

FREEDOM OF INFORMATION - CONSULTATION ON DRAFT LEGISLATION

REPORT BY THE DIRECTOR OF LAW AND ADMINISTRATION

ABSTRACT

This Report seeks agreement to the terms of a Council response to the consultation document on draft legislation on Freedom of Information.

1. RECOMMENDATION

It is recommended that the Council:-

- (i) notes the terms of the Freedom of Information draft legislation;
- (ii) notes that considerable work will be required across the Council to ensure that the Council is in a position to comply with the Freedom of Information regime when it is implemented; and
- (iii) approves the comments attached to this Report (**APPENDIX A**) as the Council's response to the consultation document.

2. BACKGROUND

Reference is made to Article 15 of the minute of meeting of the Policy and Resources Committee of 21 March 2000, when the Committee approved the Council's response to the consultation document entitled *An Open Scotland*. The Scottish Executive is committed to the introduction of an effective statutory Freedom of Information regime, and 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.

3. DRAFT LEGISLATION

Following consideration of the responses received to *An Open Scotland*, the Scottish Executive has now published a draft Freedom of Information Bill, on which comments are sought. The introduction to the consultation document indicates that Freedom of Information is not a simple area of public policy, involving 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.

3.1 Summary

The consultation document summarises the terms of the draft Bill as follows:-

"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.

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.

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."

A copy of the full commentary on the draft Bill has been placed in the Members' Lounge. The main provisions are summarised in the following paragraphs.

3.2 Part 1 - Access to Information Held by Scottish Public Authorities

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. 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.

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.

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.

Public authorities will be required to adopt and maintain a publication scheme, which must specify the following:-

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

Such a scheme will have to be approved by the Scottish Information Commissioner.

It is recognised that 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.

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*. 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.

3.3 Part 2 - Exempt Information

The draft Bill includes a number of categories of information which are exempt from the general right of access to information. Part 2 of the draft Bill is devoted to making provision for exempt information. The commentary on the draft Bill states 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." 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, 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 draft Bill sets out the exemptions and the tests for disclosure which apply to these. There are two "tests", namely the "harm test" and the "public interest test".

With regard to the "harm test", the draft Bill retains the approach in *An Open Scotland* which 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. This is referred to in the Bill as "substantial prejudice".

As regards the "public interest test", it is common in statutory Freedom of Information regimes to include a requirement that the public interest in disclosures should be considered. Accordingly, information could be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

The draft Bill then divides the exemptions into three categories, "content", "class" and "absolute". In summary, the proposals are:-

- Content based exemptions would require to pass both the "harm test" and the "public interest test".
- Class based exemptions apply to information where the general presumption is that the information would not ordinarily be released. In other words, the "harm test" would be deemed to have been satisfied, but in most cases the authority would need to consider the "public interest test" before refusing to disclose the information.
- Absolute exemptions cover a small number of class exemptions where the "public interest test" would not be applied because disclosure would be neither appropriate nor sensible.

The commentary on the draft Bill provides a brief description of each of the exemptions contained in the draft Bill. Annex B to the consultation document, attached as **APPENDIX 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.

3.4 Parts 3 and 4 - The Scottish Information Commissioner and Enforcement

The draft Bill establishes a Scottish Information Commissioner as an independent office holder to promote and enforce the Scottish Freedom of Information legislation. The Commissioner would have a general duty to promote good practice by Scottish public 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.

The draft Bill provides for the Commissioner to make reports to the Scottish Parliament and hear appeals against an authority's decision not to disclose information. The draft Bill does not include a further right of appeal to an Information Tribunal as, following the consultation on *An Open Scotland*, the Executive has decided that this would add an unnecessary layer of bureaucracy and possibly undermine the Commissioner's powers. However, as in the case of other administrative decisions, it will be open to the applicant and the public authority to appeal to the Courts on a point of law.

The draft Bill also proposes that, for certain categories of information, the final decision on the release of information should be the subject of a collective consideration by the Scottish Ministers. The commentary suggests that 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 therefore provides 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. Effectively, this means that the Scottish Executive is operating within slightly different rules than the other public authorities covered by the Bill.

3.5 Part 5 - Historical Records

The commentary states that the right of access under Freedom of Information will have implications for the public records system. The Bill defines records that are over 30 years old as "historical records". Essentially, the Bill provides 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 (eg 30 years), then they would have to be made open at that stage.

3.6 Part 6 - Codes of Practice

There are two Codes of Practice which the draft Bill requires the Scottish Ministers to issue. These are:-

- **Guidance on how public authorities should discharge their duties in complying with the Bill.** This Code would cover matters such as the provision of advice and assistance to applicants, transferring requests to another public authority, consultation with third parties, 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.
- **Guidance on the keeping, management and destruction of Scottish public authority records.** This Code can 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.

3.7 Part 7 - Miscellaneous and Supplemental

The remainder of the draft Bill deals with environmental information and the usual "technical" matters such as a power to amend or repeal statutory bars and the commencement arrangements. The intention is that all provisions of the legislation will come into force within five years of Royal Assent and will be brought into force by Order on a phased basis.

3.8 Further Work

The Scottish Executive intends to add certain matters to the Bill in relation to the sharing of information between the Scottish Information Commissioner and Scottish Ombudsmen. Indeed, in the context of the Executive's consultation on "Modernising the Complaints System", it is proposed to consider whether there would be merit in combining the offices of these officials. The Executive is also considering whether a "purpose" clause should be included in the draft legislation but has not yet reached a final decision. Further work is also required in relation to historical records and the institutional coverage of the legislation.

