

EXPLANATORY MEMORANDUM TO
THE FREEDOM OF INFORMATION ACT 2000 (AMENDMENT) (EU EXIT)
REGULATIONS 2018

2018 No. 1353

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Cabinet Office and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 These Regulations amend section 44(1)(b) of the Freedom of Information Act 2000 (“the FOI Act”) by replacing the words “EU obligation” with “retained EU obligation”.

Explanations

What did any relevant EU law do before exit day?

- 2.2 Section 44(1)(b) of the FOI Act provides an absolute exemption to disclosure under the FOI Act where disclosure would be incompatible with any EU obligation.

Why is it being changed?

- 2.3 As of exit day, no such obligations will arise. Further, the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”) will repeal the definition of “EU obligation” and introduce a new definition of “retained EU obligation”. These Regulations amend section 44(1)(b) to reflect this change, thereby ensuring that section 44(1)(b) continues to be effective with respect to bars against disclosure contained in EU law retained by the United Kingdom.

What will it now do?

- 2.4 Following exit day, section 44(1)(b) will provide an absolute exemption to disclosure under the FOI Act where disclosure would be incompatible with any retained EU obligation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument was laid for sifting on 20 July 2018. The sifting end date was 5 September 2018. The Sifting Committees agreed with the government that it was appropriate for this instrument to be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure).

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As this instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 This extent of this instrument is the United Kingdom.
4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Minister for the Constitution, Chloe Smith, has made the following statement regarding Human Rights:

“In my view the provisions of the Freedom of Information Act 2000 (Amendment) (EU Exit) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Section 1 of the FOI Act confers a general right of access to information held by certain public authorities. A requester has a right to be told whether that authority holds the information requested and, if it is held, to have it communicated to the requester. Both rights are subject to exemptions contained in the FOI Act. Amongst these exemptions, sections 2 and 44(1)(b) provide an absolute exemption where disclosure would be incompatible with “any EU obligation”.
- 6.2 “EU obligation” is defined as “any obligation created or arising by or under the Treaties, whether an enforceable EU obligation or not”: Schedule 1 to the Interpretation Act 1978 read with Schedule 1 to the European Communities Act 1972.
- 6.3 As of exit day, no such obligations will arise. Moreover, the Withdrawal Act will repeal that definition of “EU obligation”, and will introduce the corresponding definition of “retained EU obligation” with respect to retained EU law (see section 1 and paragraph 22(e) of Schedule 8 to the Withdrawal Act). “Exit day” is defined by section 20 of the Withdrawal Act.
- 6.4 Separately, section 44(1)(a) of the FOI Act provides an absolute exemption where disclosure “is prohibited by or under any enactment”. As of exit day, certain retained EU law (namely EU-derived domestic legislation and retained direct EU legislation) will fall within the definition of “enactment”: Schedule 1 to the Interpretation Act 1978 as will be amended by paragraph 22(d) of Schedule 8 to the Withdrawal Act. However, all other retained EU law will not fall within this definition: see section 6(7) of the Withdrawal Act.
- 6.5 Section 8(1) of the Withdrawal Act provides that a Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate any failure of retained EU law to operate effectively or any other deficiency in retained EU law arising from the withdrawal of the United Kingdom from the EU.

7. Policy background

What is being done and why

- 7.1 From exit day, EU obligations will cease to arise and the definition of “EU obligation” will be repealed (see “Legislative Context” above). Section 44(1)(b) will therefore cease to operate effectively. Further, certain bars to disclosure contained in EU law will be preserved by the Withdrawal Act in retained EU law. Of these, only those bars contained in EU-derived domestic legislation or retained direct EU legislation will continue to be effective via section 44(1)(a) of the FOI Act. Bars contained in other retained EU law will not be caught by section 44(1)(a). In order to ensure that those latter bars continue to be effective, these Regulations amend section 44(1)(b) to encompass any “retained EU obligation”.
- 7.2 This removes the redundant reference to “EU obligation” in section 44(1)(b). It further ensures that the status quo can be maintained so far as possible following the UK’s exit from the EU. It finally ensures that public authorities are not faced with conflicting obligations under retained EU law and the FOI Act.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8 of the Withdrawal Act in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act, the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 As this instrument makes one minor amendment to the FOI Act, there is no need for consolidation.

10. Consultation outcome

- 10.1 The Welsh and Northern Ireland devolved administrations have been consulted about this proposed amendment. There has been no other consultation.
- 10.2 The Freedom of Information (Scotland) Act 2002 applies in relation to Scottish public authorities (see s.3(1) of that Act). The Scottish Government has been informed of the proposed amendment.

11. Guidance

- 11.1 There is no associated guidance.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact of the public sector.
- 12.3 An impact assessment has accordingly not been prepared for this instrument.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 No specific monitoring arrangements are needed.

14.2 As this instrument is made under the Withdrawal Act, no review clause is required.

15. Contact

15.1 Julianne Peterson at the Cabinet Office (telephone 0207 276 1588 or email: julianne.peterson@cabinetoffice.gov.uk) can answer any queries regarding the instrument.

15.2 Sharon Carter at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Chloe Smith, Minister for the Constitution, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement(s)

1.1 The Minister for the Constitution, Chloe Smith, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Freedom of Information Act 2000 (Amendment) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

1.2 This is the case because the amendment consists of a small, technical change to the Freedom of Information Act 2000 that seeks to maintain the status quo so far as is possible.

2. Appropriateness statement

2.1 The Minister for the Constitution, Chloe Smith, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Freedom of Information Act 2000 (Amendment) (EU Exit) Regulations 2018 do no more than is appropriate.”

2.2 This is the case because the Regulations simply replace the reference to “EU obligation” with “retained EU obligation”. This removes the deficiency that will arise from withdrawal and ensures that bars to disclosure contained in retained EU law continue to be effective, thereby maintaining the status quo so far as is possible.

3. Good reasons

3.1 The Minister for the Constitution, Chloe Smith, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These are: the need to remove the deficiency in section 44(1)(b) that will arise from withdrawal; the need to ensure that bars contained in retained EU law continue to operate effectively; and the need to avoid public authorities being under conflicting obligations under retained EU law and the FOI Act.”

4. Equalities

4.1 The Minister for the Constitution, Chloe Smith, has made the following statement:

“The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

4.2 The Minister for the Constitution, Chloe Smith, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Chloe Smith, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

4.3 Little or no impact on equalities is expected.

5. Explanations

5.1 The explanations statement has been made in section 2 of the main body of this Explanatory Memorandum.