

PROTECTION OF FREEDOMS ACT 2012

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Part 6: Freedom of information and data protection

Section 102: Release and publication of datasets held by public authorities

387. **Section 102** amends the Freedom of Information Act 2000 (“FOIA”) which currently provides for access to information held by public authorities.
388. **Subsection (2)** amends section 11 of the FOIA (means by which communication to be made). **Paragraph (a)** inserts a new subsection (1A) which provides that where a request is made for information that is a dataset, or which forms part of a dataset, held by the public authority, and the applicant requests that information be communicated in an electronic form, then the public authority must, as far as is reasonably practicable, provide the information to the applicant in an electronic form that is capable of re-use, in other words a re-usable format.
389. There is no absolute duty for datasets to be provided in a re-useable format as it is recognised that, in some instances, there may be practical difficulties in relation to costs and IT to convert the format of the information. A re-usable format is one where the information is available in machine-readable form using open standards which enables its re-use and manipulation. If the applicant does not want to have the dataset communicated in electronic form, because for example, he or she wants the dataset in hard copy only, then the new duty in section 11(1A) will not arise. However, the public authority would still need to comply with the preference expressed, by virtue of the existing duty in section 11(1)(a) of the FOIA, and must provide the dataset in hard copy so far as it is reasonably practicable to do so.
390. **Paragraph (b)** amends section 11(4) by providing that the discretion which a public authority has in relation to the means by which communication of the information is to be made (which is already subject to the duty in section 11(1) of the FOIA) is now additionally subject to the new duty in section 11(1A).
391. **Paragraph (c)** of subsection (2) inserts new subsection (5) and provides for the definition of “dataset” for the purposes of the FOIA. The definition makes it clear that a dataset is a subset of information within the meaning of the FOIA. The definition provides that a dataset is a collection of information held in electronic form where all or most of the information meets the criteria set out in the following paragraphs of the new section 11(5).
392. The new subsection (5)(a) requires that the information in a dataset has to have been obtained or recorded by a public authority for the purpose of providing the authority with information in connection with the provision of a service by that authority or the carrying out of any other function of the authority.

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393. New subsection (5)(b) requires that the information is factual in nature and (a) is not the product of interpretation or analysis other than calculation, in other words that it is the ‘raw’ or ‘source’ data; and (b) provides that it is not an official statistic within the meaning given by the Statistics and Registration Service Act 2007 (“SRSA 2007”). Official statistics have been excluded from the definition of datasets as the production and publication of official statistics is provided for separately in the SRSA 2007.
394. New subsection (5)(c) requires that the information within datasets has not been materially altered since it was obtained or recorded. Datasets which have had ‘value’ added to them or which have been materially altered, for example in the form of analysis, representation or application of other expertise, would not fall within the definition for the purposes of new subsection (5). Examples of the types of datasets which meet the definition, though not a comprehensive list, will include datasets comprising combinations of letters and numbers used to identify property or locations, such as postcodes and references; datasets comprising numbers and information related to numbers such as spend data; and datasets comprising text or words such as information about job roles in a public authority.
395. *Subsection (3)* inserts new sections 11A and 11B into the FOIA which provide for the new duty to make a dataset available for re-use and the charging of fees. New section 11A(1) provides for the four criteria which must be met for the new section to apply: (a) that a person must have made a request for a dataset; (b) that the dataset requested includes a ‘relevant copyright work’; (c) that the public authority is the only owner of the ‘relevant copyright work’, in other words that it is not jointly owned with another party or that it is not owned in whole or in part by a third party; and (d) that the public authority is communicating the relevant copyright work to the requester under the FOIA, in other words that the dataset requested is not being withheld under one of the exemptions provided for in the FOIA.
396. New section 11A(2) provides that when communicating such a dataset to an applicant, the public authority must make the dataset available for re-use in accordance with the terms of a specified licence. New sections 11A(3) to (7) make provision for the charging of fees by public authorities for making datasets available for re-use. New subsection (3) provides that a public authority may charge a fee by virtue of regulations made under new section 11B and new subsection (4) preserves existing statutory powers for public authorities to charge a fee. New subsection (5) provides that where a public authority intends to charge a fee, it must give the applicant a “re-use fee notice”, which states the amount of the fee which must be paid before the dataset is available for re-use. New subsection (6) provides that where the public authority has given the applicant a re-use notice, it is not required to make the dataset available for re-use until the fee is paid in accordance with the notice; and new subsection (7) provides that if a public authority is exercising any existing statutory power to charge, the authority may combine the re-use fee notice with any other notice in accordance with the relevant statutory power being exercised.
397. New section 11A(8) adds definitions of “copyright owner”, “copyright work”, “database”, “database right”, “owner”, “relevant copyright work”, and “the specified licence” to section 11A of the FOIA. The definition of a “relevant copyright work” excludes a “relevant Crown work” and a “relevant Parliamentary work” which are separately defined.
398. Crown owned works are excluded from the requirement on public authorities to make datasets available for re-use under the terms of a licence specified by the Secretary of State. This is because the Controller of Her Majesty’s Stationery Office, who is appointed by letters patent from the Queen to manage Crown owned works, already has the authority to require these works and databases to be made available for re-use under the terms of a licence.
399. Parliamentary owned works and databases are excluded from the requirement on public authorities to make such datasets available for re-use because it would not be