4. PROPOSED RESPONSE

A suggested response by the Council to this consultation document is attached as APPENDIX A to this Report. It is disappointing that a number of the comments made by the Council in response to the earlier consultation exercise have not been picked up and these are accordingly reiterated.

5. FINANCIAL IMPLICATIONS

There are no financial implications arising directly from this Report. However considerable work will be required within the Council in relation to the Freedom of Information regime, both in ensuring that all records are appropriately managed and in making information available in response to requests. The financial implications of this should not be underestimated and this point has been picked up in the response to the consultation document.

6. HUMAN RIGHTS IMPLICATIONS

There are no human rights implications arising from the terms of this Report.

7. CONSULTATION

This Report has been subject to consultation with the Chief Executive, Director of Finance and Acting Director of Cultural Services.

CATHERINE A COULL
DIRECTOR OF LAW AND ADMINISTRATION

Note: The background papers, as defined by Section 50D of the Local Government (Scotland) Act 1973 (other than any containing confidential or exempt information) which were relied on to any material extent in preparing the above Report, are contained in file TA/1/127.

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FREEDOM OF INFORMATION

PROPOSED RESPONSE BY ANGUS COUNCIL

1. The Council welcomes the intention that the Freedom of Information Bill would apply to all Scottish public authorities. A number of these bodies do not currently operate with the openness which is now seen in local government and there is enormous advantage to be gained from bringing all Scottish public authorities under one Freedom of Information regime. In principle therefore, and subject to the comments set out below, the draft Bill is welcomed by Angus Council.
2. The Council has, however, concerns regarding the cost to public authorities of the proposed new regime. The section on costs in the consultation document does not appear to give sufficient regard to the initial costs to public authorities in setting up systems to ensure compliance with the regime. This is largely dismissed in the consultation paper by the statement 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".

While it is certainly the case that local authorities have in place procedures in accordance with their statutory obligations to be in a position to respond to requests for information, the fact that the proposed new legislation would be fully retrospective, with access rights covering information of **any** age held by Scottish public authorities, will mean considerable preparatory work being done in ensuring that all archived material can be easily accessed on request. There will also be considerable cost and practical implications relating to the need to store such information. In many cases such information may be stored at a location remote from the public authority's main office and difficulties may be encountered in accessing it. It may be necessary for authorities to appoint a Records Officer to ensure proper procedures are in place, and the actual storage accommodation will require to be physically suitable for ensuring the long-term protection of records. It is essential that the Scottish Executive does not underestimate costs of introducing this regime and ensures that public authorities are adequately funded to enable them to comply with it.

3. With regard to the issues of charging, the Council accepts the intention of the Scottish Executive that fees for supplying information under the Act should not be required to provide for full cost recovery. The Council would, however, reiterate its view that there should be a mandatory flat rate fee of £10 for information costing less than £100 to provide; with discretionary powers to charge applicants full marginal costs between £100 and a maximum level set out in regulations. Although the concept of "full marginal costs" is understood, it would be helpful, for the sake of clarity, for the definition to be set out in the regulations.
4. The Council would reiterate its concerns at the strictness of the test for a content based exemption that information could be withheld from disclosure only where such disclosure would cause substantial prejudice to the protected interest. It is considered that "substantial prejudice" is too stringent a test - particularly as it is understood that the test in the English legislation is likely to be simply "prejudice". Public authorities deal with a great number of individuals, authorities and organisations who might very well have difficulty in their affairs being disclosed to the public although falling short of being "substantially prejudice" by it. The difficulties in interpreting the term should not be underestimated and the Council would strongly urge the Scottish Executive to reconsider their position in this matter.

5. With regard to the class based exemptions on "formulation of Scottish Administration policy etc" and "prejudice to effective conduct of public affairs" the Council is extremely disappointed to note that these exemptions cover only Scottish Ministers. The formulation of policy, the provision or the request for provision of advice from legal advisers, the free and frank provision of advice or exchange of views for the purposes of deliberations are all matters which pertain to local authorities equally as much as to Scottish Ministers. It is considered entirely inappropriate that such matters when being dealt with by Scottish Ministers should be covered by a class based exemption while local authorities and other public bodies are not. Again the Council would urge the Scottish Executive to reconsider their position in this matter.
6. Local authorities are of course already required to comply with a number of statutory provisions in relation to the provision of information. In addition to the provisions on Access to Information contained in the Local Government (Scotland) Act 1973 and the requirements relating to environmental information, local authorities are also required to comply with the Data Protection regime and other requirements relating to personal information. These different pieces of legislation have different periods of time for which information is required to be held; different timescales for responding to requests for information; and different charging regimes. For example under the Data Protection Act 1998 a public authority has forty days to provide information, as opposed to the twenty working days proposed in the Freedom of Information Bill. Given the possibility for confusion, not only within public authorities but particularly for members of the public seeking to exercise their rights to access information, it is suggested that the Scottish Information Commissioner, when appointed, should carry out a general review and codification of all legislation relating to access to information.

Summary of Exemptions

Section in draft Bill	Exemption	Absolute ¹	Class or Content ²	Ministerial Certificates ³	Duration of exemption ⁴
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)	Personal data relating to applicant	Yes	Class	No	Perpetuity
37 (1)(b)	Other personal data	In certain circumstances	Class	No	Perpetuity
37 (1)(c)	Personal census information	Yes	Class	No	100 years
37 (1)(d)	Health Records	Yes	Class	No	100 years after death
38(1)	Health, safety and the environment	No	Content	No	Perpetuity
38(2)		No	Class	No	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

¹ See paragraph 36² See paragraphs 34, 35³ See paragraphs 72, 73⁴ See paragraphs 75 - 78

