

## **POLICY NOTE**

### **THE ENVIRONMENTAL INFORMATION (SCOTLAND) AMENDMENT REGULATIONS 2013**

**SSI 2013/127**

These amending Regulations were made in exercise of the powers conferred by section 2(2) of the European Communities Act 2002 (as amended by section 53 of the Scotland Act 1998). The Order is subject to negative parliamentary procedure, as set out Schedule 2 of the Act.

#### **Policy Objectives**

The Regulations amend regulation 19 in the existing Environmental Information (Scotland) Regulations 2004 (“the EIRs”) in order to make equivalent provision in line with recent changes to section 65 of the Freedom of Information (Scotland) Act 2002 (“FOISA”) by the Freedom of Information (Amendment) Scotland Act 2013. The effect of the changes is to extend the period during which an offence of trying to destroy or conceal information can be prosecuted.

The EIRs were introduced in order to implement the Directive of the European Parliament and of the Council on public access to environmental information (Directive 2003/4/EC); they came into force on 1 January 2005 and place a duty on every Scottish public authority to make environmental information available on request.

The EIRs operate alongside FOISA as both pieces of legislation offer very similar rights to access information, although the EIRs only relate to environmental information while any information can be requested under FOISA. In fact, in order to make the process of requesting information as straightforward as possible for members of the public, the EIRs are identical in many respects to FOISA (although in some respects there are variations, in order to ensure the Regulations comply with the requirements of Directive 2003/4/EC).

The Freedom of Information (Amendment) (Scotland) Act 2013<sup>1</sup> (“the Amendment Act”) was recently passed by the Scottish Parliament. That Act makes a number of amendments to FOISA in order to improve its operation. In particular, section 5 amends section 65 of FOISA under which it is an offence to alter, deface, block, erase, destroy or conceal any information that is held by a public authority in order to prevent its disclosure if it has been requested under FOISA. Currently, such an offence must be prosecuted within six months of it taking place i.e. within six months of the information being destroyed. However, in practice, due to the timescales set out in FOISA, it is potentially ten months from the commission of the offence before an application for a decision is made to the Scottish Information Commissioner at appeal stage (allowing for the maximum number of days to process a request, ask for a review, process a review and then apply to the Commissioner for a decision). Only then can an investigation commence into how the request has been handled. Given this potential timescale, even if evidence of an offence was found, a prosecution could not go ahead.

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<sup>1</sup> See [http://www.legislation.gov.uk/asp/2013/2/pdfs/asp\\_20130002\\_en.pdf](http://www.legislation.gov.uk/asp/2013/2/pdfs/asp_20130002_en.pdf)

However, once section 5 of the Amendment Act is commenced, a prosecution will be able to be commenced at any time within six months of the prosecutor becoming aware of sufficient evidence to justify proceedings. No proceedings will be able to be commenced more than three years after the offence was committed. In cases where an offence was committed over a period of time, rather than as a one off action, the three year period starts from the last date on which an offence was committed.

This will mean that, even where it takes some time through investigations by the Scottish Information Commissioner before an offence comes to light, it will still be possible to prosecute those responsible for that offence if there is sufficient evidence. Given that the Scottish Government considers that the alteration, destruction or concealment of information with the intention of preventing its disclosure is a serious offence, this amendment will ensure that the power to prosecute those who do so is made fully effective.

Regulation 19 of the EIRs was drafted so as to have the same effect as section 65 of FOISA. To ensure consistency between the two pieces of legislation, it is appropriate that the timescales in which a prosecution may be brought for an equivalent offence is also fully effective under the EIRs if there is evidence that a person has altered, defaced, blocked, erased, destroyed or concealed any information requested under the EIRs that was held by a public authority in order to prevent its disclosure.

Therefore these Amendment Regulations will alter the EIRs in the same way that section 65 of FOISA will be amended. These changes will come into force on 31 May 2013, but will only apply to any offence which is committed on or after that date.

## **Consultation**

The Scottish Government has not consulted separately on this proposed change to the EIRs. However, the draft Freedom of Information (Amendment) (Scotland) Bill was published in December 2011 for public consultation<sup>2</sup>. Respondents who commented all agreed that the current provisions in section 65 of FOISA would not in many cases allow sufficient time for a prosecution to be taken forward. A small number of responses, including that from the former Scottish Information Commissioner, also proposed that, for consistency, the EIRs should be amended in the same way.

The consultation had proposed extending the time limit from six months after the offence was committed to twelve months, but some respondents felt that this would still not allow sufficient time for an offence to be uncovered in some cases<sup>3</sup>. As a result of this feedback, the proposals for the Bill and, subsequently, these Amendment Regulations, legislate for prosecution up to six months after evidence of the offence came to light.

Given that the EIRs operate on the same principles as FOISA and are largely viewed interchangeably as one set of legislation by members of the public and many stakeholders, the Scottish Government does not feel that a separate consultation is required.

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<sup>2</sup> See <http://www.scotland.gov.uk/Publications/2011/12/13125045/0>

<sup>3</sup> See <http://www.scotland.gov.uk/Resource/0039/00394208.pdf> - paragraphs 26 to 32

## **Impact Assessments**

An Equalities Impact Assessment (EQIA) has not been completed for this Order as the Order has no particular impact on any equalities groups. However, an EQIA was completed for the Amendment Bill<sup>4</sup>.

## **Financial Effects**

The Deputy First Minister & Cabinet Secretary for Infrastructure, Investment and Cities confirms that no Business and Regulatory Impact Assessment (BRIA) is necessary as the instrument has no financial effects on business.

There are also no significant financial effects on the Scottish Government or on local government. This amendment to the EIRs does increase the potential for prosecution of public bodies – and individuals - if an offence has been committed, which would lead to a fine if they were found guilty. However, it is considered that after over eight years of operation of the EIRs, public authorities should have effective resources including guidance and records management practices in place to minimise the likelihood of such an offence being committed.

Scottish Government  
Strategy and Constitution Directorate  
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<sup>4</sup> See <http://www.scotland.gov.uk/Topics/People/Equality/18507/EqualityImpactAssessmentSearch/FOIScotlandBillEQIA>