

POLICY NOTE

THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 (HISTORICAL PERIODS) ORDER 2013

SSI 2013/365

This Order is laid in exercise of powers set out at section 59(1) of the Freedom of Information (Scotland) Act 2002 (“the Act”). The Order is subject to affirmative parliamentary procedure, as set out at section 72(2)(b) of the Act.

Policy Objectives

The Freedom of Information (Scotland) Act 2002 (‘the Act’) came into force on 1 January 2005. The Act encourages the development of a more open culture across the public sector. It does so by providing a statutory right of access to information held by Scottish public authorities (including, for example, the Scottish Ministers, local authorities, health boards, doctors and dental practitioners).

The policy objective of this order is to promote openness and transparency across Scottish public authorities by reducing the lifespans of certain exemptions in the Act. Changing practice and greater expectations of openness and transparency have led the Scottish Government to reassess the appropriate lifespans of certain time-limited exemptions.

The order amends section 57(1) of the Act to make alterations to the definition of when a record containing information becomes a historical record for the purposes of that Act. Following the amendment of the order-making power in section 59 of the Act by the Freedom of Information (Amendment) (Scotland) Act 2013, the Scottish Ministers may make different provision for records of different descriptions, exemptions of different kinds and different purposes in other respects when using the revised order-making power.

At present, a record becomes ‘historical’ at the end of a period of 30 years commencing at the beginning of the calendar year following that in which it was created. The order amends the general definition of when a record becomes a historical record for the purposes of the Act from 30 to 15 years. This will mean that, once the Order is in force, most time-limited exemptions under the Act can only be applied for up to 15 years after information was created.

To ensure an appropriate degree of protection is maintained for certain types of information separate provision is made for records which contain information which would be exempt under section 36 of the Act (legal advice and information provided in confidence) as well as records to which section 41(a) could apply (i.e. records relating to communications with her Majesty, a member of the Royal Family or the Royal Household).

The changes in this draft order will come into force on 1 April 2014. Once in force, more information should be placed in the public domain earlier.

Consultation

Since 2009 it has been Scottish Government policy to open files preserved at the National Records of Scotland after 15 years rather than 30 years (unless longer term exemptions apply). Consequently, over 12,000 files have been opened 15 years earlier than originally scheduled placing significant amounts of information into the public domain at a much earlier date than anticipated.

In July 2009 the Scottish Government consulted on reducing the period of time at which a record becomes ‘historical’ from 30 years to 15¹. The order, as subject to consultation, would affect those time-limited exemptions at section 58(1) of the Act and would apply to all public authorities subject to freedom of information the legislation.

Consultation responses showed strong support for amending the definition of ‘historical record’². However, some responses raised issues regarding particular sensitivities around certain exemptions, most specifically sections 33(1) (trade secrets and commercial interests) and 36.

Given the wide-ranging functions and responsibilities of public authorities and the breadth of information held, the Scottish Government recognised that the lifespans of the ‘30-year’ exemptions should be assessed separately (rather than either all or none). Therefore, the consultation in 2011 on the proposed Freedom of Information (Amendment) (Scotland) Bill set out the Scottish Government’s intentions to reduce the definition of historical record to 15 years while retaining the lifespan of the exemption at section 36 at 30 years as well as making separate arrangements for the lifespan of section 41(a)³. Consequently, following the passing into law of the Amendment Act, an order can now revise the lifespans of individual exemptions contained in section 58(1) as well as make separate provision for records of different descriptions etc.

Consultation responses to the draft Bill⁴ were broadly supportive of these proposals which, following the coming into force of the Amendment Act, were subject to further, formal consultation between May and July 2013⁵. The analysis of the responses⁶ to this consultation also showed broad support for the proposals. While some concerns were again raised by the higher education (HE) sector regarding the proposed reduction in the lifespan of the section 33(1) exemptions, the great majority of respondents were content with the proposal to reduce this exemption to 15 years.

¹ <http://www.scotland.gov.uk/Publications/2009/07/01094653/0>

² <http://www.scotland.gov.uk/Publications/2009/11/26114548/0>

³ <http://www.scotland.gov.uk/Publications/2011/12/13125045/0>

⁴ <http://www.scotland.gov.uk/Publications/2012/04/4515>

⁵ <http://www.scotland.gov.uk/Publications/2013/05/6379>

⁶ <http://www.scotland.gov.uk/Publications/2013/09/5421/0>

Impact Assessments

The Equality Impact Assessment⁷ (EQIA) which accompanied the introduction of the draft Freedom of Information (Amendment) (Scotland) Bill in May 2012 considered the equalities impact of more flexible lifespans for certain exemptions.

The assessment concluded that the policy would have no impact specific to members of any particular social and/or minority group. The assessment also noted that secondary legislation arising from the Bill would enable all sectors of society to access information earlier in the interests of accountability and transparency.

Financial Effects

A partial Business and Regulatory Impact Assessment (BRIA) was also consulted on as part of the 2013 consultation.

The assessment identified three options for the proposed section 59 order – no change to the present arrangements, a uniform reduction to a 15 year lifespan, or variable lifespans for different exemptions utilising the more flexible order-making provided by the Amendment Act. In particular, the assessment sought to establish whether revised lifespans would place undue financial burdens on public authorities.

The consultation response paper contains the final BRIA. This noted that the consultation produced no hard evidence demonstrating that revising the lifespans of certain exemptions would have any significant impact – financial or otherwise - on the ability of authorities to fulfil their freedom of information duties.

While there may be a very small increase in complexity given more variable lifespans, given no evidence of significant numbers of requests for more historical information or significant quantities of such information being held any impact is likely to be minimal.

Moreover, the experience of the National Records of Scotland suggests that, over time, the number of requests may in fact decline as less historical information is withheld.

Finally, the proposed coming into force date of 1 April 2014 should give public authorities sufficient time to prepare for their new responsibilities.

Scottish Government
Strategy and Constitution Directorate
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<http://sh45inta/Topics/People/Equality/18507/EqualityImpactAssessmentSearch/FOIScotlandBillEQIA>.