

# Scottish Information Commissioner

## Briefing Note for the Scottish Parliament

### Finance Committee



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Briefing Note on proposed amendments to the  
Freedom of Information (Amendment) (Scotland) Bill  
Stage 2

#### Original section 1, amending Section 2 of FOISA

The original Amendment Bill proposed a change to section 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), to make section 41(a) an absolute exemption, removing the public interest test – the proposal that came to be referred to as “The Royal Exemption”. Following the recommendation of the Committee in their stage 1 report, this has been removed by Ministers. I welcome this.

#### New section 1 on designation, amending Section 5 and inserting section 7A of FOISA

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

I support the proposals to introduce a requirement for wider consultation at section 5(5)(b) of FOISA. However, I am concerned that the amendment proposed by Ministers lacks precision, in that it fails to indicate the types of persons or bodies who should be included in such a consultation. As I set out in my letter to the Committee of 28 September, a weakness of the current provision is that it does not require consultation with the users of public services whose rights may be curtailed as a result of changes in public service delivery. I would therefore urge the Committee to consider how the current proposed wording will provide the necessary safeguards to ensure the general public, and those who represent them, will be appropriately represented in any future consultation.

- **7A - Reports on section 5 power (to be inserted after section 7)**

I support the proposal to introduce mandatory reporting to Parliament on the exercise (or otherwise) of the section 5 power. However, given that the section 5 power has now lain dormant for ten years, I would question whether it is appropriate to delay the laying of an initial report for a further three and a half years, until June 2016. The Committee may want to consider whether it may be appropriate for this timescale to be brought forward, in order to provide both the public and the Parliament with a speedier reassurance that FOI rights are being protected - and if not why not?

The Committee may also wish to consider the rationale behind the proposal to leave a period of three years between parliamentary reports. I would suggest that it may be desirable to consider whether reports can be laid more frequently (e.g. every two years). This would help ensure that, where rights are lost through e.g. the outsourcing of public services or the transfer of housing stock, service users or tenants are not faced with a lengthy delay before this loss of rights is remedied. It would also ensure more regular Parliamentary scrutiny.



### **Sections 2 and 5, amending sections 18 and 65 of FOISA**

- **18 - Further provision as respects responses to request**
- **65 - Offence of altering etc. records with intent to prevent disclosure and**
- **Inserting after s65, 65A Time limit for proceedings**

I support the proposed amendments and have no additional comments to make to those made at stage 1.

### **Section 3, amending section 25 of FOISA**

- **25 - Information otherwise accessible**

The proposed wording appears to give the clarity desired and I support the amendment.

### **Section 4, amending sections 57, 58, 59 and 72 of FOISA by the insertion of sections (IZA) and (IZB)**

- **57 - The expression “historical record”**
- **58 - Falling away of exemptions with time**
- **59 - Power to vary periods mentioned in sections 57 and 58**
- **72 - Orders and regulations**

Having reviewed this amendment in detail, I am concerned about its potential impact on the lifespan of exemptions. In particular, I am concerned about unforeseen consequences that may arise in relation to the lifespan of the exemption under section 41(a) of FOISA (Communications with Her Majesty, etc.).

Section 59(IZA) gives Ministers the power to modify any rule by which a record becomes a historical record. I am unclear as to the purpose of this amendment and what it may achieve over and above the existing provision in section 59(1). It strikes me that the key factor which qualifies a record as “historical” will be its age. The Committee may wish to consider what “rules” beyond this factor that Ministers consider might be relevant here and whether the ability to vary them would support or undermine the aims of FOISA.

Section 59(IZB)(a) looks to the section 41(a) exemption and gives examples of the types of rules the Ministers may make for that exemption. In relation to section 59(IZB)(a), Ministers suggest they may want to make regulations which will allow the Royal Communications exemption to fly-off after a period of less than the current 30 years or after no more than 30 years after an “event”. There is no further definition provided in relation to what is meant by an “event”.

I am extremely concerned about this provision, and the lack of definition of an “event”. As drafted, a relevant event could be one which happens many years in the future (e.g. such as the coronation or death of a future monarch), which would have the effect of substantially lengthening the period during which the exemption can be applied. In addition, the term “event” can be defined so widely as to be almost meaningless. The only thing that is clear from section 59(IZB)(a)(ii) is that it doesn’t include the creation of a record. The current proposed amendment has the potential to conflict with the Bill’s intent to reduce the timespan for the falling away of exemptions.



It is clear that any future rules would be required to go through the affirmative resolution procedure (as set out in the proposed amendment to section 72(2)(b)). It is also clear from the amendment withdrawn by the Deputy First Minister that the section 41(a) exemption will remain subject to the public interest test.

Nevertheless, I would suggest that the Committee ensure that the section 59(1ZB)(a) provision is fully scrutinised at stage 2, in order to ensure that the circumstances in which it might be applied, including any potential unintended consequences in relation to the lifespan of exemptions, are fully understood.