appropriate to make Parliament subject to a direction of the Secretary of State as new section 11A of the FOIA would in effect do by way of the specified licence in the code of practice under section 45 of the FOIA.

400. New section 11B makes further provision about the charging of fees by public authorities for making datasets (containing relevant copyright works) available for re-use. Subsection (1) confers a power on the Secretary of State to make regulations (subject to the negative resolution procedure) about the charging of fees in connection with making the datasets available for re-use in response to requests under the FOIA and publication schemes. Subsections (2) and (3) set out what the regulations may prescribe, such as when a fee may or may not be charged and how much that fee might be.
401. *Subsection (4)* amends section 19 (publication schemes) of the FOIA. *Paragraph (a)* inserts new subsections (2A) to (2F) into section 19 of the FOIA. Under new section 19(2A), publication schemes must include a requirement for the public authority to publish any dataset it holds, which is requested by an applicant, and any updated version of a dataset, unless the authority is satisfied that it is not appropriate for the dataset to be so published (new subsection (2A)(a)). It requires public authorities, where reasonably practicable, to publish any dataset under new subsection (2A)(a) in an electronic form which is capable of re-use (new subsection (2A)(b)). Subject to new subsection (2B), it also requires public authorities to make any relevant copyright work (if the authority is the only owner) available for re-use in accordance with the terms of the specified licence. New subsections (2B) to (2F) mirror new section 11A(2) to (7) by making equivalent provision in respect of publication schemes for the charging of fees by public authorities for making datasets (where they contain relevant copyright works) available for re-use.
402. *Paragraph (b)* of subsection (4) inserts a new subsection (8) into section 19 of the FOIA which provides definitions of “copyright owner”, “copyright work”, “database”, “database right”, “owner”, “relevant copyright work” and “the specified licence”. The definition of a “relevant copyright work” excludes a “relevant Crown work” and a “relevant Parliamentary work” which are separately defined.
403. *Subsection (5)* amends section 45 of the FOIA (issue of code of practice). *Paragraph (a)* amends the list in section 45(2) of the FOIA, which sets out the matters that must be included in the code of practice made under that section, to insert a new requirement for the code of practice to include provision relating to the disclosure by public authorities of datasets held by them. *Paragraph (b)* sets out the different provisions relating to the re-use and disclosure of datasets that may, in particular, be included in the code of practice under section 45 of the FOIA. *Paragraph (c)* amends section 45(3) of the FOIA so as to provide for the possibility of making more than one code of practice under section 45, each of which makes different provision for different public authorities.
404. *Subsection (6)* inserts into section 84 of the FOIA, which defines the terms used in that Act, a definition of the new term “dataset”.

Section 103: Meaning of “publicly-owned company”

405. This section amends section 6 of the FOIA to widen the definition of “publicly-owned company”.
406. *Subsection (2)* amends section 6(1) of the FOIA to provide that, as well as companies wholly owned by the Crown, any government department or a single public authority, those wholly owned by one or more bodies from the wider public sector or owned by any such body or bodies in conjunction with the Crown or government departments are also subject to the FOIA. Currently section 6(1) of the FOIA only applies to bodies wholly owned by the Crown, any government department or another single public authority.
407. *Subsection (3)* replaces the current section 6(2) of the FOIA to define when a company is owned by the Crown, the wider public sector, or a combination of both. For a company

to be wholly owned by the Crown every member must be a Minister of the Crown, a government department or a company owned by the Crown; or a person acting on behalf of any of these. For a company to be wholly owned by the wider public sector every member must be a relevant public authority or company wholly owned by the wider public sector; or a person acting on behalf of either. For a company to be wholly owned by the Crown and wider public sector at least one member must be a Minister of the Crown, a government department, a company wholly owned by the Crown, or a person acting on behalf of one of these; at least one member must be a relevant public authority, a company wholly owned by the wider public sector, or a person acting on behalf of one of these; and all of its members must fall within these two categories. This has the effect that companies wholly owned by the Crown (including government departments) or any combination of public authorities listed in Schedule 1 to the FOIA (subject to *subsection (4)*) are subject to its provisions, as are companies owned by the Crown and any combination of relevant public authorities. Examples of bodies to which the FOIA will be extended include waste disposal companies and purchasing organisations wholly owned by a number of local authorities.

