

**EXPLANATORY MEMORANDUM TO  
THE FREEDOM OF INFORMATION (ADDITIONAL PUBLIC AUTHORITIES)  
ORDER 2005**

**2005 No. 3593**

**AND**

**THE FREEDOM OF INFORMATION (REMOVAL OF REFERENCES TO PUBLIC  
AUTHORITIES) ORDER 2005**

**2005 No. 3594**

- 1** This explanatory memorandum has been prepared by the Department for Constitutional Affairs (DCA) and is laid before Parliament by Command of Her Majesty. It deals with two linked Instruments made under the Freedom of Information Act 2000 (The Act).
- 2 Description**
  - 2.1 The Order made under section 4(1) of the Act adds 21 specific references to bodies and two general references to bodies to Schedule 1 of the Act. Each body added to Schedule 1 becomes a public authority for the purposes of the Act. As a public authority, each body is obliged to make information available to the public in accordance with the terms of the Act.
  - 2.2 The Order made under section 4(5) of the Act removes references to 9 public authorities from Schedule 1 of the Act, so that those bodies would not longer be subject to obligations under the Act.
  - 2.3 Parliamentary Counsel has been consulted regarding the contents of the Orders and this Explanatory Memorandum.
- 3 Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 All of the bodies in the Schedules to the section 4(1) Order are intended for inclusion in Schedule 1 of the Act for the first time, except the Commission for Integrated Transport (CfIT). It was intended that the CfIT be included in Schedule 1 at the time the Act was created. However, the entry for that body was erroneously drafted so that it read “The Commissioner for Integrated Transport”. Since no such body exists, the entry is defective, and doubt arises as to whether CfIT is covered by the Act as intended.
  - 3.2 To correct this error, the section 4(1) Order adds an entry to Schedule 1 with the correct name, “the Commission for Integrated Transport”. Since CfIT continues to satisfy both of the conditions in section 4(1) of the Act, the DCA considers that there is a vires to make that addition (the conditions are set out in full in paragraph 4.2 below). This addition will remove any legal effect that the defective entry may have had.

- 3.3 Since it will become obsolete the DCA has also made provision in the section 4(5) Order, to come into force on the same date as the 4(1) Order, to remove the defective entry in Schedule 1 so that no confusion is caused by there being two entries ostensibly relating to the same organisation. However, the DCA notes that the power in section 4(5) only allows the Secretary of State to remove bodies from Schedule 1 that have ceased to exist or ceased to satisfy the conditions for inclusion in Schedule 1.
- 3.4 Unfortunately this drafting error did not come to light until recently and there are no express incidental powers to amend the provisions of the Act that could be used to remove the defective entry. Therefore, if the defective entry is not removed by way of an order under section 4(5), then the entry will remain in place until primary legislation can be brought forward to remedy the difficulty. No suitable legislative vehicle is planned at this time.
- 3.5 In any event the DCA considers that the exercise of the power in section 4(5) to remove the defective entry is *intra vires* and draws the committee's attention to two linked points in support of this proposition. First we refer the committee to page 215 of Bennion on Statutory Interpretation<sup>1</sup>, where it is noted that a power to create secondary legislation should be interpreted in line with Parliament's primary purpose in providing that power. The order making powers in sections 4(1) and 4(5) were plainly provided by Parliament to ensure that Schedule 1 of the Act, which informs the public of the bodies they can obtain information from, could be kept up to date. While the powers in that section may not have countenanced the need to remove an original entry as being defective, to leave such an entry in place is to defeat in part the purpose of providing those powers.
- 3.6 Secondly, if the JCSI is not satisfied that the wording of the powers in Schedule 1 can be interpreted as literally including the power to remove defective entries, then we would refer the JCSI to page 209 of Bennion which cites the rule exposed in the case of the Attorney-General v. The Great Eastern Railway Company (1880-81) L.R. 16 Ch. D. 59. In that case the then Lord Chancellor, Lord Selborne held that the doctrine of *Ultra Vires*:

*“ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.”*

Following this principle, even if the removal of defective entries may not be literally within the *vires* in 4(5), the DCA considers that removal of defective entries in Schedule 1 may fairly and reasonably be regarded as incidental to the function of keeping Schedule 1 up to date and should not therefore be seen as *ultra vires*.

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<sup>1</sup> 4<sup>th</sup> edition, Butterworths, 2002

## **4 Legislative Background**

- 4.1 The section 4(1) Order is the fourth order made under that section. The making of regular orders updating Schedule 1 of the Act ensures that Schedule 1 remains up to date and consistent. The Order adds 23 references to Schedule 1.
- 4.2 Section 4(1) of the Act provides that the Secretary of State may add to Schedule 1 a reference to any body or the holder of any office not listed in Schedule 1, but which fulfils both the following conditions:
- i) that the body or office is established by Her Majesty's prerogative, legislation, a Minister of the Crown, a government department, or the National Assembly for Wales; and that
  - ii) in the case of a body, it is wholly or partly constituted by appointment made by the Crown, by a Minister or government department or the National Assembly for Wales, or
  - iii) in the case of an office, that appointments to that office are made by the Crown, by a Minister or government department or the National Assembly for Wales.
- 4.3 Section 4(5) of the Act provides that the Secretary of State may remove from Schedule 1 a reference to any body or office that has:
- i) ceased to exist, or
  - ii) has ceased to satisfy either the first or second condition for inclusion in an Order under section 4(1) of the Act.

## **5. Extent**

- 5.1 These instruments extend to the United Kingdom.

## **6. European Convention on Human Rights**

The Parliamentary Under Secretary of State for the Department for Constitutional Affairs, Baroness Ashton, has made the following statement regarding Human Rights:

In my view the provisions of the Freedom of Information (Additional Public Authorities) Order 2005 are compatible with the Convention rights.

No statement is required in respect of the 4(5) Order.

## **7. Policy background**

- 7.1 The Act came into force on 1<sup>st</sup> January 2005. The Act makes provision for the disclosure of information held by public authorities. This contributes to the Government's aim to strengthen the connection between citizen and the state.

The Act aims to enable greater transparency, accountability and engagement. For example, by providing more information about how taxpayers' money is spent and providing the context for better informed public debate.

- 7.2 The section 4(1) Order adds to the list of public authorities from which the public has a right to access information. These include a number of newly created public bodies and some that were not included previously.
- 7.3 The section 4(1) Order is the first to cover additional public bodies since the Act came into force. Bodies will be covered by the Act as soon as the Order is commenced. To allow organisations to prepare fully the Order has been structured so that it will commence in relation to some organisations at a later date. Each body has been consulted to ensure that it will be able to meet its obligations under the Act when the Order comes into force for them.
- 7.4 The 4(5) Order removes a number of public bodies from the scope of the Act. All of those bodies have ceased to exist (and one never existed), so there will be no practical reduction in the scope of the Act.

## **8. Impact**

- 8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.
- 8.2 An initial public sector Regulatory Impact Assessment has been carried out and from this assessment we have concluded that it is not necessary to carry out a full public sector Regulatory Impact Assessment. The impact on the public sector is that the public sector bodies that are added to the Act will be required to produce a list of publications that they routinely make available (a publication scheme) and publish in accordance with it. They will also be required to answer requests for information that they hold. This will require them to locate the information requested, consider the application of relevant exemptions from disclosure and reply accordingly. There is no obligation for public authorities to reply to vexatious requests or those that exceed a cost threshold which is determined from time to time by the Secretary of State. The cost of disbursements can be recovered. There is no significant impact on any other part of the public sector.

## **9. Contact**

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