veto could block any disclosure of information relating to: the formulation of government policy including the facts on which policy decisions have been based; any ministerial communications or reference to them; law officers' advice; the operation of a ministerial private office; national security; investigations and proceedings; routine inspections by enforcement bodies including those dealing with safety matters; information relating to incomplete fatal accident inquiries; or obtained in connection with the making of a report about a death to the procurator; information about the obtaining of information from confidential sources; legal advice and honours.

Jim Wallace’s amendment 30 would limit the use of the veto to cases where the information is of “exceptional sensitivity”. This is a move in the right direction. We nevertheless believe the veto is wrong in principle and open to abuse. **We support Amendment 8** which would delete the veto power altogether.

Section 72	Amendment 77	Robin Harper	Commencement
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Section 72(1) allows an extraordinary period, *of up to five years* from Royal Assent, for the Act to be brought into force.

Robin Harper’s Amendment 77, which we support – would require the Act to be brought into force within *one year* of Royal Assent. Overseas FOI laws have been implemented far much more rapidly, applying to central government after a year in Canada and Ireland, 9 months in Australia and 7 months in New Zealand.

The 1 year period proposed in the amendment is in line with overseas practice - and with the principles set out by Consultative Steering Group that Scotland’s Parliament should be open, accessible and accountable and that the Executive should be accountable to the Parliament and the people. The Parliament has already been functioning for almost three years without freedom of information – it should not permit this situation to continue for another 4 or 5 years.