408. Subsection (4) amends section 6(3) of the FOIA to define “relevant public authority”. All public authorities listed in Schedule 1 to the FOIA are relevant public authorities except those listed only in relation to particular information. Companies owned entirely or in part by public authorities listed only in relation to particular information are not publicly-owned companies for FOIA purposes. Government departments are excluded from the definition of a relevant public authority on account of their being part of the Crown.

Section 104: Extension of certain provisions to Northern Ireland bodies

409. Subsection (1) repeals section 80A of the FOIA and paragraph 6 of Schedule 7 to the Constitutional Reform and Governance Act 2010 which excluded Northern Ireland bodies from provisions in the FOIA relating to the disclosure of historical records and communications with the Royal Family.
410. As a result Northern Ireland bodies will be subject to the amendments made to sections 2(3) and 37(1)(a) of the FOIA about information relating to communications with the Royal Family and Household. The Constitutional Reform and Governance Act 2010 substituted five categories of communication for those previously set out in section 37(1)(a). These are communications:
- with the Sovereign (new paragraph (a));
 - with the heir to the Throne or the second in line to the Throne (new paragraph (aa));
 - with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne. This provides an exemption for information which relates to communications with such a person from the date they accede to the Throne or become heir or second in line to the Throne. The exemption also applies to all relevant information created before that date. Should that person cease to be the Sovereign, heir to or second in line to the Throne otherwise than by death and remain a member of the Royal Family then paragraph (ac) will apply to information relating to communications with that person created on or after the date of that change (new paragraph (ab));
 - with members of the Royal Family who do not themselves fall within paragraphs (a) to (ab) other than when those communications are made or received on behalf of the persons referred to in paragraphs (a) to (ab) (new paragraph (ac)); and
 - with the Royal Household other than where those communications are made or received on behalf of the persons referred to in paragraphs (a) to (ac) (new paragraph (ad)).

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411. The amendment to section 2(3) of the FOIA by which the exemptions in the new paragraphs (a) to (ab) are absolute, and those in the new paragraphs (ac) and (ad) are qualified (as they are subject to a public interest test), applies to Northern Ireland bodies.
412. The amendments made by the Constitutional Reform and Governance Act 2010 to sections 62(1) and 63 of the FOIA relating to historical records will also apply to Northern Ireland bodies. The amended section 62(1) provides for a change in the meaning of “historical record” so that a record becomes an “historical record” at 20 years rather than 30 years as previously.
413. The amended section 63 of the FOIA limits the exemptions from disclosure which can be applied to “historical records” so the maximum period for which information can be withheld is reduced from 30 years to 20 years for:
- sections 30(1) (investigations and proceedings conducted by public authorities), 32 (court records), 33 (audit functions), 35 (formulation of government policy) and 42 (legal professional privilege); and
 - section 36 (prejudice to the effective conduct of public affairs), except for subsection (2)(a)(ii) (information which would or would be likely to prejudice the work of the Executive Committee of the Northern Ireland Assembly) and section 36(2)(c), in so far as disclosure would prejudice the effective conduct of public affairs in Northern Ireland where the lifespan of the exception remains at 30 years.
414. The amended section 63 also specifies the time limit applying to subsections 37(1)(a) to (ad) (communications with Her Majesty, etc). The time limit is 20 years after the creation of the record in which the information is contained, or five years after the death of the relevant member of the Royal Family, whichever is longer. In the case of communications with the Royal Household falling within new paragraph (ad), the relevant member of the Royal Family for these purposes is the Sovereign reigning when the record in question was created.
415. The maximum duration remains 30 years for sections 28 (relations within the UK) and 43 (commercial interests) of the FOIA.
416. *Subsection (2)* ensures that the power in section 46(2) to (5) of the Constitutional Reform and Governance Act 2010 may apply to Northern Ireland bodies. Subsections 46(2) to (5) of the Constitutional Reform and Governance Act 2010 allow transitional provisions to be made in connection with the amendments to the FOIA that reduce from 30 to 20 years the period within which certain exemptions from disclosure apply; give the Secretary of State power, by order, to make transitional arrangements relating to those amendments; enable provision to be made in any such order about the time when the exemptions cease to apply; and enable different provision to be made for records of different descriptions. A statutory instrument containing such an order is subject to the negative resolution procedure.

