

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

EXPLANATORY NOTES

THE ACT – SECTION BY SECTION

Part 3 – The Scottish Information Commissioner

Section 42 – The Scottish Information Commissioner

110. This section provides as to the appointment of the Scottish Information Commissioner and the basis on which that office is held.
111. Under section 42(1) the Commissioner will be appointed by Her Majesty on the nomination of the Parliament. The Parliamentary corporation will determine the Commissioner's salary, allowances and other terms and conditions. The Commissioner will hold office for a term not exceeding 5 years and for no longer than 2 terms unless re-appointment for a third is desirable in the public interest. The Commissioner retires at the end of the calendar year in which the age of 65 is reached, and can be removed from office by Her Majesty following a resolution of the Parliament passed by a majority of no less than two thirds of the total number of members of the Parliament.
112. Under section 42(7) the Commissioner is not subject to the direction or control of the Parliament, the Parliamentary corporation or any member of the Scottish Executive, except in relation to the preparation of accounts (which, under paragraph 5 of schedule 2, must be in accordance with any directions provided by the Scottish Ministers) and the appointment of staff (which, under paragraph 3(4) of schedule 2, requires the approval of the Parliamentary corporation).

Section 43 – General functions of Commissioner

113. This section places a duty on the Commissioner to promote good practice and enforce Scottish public authorities' compliance with the Act, their publication schemes and codes of practice. The Commissioner is also obliged, where he or she considers it expedient, to disseminate information to the public about the Act. The Commissioner is permitted to charge fees for such services. Section 43(4) provides that the Commissioner may also make recommendations to the Scottish Ministers regarding bodies which could be included within the scope of the Act under sections 4 and 5. This section also places a duty on the Commissioner from time to time to consult with the Keeper of the Records of Scotland about the promotion of observance by authorities of the code of practice as to the keeping, management and destruction of records (issued by the Scottish Ministers under section 61).

Section 44 – Recommendations as to good practice

114. This section enables the Commissioner to take action where he or she considers that the practices of a Scottish public authority in relation to its functions under the Act do not conform with a code of practice issued under section 60 or 61. The Commissioner

may issue a “practice recommendation”, specifying the provisions with which the Commissioner considers the authority’s practice does not conform and the steps the authority should take to so conform. The Commissioner is required to consult with the Keeper of the Records of Scotland before issuing a practice recommendation which relates to a failure to conform with the code of practice (issued under section 61) as to the keeping, management and destruction of records.

Section 45 – Confidentiality of information obtained by or furnished to Commissioner

115. This section sets out the conditions governing the disclosure of information held by the Commissioner. The Commissioner, or a member of his or her staff, or an agent of the Commissioner will not be able to disclose information furnished to the Commissioner under this Act and which is not available in the public domain, unless that disclosure is made with lawful authority.
116. The Commissioner will be considered to have lawful authority where the circumstances set out at Section 45(2) are present, including where disclosure is required under this Act (as a consequence of an FOI request made to the Commissioner). Sections 45(3) and 45(4) create a criminal offence of knowingly or recklessly disclosing information without the lawful authority mentioned in section 45(2).

Section 46 – Laying of reports

117. This section requires the Commissioner to lay annual reports before the Scottish Parliament and enables him or her to lay such other reports as he or she thinks appropriate.