Section 105: Appointment and tenure of Information Commissioner

417. **Section 105** makes further provision about the appointment and tenure of the Information Commissioner.
418. *Subsection (1)* amends paragraph 2(1) of Schedule 5 to the Data Protection Act 1998 (“DPA”) with the effect that the Information Commissioner is appointed for a term not exceeding seven years. Currently the Commissioner is appointed for terms not exceeding five years.
419. *Subsection (2)* inserts new sub-paragraphs (3A) to (3C) into paragraph 2 of Schedule 5 to the DPA. Under paragraph 2(3) of Schedule 5 the Commissioner may be removed from office by Her Majesty in pursuance of an Address from both Houses of Parliament. New sub-paragraph (3A) sets out grounds for removing the Information Commissioner

from his post. It also provides that an Address cannot be sought unless a Minister is satisfied that at least one of the listed grounds is met and presents a report to this effect.

420. New sub-paragraph (3B) provides that the Information Commissioner must be appointed on merit and on the basis of fair and open competition.
421. New sub-paragraph (3C) provides that the Information Commissioner may only serve a single term of office, and cannot be reappointed. As a consequence, subsection (2) repeals paragraph 2(5) of Schedule 5 to the DPA which currently permits reappointment of the Commissioner. This subsection also repeals paragraph 2(4) of Schedule 5 which requires the Commissioner to vacate his or her office on reaching 65 years of age.
422. *Subsection (4)* makes a consequential amendment to the heading of paragraph 2 of Schedule 5 to the DPA ('tenure of office' becomes 'tenure of office and appointment') to reflect the wider scope of this provision.
423. *Subsection (5)* repeals spent transitional provisions in section 18 of the FOIA in respect of the tenure of office of the Data Protection Commissioner following the change of name of that office to that of Information Commissioner.

Section 106: Alteration of role of Secretary of State in relation to guidance powers

424. **Section 106** removes the current requirement that guidance issued by the Information Commissioner under sections 41C, 52A and 55C of the DPA relating to assessment notices, data sharing and monetary penalty notices respectively must be approved by the Secretary of State.
425. *Subsection (1)* replaces the current section 41C(7) of the DPA so as to require the Information Commissioner to consult the Secretary of State before issuing or amending a code of practice relating to assessment notices issued under section 41C. The current requirement for Secretary of State approval is removed.
426. *Subsection (2)* replaces the current section 52B(1) to (3) and amends section 52B(6) of the DPA to require the Information Commissioner to consult the Secretary of State when preparing a code of practice relating to data sharing under section 52A. The current requirement for Secretary of State approval, which can only be withheld where it appears that the terms of the code could result in the UK being in breach of its EU or other international obligations, is removed. A code of practice issued under section 52A must still be laid before Parliament by the Secretary of State.
427. *Subsection (3)* replaces the current section 55C(5) of the DPA to require the Information Commissioner to consult the Secretary of State before issuing a code of practice relating to his functions under sections 55A and 55B in respect of civil monetary penalties. The current requirement for Secretary of State approval is removed.

Section 107: Removal of Secretary of State consent for fee-charging powers etc.

428. **Section 107** removes the current requirement in section 51(8) of the DPA and 47(4) of the Freedom of Information Act ("FOIA") for the Information Commissioner to obtain the consent of the Secretary of State before charging for services provided under section 51 of the DPA and section 47 of the FOIA.
429. *Subsections (1)* and *(3)* amend section 51 of the DPA and section 47 of the FOIA respectively to specify the relevant services for which the Information Commissioner can charge under those Acts, namely the supply of multiple copies of publications (that is, those that are reasonably accessible to the public free of charge because for example they can be downloaded from the Information Commissioner's Office ("ICO") website), and the provision of training and conferences. It does not permit the Commissioner to charge for his or her attendance (or that of his or her staff) at conferences organised by others. In each case the definition of "relevant services" may be amended by order made by the Secretary of State (by virtue of the amendments

made to the DPA and the FOIA by *subsections (2) and (4)* such orders are subject to the negative resolution procedure).

Section 108: Removal of Secretary of State approval for staff numbers, terms etc.

430. **Section 108** makes further provision about the appointment of staff by the Commissioner, and their terms and conditions.
431. *Subsection (1)* amends paragraph 4 of Schedule 5 to the DPA as set out in *subsections (2) and (3)*.
432. *Subsection (2)* inserts a new sub-paragraph (4A) into paragraph 4 of Schedule 5 of the DPA. This provides that when appointing a deputy commissioner or any other officers or staff, the Information Commissioner must have regard to the principle of selection on merit on the basis of fair and open competition.
433. *Subsection (3)* removes the existing requirement, in paragraph 4(5) of Schedule 5 to the DPA, on the Information Commissioner to obtain the Secretary of State's approval for the number of staff to be appointed to the ICO and to the terms and conditions of appointment of such staff.